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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0190

Damian Loth,
Appellant,

vs.

Gregory Hoscheit, et al.,
Respondents,

George Griffith, Defendant.

Filed August 13, 2018
Affirmed
Smith, Tracy M., Judge

Houston County District Court
File No. 28-CV-12-713

Thomas M. Manion, Lanesboro, Minnesota (for appellant)

Jacob M. Tomczik, Brian J. Kluk, McCollum, Crowley, Moschet, Miller & Laak, Ltd., Bloomington, Minnesota (for respondents Gregory Hoscheit, Daren Hofschulte, Lifestyle Medical Group, and VO2fx, Inc.)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this appeal from judgment following a bench trial in a corporate-buyout action, appellant asserts that the district court abused its discretion by (1) failing to grant

appellant's requested equitable relief based on statutory violations and his expectation to remain involved with respondent-companies; and (2) accepting respondents' expert's valuation opinion and rejecting appellant's expert's valuation opinion when determining the value of appellant's interest in the companies. We affirm.

FACTS

In April 2007, appellant Damian Loth contacted respondent Gregory Hoscheit about a line of compression socks, SmoothToe, sold by Hoscheit's employer, Osborn Medical. Soon after, Loth began performing consulting work for Osborn Medical to improve the SmoothToe website and to increase online marketing and sales.

On April 1, 2008, Loth, Hoscheit, and respondent Daren Hofschulte formed a limited liability company (LLC), respondent Lifestyle Medical Group (LMG), to purchase the SmoothToe line from Osborn Medical for $75,000. Prior to LMG's formation, Loth projected that, based on his online marketing expertise, he could achieve first-year annual sales of $500,000 to $1,000,000, a substantial increase from SmoothToe's past annual sales of $55,000 to $65,000. Hofschulte contributed $300,000 in start-up funding, Hoscheit contributed inventory and additional funds, and Loth contributed no money. Loth, Hoscheit, and Hofschulte agreed that each owned a one-third member interest in LMG and each held a vote. They also agreed that Hoscheit would provide day-to-day product-line management and knowledge, Loth would provide online-sales experience, and both Hoscheit and Loth would be paid $75,000 annually by LMG through monthly management fees.

In 2008 and 2009, LMG incurred annual net losses of $179,323.93 and $60,488.07, respectively. From 2008 to 2011, LMG averaged approximately $35,000 in annual online sales. During that time, Loth proposed a number of marketing strategies that failed to generate his projected online sales.

In September 2010, Loth and Hoscheit formed VO2fx Inc. as a separate corporation to raise capital for LMG because LMG's financial statements were so poor that it could not attract investors. Thereafter, VO2fx sold athletic socks using the SmoothToe specifications, but featuring a different visual design. George Griffith, who was initially a defendant in the complaint but is not a party to this appeal, contributed $150,000 to VO2fx. In 2010, LMG and VO2fx (together, the companies) generated combined online sales of $40,000, and incurred a combined annual net loss of $146,512.34.

In 2011, the companies secured a large deal with Jarden Team Sports that generated $275,369.08 in new sales. Despite this deal, the companies incurred a combined annual net loss in 2011 of $152,412.57. In October 2011, Hoscheit informed Loth that a number of business areas needed improvement, including online sales and uneven workloads among the managers.

In January or February 2012, Hoscheit learned that Jarden could not sell the VO2fx socks and would not be ordering more, and that the Jarden deal, on which the companies were relying to stay financially viable, would be ending. In February 2012, Griffith asserted various claims against the companies and demanded satisfaction of a $50,000 loan that he had made to VO2fx. Hoscheit became concerned about the companies' survival because they lacked funds to repay Griffith and, in addition to their continued operating

expenses, the companies owed bank loans in excess of $200,000, which were personally guaranteed by Hoscheit and Hofschulte. According to Hoscheit, Loth's online marketing efforts were unsuccessful, Loth had not brought any benefit to the companies, and eliminating Loth's annual $75,000 management fees would help the companies meet their expenses, which were spiraling out of control. Hoscheit and Hofschulte then decided to terminate Loth's employment from the companies.

