No. 35475 - Donna Wilson v. Leon Hunter Wilson

FILED
November 30, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., dissenting:

In this proceeding, the family court judge found that a company jointly owned by the parties, the Hunter Company, was valued at $8,927,957.00 as of the date of separation of the parties and that the company had only enterprise goodwill. The family court awarded Mrs. Wilson $4,914,582,50 as her equitable share of the Hunter Company. The circuit court reversed the family court rulings and determined that the Hunter Company had a negative value of $2,196,915.00 and that the company had only personal goodwill. As a consequence of the negative value of the Hunter Company, the circuit court set aside the award of $4,914,582,50 to Mrs. Wilson and further determined that Mrs. Wilson owed Mr. Wilson $894,286.00. The majority opinion has determined that the circuit court was correct in finding the Hunter Company had only personal goodwill, but that the circuit court committed error in finding the company had a negative value. I would have reversed the circuit court's order in its entirety and reinstated the family court order. Consequently, I dissent from the disposition of this case by the majority opinion for the reasons set out below.

The Circuit Court and Majority Opinion Did What No Expert Could do: Reject the Valuation of the Hunter Company by Mrs. Wilson's Expert and Find That Mr. Wilson Had Personal Goodwill in the Hunter Company

The parties stipulated that the value of their marital assets, *excluding* the value of the Hunter Company stock they owned, was $11,587,324.02. In other words, both parties could afford to have experts testify on their behalf. However, Mrs. Wilson was the only party to retain an expert to offer advice to the family court and appellate courts on the value of the Hunter Company and whether or not personal or enterprise goodwill existed in the company. Mr. Wilson's attorneys *did not offer any expert* to testify to these issues.[1]

I submit that, because of the personal wealth of Mr. Wilson, there was clearly no financial impediment to his attorney's procuring an expert to testify to the issue of the value of the Hunter Company and Mr. Wilson's claim for personal goodwill. Given the importance of this issue, the only reasonable explanation for the failure to obtain such an expert is that no expert could provide an opinion that was favorable to Mr. Wilson. Thus, in my judgment, Mr. Wilson's highly experienced attorneys could not find an expert who could ethically do what the circuit court and the majority opinion have done: contest the value of the Hunter Company as calculated by Mrs. Wilson's expert, and opine that Mr. Wilson had personal goodwill in the company. To be clear, no expert made these

[1]The circuit court's order specifically noted that, "Mr. Wilson offered no trial expert[.]"

conclusions. The plain and simple truth is that these unsupportable conclusions are the result of improper judicial activism.

A. Mr. Wilson Did Not Provide Expert Testimony on the Issue of the Value of The Hunter Company

The record in this case shows that the circuit court found that Mr. Wilson's evidence demonstrated that the Hunter Company had a negative value of $2,196,915.00. The majority opinion rejected this conclusion and found that insufficient evidence existed as to the value of the Hunter Company. To reach this conclusion the majority opinion, like the circuit court's order, disingenuously ignored the only expert testimony provided on this issue. That expert testimony was presented by Mrs. Wilson's expert. The case law of this Court has made clear that "[t]here is little doubt that in valuing . . . a business or property which [has] been found to be [a] marital asset[], *expert witnesses are needed*." *Bettinger v. Bettinger*, 183 W. Va. 528, 544, 396 S.E.2d 709, 725 (1990) (emphasis added) citing *Tankersley v. Tankersley*, 182 W. Va. 627, 390 S.E.2d 826 (1990)); *Shank v. Shank*, 182 W. Va. 271, 387 S.E.2d 325 (1989). Through flawed analysis, the majority opinion rejected the opinion of Mrs. Wilson's expert and decided to give Mr. Wilson another opportunity to present expert testimony on the issue of the value of the Hunter Company. As I will demonstrate, Mrs. Wilson presented competent evidence on the value of the Hunter Company through her expert.

The record before the family court was uncontested in showing that, in August 2004, Mr. Wilson sought a loan from a bank in the amount of $14,400,00.00, for the purpose of developing properties. To obtain the loan, Mr. Wilson represented that his total personal assets were valued at $20,311,641; which included the value of the Hunter Company. An August 4, 2004, financial statement signed by Mr. Wilson and submitted to the bank showed the value of the Hunter Company as being $l0,159,411.