On March 6, 2012, Hoscheit, Hofschulte, Griffith, and their attorneys, met to discuss repayment of Griffith's $50,000 loan and his $150,000 contribution, and a lease agreement. Loth was not included. At the meeting, Hoscheit and Hofschulte discussed making changes to the company, including Loth's employment, but they testified at trial that they had decided to terminate Loth prior to the meeting. On March 8, 2012, Hoscheit and Hofschulte held a meeting with Loth and informed him that he was terminated from working for the companies, which they ratified by majority vote. Hoscheit and Hofschulte also voted on the value of Loth's interest in the companies and determined that his interest was worthless because the companies had negative earnings and substantial debt.

On August 3, 2012, Loth sued Hoscheit and Hofschulte for breach of fiduciary duty and breach of contract and for equitable relief, seeking a buy-out of his company shares and attorney's fees and costs, under Minn. Stat. § 302A.751 (2012) (MBCA), and Minn. Stat. § 322B.833 (2012) (MLLCA).[1] Hoscheit and Hofschulte brought a number of

[1] We cite the 2012 versions of the Minnesota Business Corporation Act (MBCA) and the Minnesota Limited Liability Company Act (MLLCA), which were in effect at the time this action was initiated. We note that the MLLCA has since been repealed and replaced by the Minnesota Revised Uniform Limited Liability Company Act. 2014 Minn. Laws ch.

counterclaims against Loth, including fraudulent-inducement and negligent-misrepresentation claims.

Following a five-day bench trial in April 2015, the district court found that Loth's services provided no benefit to the companies, he provided no day-to-day management support, and his management fees created unnecessary expenses that acted as a financial drain on the struggling companies. The district court concluded that Hoscheit and Hofschulte reasonably and necessarily terminated Loth's employment to keep the companies financially viable, but that Loth retained his one-third member interest in LMG and his shareholder interest in VO2fx. The district court determined that Hoscheit and Hofschulte's conduct was not unfairly prejudicial, fraudulent, or illegal, and that equitable relief was not warranted on that basis. However, the district court granted Loth's buy-out request pursuant to Minn. Stat. § 302A.751, subd. 2, and Minn. Stat. § 322B.833, subd. 2, concluding that the shareholders and members of the companies were deadlocked and unable to break the deadlock. The district court ruled that it would determine the value of Loth's interest under the applicable statutory procedure if the parties were unable to agree on the value of his interest. The district court denied all counterclaims.

After the parties failed to reach an agreement, the district court appointed two appraisers nominated by the parties to perform valuations of LMG, VO2fx, and Loth's interest in each as of March 8, 2012, the date of his termination. Lyndon Steele, Loth's nominated appraiser, appraised the combined fair value of LMG and VO2fx at $7,000,000

157, art. 1, at 122-85. No party argues that the new act applies. *See* Minn. Stat. § 322C.1204 (2016) (providing staggered effective dates for application of the new act).

and the total value of Loth's interest at $2,175,695. Benjamin Turnquist, Hoscheit and Hofschulte's nominated appraiser, appraised the fair value of both companies at zero dollars and concluded that Loth's interest was worthless. Following an evidentiary hearing at which both appraisers testified, the district court found Turnquist's zero-dollar valuation to be accurate and reliable, and found that Steele's valuation was flawed in several respects. The district court ordered that Loth receive nothing in compensation for the value of his interest in the companies.

Loth appeals.

D E C I S I O N

I. The district court did not err in denying Loth's requested equitable relief.

"We review the district court's exercise of equitable relief for abuse of discretion." *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *review dismissed* (Minn. Oct. 28, 2005). "A district court abuses its discretion if its decision is against the facts in the record or if its ruling is based on an erroneous view of the law." *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 799 N.W.2d 619, 625 (Minn. App. 2011) (quotations omitted). We view the record in the light most favorable to the district court's factual findings, and we defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

A. Hoscheit and Hofschulte's conduct was not unfairly prejudicial.

Loth argues that the district court erred in determining that Hoscheit and Hofschulte did not act in an unfairly prejudicial manner toward him and denying him equitable relief on that basis.

Under both the MBCA and the MLLCA, a district court "may grant any equitable relief it [finds] just and reasonable in the circumstances" if individuals in control of the corporation or LLC have acted "in a manner unfairly prejudicial" toward another member or shareholder. Minn. Stat. §§ 302A.751, subd. 1(b)(3), 322B.833, subd. 1(2)(ii). The district court found that Hoscheit and Hofschulte did not act in an unfairly prejudicial manner toward Loth "as they had to make financial decisions to keep the businesses going and that meant terminating the services of Loth from both companies."