The record also indicates that, subsequent to the loan commitment by the bank, Mr. Wilson was required to provide the bank with updated financial statements. Mrs. Wilson introduced into evidence an unsigned financial statement dated February 7, 2005, that was in the possession of the bank and the Hunter Company, which showed the value of the Hunter Company to be $14,981,018.72.[2]

Mrs. Wilson's expert, Kenneth Apple, valued the company at $9,381,420.00.[3] This valuation was based upon the net profits of three projects the Hunter Company had. It is not disputed that Mr. Apple used generally accepted accounting principles (GAAP) in reaching his conclusion. The information relied upon by Mr. Apple was supplied by Mr.

[2]Although the circuit court disregarded the February financial statement because it was not signed by Mr. Wilson, this fact is of no moment. What is indisputable is that the bank made a loan commitment to Mr. Wilson based upon representations that the Hunter Company was valued at more than $10,000,000.00.

[3]The family court adjusted this figure to arrive at a value of $8,927,957.00.

Wilson in response to discovery requests.[4]

Mr. Wilson called as witnesses, but not as experts, Mr. Alan Murray, who was an accountant for National Land Partners, and Ms. Joan Holtz, who was an accountant for the Hunter Company. These two witnesses introduced evidence, over the objections of Mrs. Wilson, that included financial data that had not been turned over to Mrs. Wilson as required during discovery. Mr. Murray and Ms. Holtz offered testimony as to the value of the Hunter Company under a theory called construction spending theory.[5] This purported theory was not based upon, and in fact, was inconsistent with, GAAP. Utilizing this spurious theory, the witnesses testified that the Hunter Company was improperly paid fees by National Land Partners and, therefore, the Hunter Company had a negative value of $2,680,672.00.

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[4]The circuit court and majority opinion took issue with the fact that Mr. Apple did not include additional projects that the Hunter Company worked on. The data used by Mr. Apple was the only complete project financial data that Mr. Wilson disclosed during discovery. Mr. Apple noted in his final report that additional financial data for other projects were belatedly disclosed, but that he "could not utilize these statements in [his] analysis because they do not project future sales and expenses. These financial statements are not prepared using generally accepted principles[.]" In other words, Mr. Wilson failed to disclose all the data needed for a complete report. More important than the fact that Mr. Wilson failed to disclose all the data needed for a complete report, is the fact that Mrs. Wilson was willing to leave money on the table to get on with her life. This is to say that, if Mr. Wilson had disclosed the financial data for *all* of the projects, the net value of the company would have increased, not decreased – this is the reason why all the data was not disclosed.

[5]Like the majority opinion, my research failed to disclose any state or federal case, or law review article, discussing this theory.

The family court heard the non-expert testimony of Mr. Wilson's witnesses as to the value of the Hunter Company, as well as the testimony of Mrs. Wilson's expert. The family court rejected the testimony of Mr. Wilson's witnesses as being inconsistent with his representations to a bank that the company had assets of over $10,000,000.00 just shortly before the parties separated. Further, the family court found that the valuation of $9,381,420.00 by Mrs. Wilson's expert was consistent with the representations made by Mr. Wilson to the bank, *i.e.*, that the company was worth more than $10,000,000.00.

The circuit court and majority opinion disregarded the evidence of Mrs. Wilson's expert, which was corroborated by financial statements given to a bank, and, in effect, took the position that Mr. Wilson was being less than candid to the bank when he represented that the Hunter Company was worth more that $10,000,000.00. The circuit court opinion found no problem with using its unsupportable conclusion to require Mrs. Wilson to pay to Mr. Wilson $894,286.00. The majority opinion decided against adopting the extreme conclusion of the circuit court. Instead, the majority opinion took an opposite extreme conclusion and decided to simply reject the corroborated value of the Hunter Company given by Mrs. Wilson's expert and to give Mr. Wilson a second opportunity to value the company. There is simply no justification for allowing Mr. Wilson to do that which he failed to do when given the opportunity, and to penalize Mrs. Wilson for doing that which the law required.

B. No Expert Testified That Mr. Wilson Had Personal Goodwill in the Hunter Company

After concluding that Mr. Wilson deserved a second opportunity to offer expert testimony on the value of the Hunter Company, the majority opinion went on to reach the unsupportable conclusion that Mr. Hunter had personal goodwill in a company the majority opinion could not place a value on.

The record indicates that the Hunter Company's business is that of acquiring and subdividing land, building roads, and selling real estate for National Land Partners. The properties were the "product" that the Hunter Company was selling for National Land Partners. The circuit court and the majority opinion took the position that, because Mr. Wilson was selected by National Land Company to be a conduit for selling its properties through the Hunter Company, Mr. Wilson was indispensable. Consequently, the circuit court and the majority opinion found that Mr. Wilson had personal goodwill in the Hunter Company as a result of developing and selling real estate for National Land Partners. The record is clear in showing that no expert testified to this conclusion, because Mr. Wilson did not retain an expert to testify on the issue of personal goodwill.