The record supports the district court's finding. The evidence shows that, from 2008 to 2012, the companies paid Loth approximately $242,058.90 in management fees. During that time, the companies' online sales fell far short of Loth's projections and they incurred substantial net losses each year. In addition, Hoscheit and Hofschulte personally guaranteed significant liabilities on behalf of the companies to keep them running while Loth took on no liabilities, made no financial contributions, and provided no day-to-day operations assistance. Hoscheit testified that, in light of the companies' losses and significant liabilities, they needed to eliminate Loth's management fees, from which the companies were deriving no benefit, in order to survive. "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangsness*, 607 N.W.2d at 474. Viewing the evidence in the light most favorable to the district court's findings, we conclude that the district court's determination that Hoscheit and Hofschulte did not act in an unfairly prejudicial manner toward Loth has support in the record and that the district court did not abuse its discretion in denying him equitable relief.

B. Loth's discharge did not violate his reasonable expectation of continued employment.

Loth next argues that the district court erred in denying him equitable relief because Hoscheit and Hofschulte violated his reasonable expectation of continued employment by discharging him from the companies.

"Shareholders in a closely held corporation typically have an expectation of continuing employment, and the discharge of a shareholder-employee may be grounds for equitable relief under Minn. Stat. § 302A.751." *Haley v. Forcelle*, 669 N.W.2d 48, 59 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). The threshold issue is whether the minority shareholder's expectation of continued employment is reasonable. *Id.* In determining whether such an expectation is reasonable, we consider several factors, including "whether (1) the shareholder made a capital investment in the company; (2) continued employment could be considered part of the shareholder's investment; (3) the shareholder's salary could be considered a de facto dividend; and (4) continued employment was a significant reason for making the investment." *Id.* However, "the shareholder's expectation of continued employment is only reasonable if that expectation is known and accepted by other shareholders and properly balanced against the majority or controlling shareholders' need for flexibility in running the business," *id.* at 59-60, and doing so "in a productive manner," *Gunderson v. All. of Comput. Prof'ls, Inc.*, 628 N.W.2d 173, 191 (Minn. App. 2001), *review granted* (Minn. July 24, 2001), *and appeal dismissed* (Minn. Aug. 17, 2001).

Here, although the district court did not expressly address Loth's expectation of continued employment, the court found that his discharge "was reasonable and necessary" for the companies to be financially viable. As noted, the record supports the district court's finding that Loth's discharge was the result of a financial decision to keep the companies running at a time when the companies were in "survival mode." The record also supports the district court's findings that Loth's online marketing services were not providing benefit to the companies, he was not providing day-to-day management of the companies, and his management fees were draining the companies' limited resources. Moreover, it is undisputed that, unlike Hoscheit and Hofschulte, Loth made no capital investment in the companies. On balance, the evidence in the record supports the determination that Hoscheit and Hofschulte's need to run the companies in a productive manner outweighed the extent to which Loth could reasonably expect continued employment, in light of the companies' losses, liabilities, and low online sales. We conclude that Loth's discharge did not violate his reasonable expectation of continued employment and the district court did not abuse its discretion in denying him equitable relief on that basis.

C. The district court did not err by not making explicit findings on whether Hoscheit and Hofschulte fulfilled their duty to act honestly, fairly, and reasonably.

Loth argues that the district court erred because its findings do not address Hoscheit's and Hofschulte's duties to act in an honest, fair, and reasonable manner for the purposes of determining equitable relief.

For both corporations and LLCs, the district court must consider the duty that all shareholders or members owe one another to act in an "honest, fair, and reasonable

manner" in the operation of the corporation or LLC when determining equitable relief. Minn. Stat. §§ 302A.751, subd. 3a, 322B.833, subd. 4. Here, the district court found that Hoscheit and Hofschulte did not act in a manner unfairly prejudicial, fraudulent, or illegal in terminating Loth. The district court did not explicitly find that Hoscheit and Hofschulte fulfilled their duty "to act in an honest, fair, and reasonable manner." However, Loth provides no caselaw or authority to support his argument that the district court must make such explicit findings when determining equitable relief. Moreover, based on the district court's determination that Loth's discharge "was reasonable and necessary," which has support in the record, we can infer that the district court implicitly found that Hoscheit and Hofschulte acted in an honest, fair, and reasonable manner in the operation of the companies. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (holding that implicit findings may be derived from the district court's final resolution of a matter), *review denied* (Minn. Aug. 30, 1995). Furthermore, Loth makes no argument that the absence of explicit findings under Minn. Stat. § 302A.751, subd. 3a, or Minn. Stat. § 322B.833, subd. 4, resulted in any prejudice. Therefore, we conclude that the district court did not err by not making explicit findings on whether Hoscheit and Hofschulte fulfilled their duty to act in an honest, fair, and reasonable manner in determining equitable relief.

II. The district court did not err in determining the value of Loth's interest in LMG and VO2fx based on the valuations submitted by the parties' experts.

Loth argues that the district court erred in determining the value of his interest in LMG and VO2fx because it adopted the Turnquist appraisal, which valued the companies

at zero dollars, rather than the Steele appraisal, which valued the companies at $7 million. We disagree.

A district court's valuation determination is reviewed for an abuse of discretion. *Cf. Bolander*, 703 N.W.2d at 548 ("We review the district court's exercise of equitable relief for abuse of discretion."). When conflicting opinions of expert witnesses have a reasonable basis in fact, the trier of fact must decide who is right. *Thomas v. Thomas*, 407 N.W.2d 124, 126 (Minn. App. 1987). Appellate courts generally defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

If parties cannot agree on the fair value of an LLC membership interest within 40 days of an order for its sale, then the district court must "determine the fair value of the membership interests under the provisions of section 322B.386, subdivision 7." Minn. Stat. § 322B.833, subd. 2. Under Minn. Stat. § 322B.386, subd. 7 (2012), "[the district court] shall determine the fair value of the membership interests, taking into account any and all factors the court finds relevant, computed by any method or combination of methods that the court, in its discretion, sees fit to use[.]" District courts follow the same procedure when parties cannot agree on the fair value of corporate shares following an order for sale. *See* Minn. Stat. § 302A.751, subd. 2 (referencing Minn. Stat. § 302A.473, subd. 7 (2012)).

Loth first argues that the district court erred in adopting the Turnquist appraisal because it improperly calculated the fair value of the companies based on the "book" or "liquidation" value, rather than on the companies' value as a going concern. The Minnesota Supreme Court has defined "fair value," for the purpose of ordering a buy-out of corporate shares, as the "pro rata share of the value of the corporation as a going

concern." *Advanced Commc'n Design, Inc. v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000).[2] The supreme court has held that, "[t]o determine fair value, the [district] court may rely on proof of value by any technique that is generally accepted in the relevant financial community and should consider all relevant factors, but the value must be fair and equitable to all parties." *Id*.

Here, the Turnquist appraisal stated that the fair value of the companies would be calculated based on the companies continuing "as a going concern." The appraisal further stated that the value of the companies "is greater as a going concern than in liquidation value" and that the appraisal would not use liquidation value because that would assume discontinuance of the companies as a going concern. The appraisal calculated the companies' fair value using two methods: an "income approach" and an "asset approach." Under the income approach, Turnquist appraised the value of the companies to be negative $593,000 due to their operating losses. Under the asset approach, Turnquist appraised the value of the companies to be negative $4,000. Turnquist ultimately applied the adjusted-assets appraisal because it provided the highest estimated value for the companies. Loth's contention that Turnquist determined the value of the companies based on their liquidation value, rather than on their value as a going concern, is contradicted by the record.

Loth next argues that corporate valuations must be supported by "contemporaneous expectations of management," that the Turnquist appraisal failed in that regard, and that

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[2] Interpretations of the MBCA have been applied to interpretation of the MLLCA. *See Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 486 (Minn. App. 2007) ("[T]he law relevant to corporations guides our interpretation and application of the law relevant to LLCs . . . .").

the appraisal ignored a ten-week period in January through March 2012, during which, he claims, the companies showed a small profit. Loth also argues that the appraisal "defies logic" because the companies have continued to operate and litigate the case. Issues not adequately briefed on appeal are not properly before this court. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection."). Loth cites no caselaw or authority to support his arguments, and provides no citation to evidence in the record showing the profits he claims that the companies realized. Moreover, Loth does not dispute the district court's findings that the companies lost money in each year from 2008 to 2011 and had negative equity at the time of his discharge. Because prejudicial error is not obvious upon mere inspection, we decline to reach the merits of these arguments.

Loth also argues that the district court erred in adopting the Turnquist appraisal because the appraisal overlooked evidence showing (1) Griffith's $150,000 investment in the companies and (2) Hoscheit's self-prepared May 2012 financial statement in which he valued his interest in the companies as $700,000. Loth also claims that there is no evidence to support the district court's finding that Hoscheit learned that the companies would be losing the Jarden deal before terminating Loth, which the Turnquist appraisal accepted in calculating the companies' fair value.

Each statement of material fact in an appellant's brief "shall" be accompanied by a cite to record. Minn. R. Civ. App. P. 128.02, subd. 1(c). "[M]aterial assertions of fact in

a brief properly are to be supported by a cite to the record, and such cites are particularly important where . . . the record is extensive." *Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996) (citing Minn. R. Civ. App. P. 128.02, subd. 2; 128.03), *aff'd*, 568 N.W.2d 705 (Minn. 1997). Failure to comply with the rules may lead to nonconsideration of an issue. *Cole v. Star Tribune*, 581 N.W.2d 364, 371-72 (Minn. App. 1998).

Here, Loth provides no citations to the record evidence that he claims Turnquist failed to consider. Nonetheless, our review of the evidence shows that the district court characterized Griffith's $150,000 contribution as a loan, rather than an investment, and entered judgment for Griffith in the amount of $150,000 with interest in 2015, prior to the appraisal. The evidence also includes Hoscheit's testimony that he used 2011 values to prepare his May 2012 financial statement, when the companies were operating under the assumption, later proved false, that the Jarden deal would continue. The district court's finding on the timeframe in which Hoscheit learned that the companies would be losing the Jarden deal is supported by Hoscheit's testimony, and Loth cites no evidence in the record to support his claim that the finding is erroneous. Therefore, Loth has not met his burden to show that the district court erred in adopting the Turnquist appraisal on the grounds that the appraisal overlooked evidence.[3]

Loth argues that the district court erred in discrediting the Steele appraisal because the judgment in favor of Griffith on which the district court relied occurred after the

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[3] Loth also argues that the district court erred in considering the companies' 2013 tax returns and QuickBooks data in determining the value of the companies. However, Loth provides no record citation to the specific finding or evidence that he challenges. Therefore, we decline to reach the argument.

valuation date. Loth cites to a federal-tax-court memorandum and a federal-small-claims case addressing the consideration of events subsequent to a valuation date. But this court is bound only by decisions of the Minnesota Supreme Court and the United States Supreme Court. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003). In a case involving the fair valuation of a property subject to a taking, the Minnesota Supreme Court held that "when valuing . . . property, the fact finder should take into account conditions that exist at the time of the taking but are discovered subsequent to the taking." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 884 (Minn. 2010). And the district court has broad equitable powers when fashioning a buy-out. *Follett*, 615 N.W.2d at 292.

Here, it is undisputed that Griffith contributed $150,000 to the companies before the March 8, 2012 valuation date. The Steele appraisal submitted by Loth treated the contribution as an investment in the companies despite the district court's 2015 judgment that the companies owed Griffith $150,000 with interest, which the court characterized as a determination that Griffith did not invest in the companies, but made a loan.[4] Griffith's contribution is the relevant event that occurred before the valuation date. The district court's later ruling merely clarified that the contribution was not an investment. Given the district court's broad equitable powers, we conclude that the district court did not err in

[4] Loth does not challenge the district court's characterization of the 2015 judgment; he argues only that the judgment itself constituted an event occurring subsequent to the valuation date, which the experts should not consider.

discrediting the Steele appraisal because it treated the $150,000, which the court had awarded to Griffith, as an investment in the companies.

Because Loth has not met his burden to demonstrate that any of the challenged findings are clearly erroneous or unsupported by the record, and because we defer to the district court's factual findings and credibility determinations, we conclude that the district court did not abuse its discretion in determining the value of Loth's interest in the companies on the basis of the expert opinions.

Affirmed.