Personal goodwill has been described as "'that part of increased earning capacity that results from the reputation, knowledge and skills of individual people.'" *May*

v. May, 214 W. Va. 394, 400, 589 S.E.2d 536, 542 (2003) (quoting Diane Green Smith, "'Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill," 26 J. Marshall L. Rev. 147, 164-65 (1992)). Personal goodwill "is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner's personal skill, training or reputation." Syl. pt. 3, in part *May*. More importantly, this Court has recognized that the determination of personal goodwill must be based upon expert testimony. This Court alluded to this fact in *May*, when we recognized that "'[o]n appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.'" *May*, 214 W. Va. at 407, 589 S.E.2d at 549 (quoting *Conway v. Conway*, 131 N.C. Ct. App. 609, 508 S.E.2d 812, 818 (1988)). *See also Helfer v. Helfer*, 224 W. Va. 413, 416 n.1, 686 S.E.2d 64, 67 n.1 (2009) ("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 value of zero."); *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009) ("[G]oodwill can have pecuniary value if the trial court finds that there is reasonable evidence to support its value. In reaching a value, the trial court must have a rational basis for applying given accounting principles. Its decision must be supported by adequate evidence, and should avoid speculation and assumptions as much as possible.").

Expert testimony is crucial to the issue of goodwill because goodwill must be given a valuation. Determining that valuation is done through accounting methods. This court has recognized that there are five major and acceptable valuation formulas: "the straight capitalization method; the capitalization of excess earnings method; the IRS variation of capitalized excess earnings method; the market value approach; and the buy/sell agreement method." *Helfer*, 224 W. Va. at 422 n.19, 686 S.E.2d at 73 n.19. In the instant proceeding, Mr. Wilson failed to present expert testimony *on any* of the methods for determining and valuing personal goodwill. For this reason the family court correctly rejected mere assertions by Mr. Wilson that he had personal goodwill in the Hunter Company. The majority opinion joined the circuit court in leaping into the abyss and summarily concluding that Mr. Wilson had personal goodwill.

One of the factors used to assess personal goodwill is whether or not the customer base of a business would suffer if a key person left that business. *See Williams v. Williams*, 108 S.W.3d 629, 646 (Ark. Ct. App. 2003) ("Furthermore, appellee's expert failed to adequately account for the reduction in patient revenues that would be associated with appellant's departure from the practices. For these reasons, and because appellant's expert, Ms. Shuffield, did in fact include enterprise value in her valuation of the practices, we cannot say that the trial judge erred in crediting her valuation over that of Mr. Schwartz."); *Skrabak v. Skrabak*, 673 A.2d 732, 736 (Md. Ct. Spec. App. 1996) ("The traditional definition of

goodwill is the probability that the old customers will resort to the old place." (internal quotations and citation omitted)).

Insofar as the Hunter Company existed only to the extent that the National Land Partners utilized it to develop and sell properties, the Hunter Company's only client was National Land Partners. There was no evidence that National Land Partners would stop utilizing the Hunter Company if Mr. Wilson was no longer employed by the company. In fact, the management agreement between the Hunter Company and National Land Partners specifically required hiring a new person to fill Mr. Wilson's role with the company in the event that he died or became incapacitated. Although there was evidence that the National Land Partners valued Mr. Wilson's aggressiveness in developing their properties, the management agreement alone clearly established that National Land Company was prepared to continue using the Hunter Company as a conduit for developing and selling real estate in West Virginia *regardless* of whether Mr. Wilson remained as manager of the company.

In finding that Mr. Wilson had personal goodwill in the Hunter Company, the circuit court relied upon cases that are factually distinguishable from the instant matter. The majority opinion failed to rely on any case. The circuit court cited to the decision in *Matter of Marriage of Lankford*, 720 P.2d 407 (Or. Ct. App. 1986). In *Lankford* the wife contended that her husband's logging business should have been valued at a higher amount because it

was a "going concern." The appellate court rejected the argument on the grounds that the logging business was tied to the husband's ability to negotiate contracts with potential customers. The circuit court also cited to the decision in *In re Marriage of Foley*, 516 N.E.2d 455 (Ill. App. Ct. 1987). In that case the husband owned an electrical parts company. The issue on appeal by the wife was not whether personal goodwill existed. The wife argued that some portion of the company's value should have been attributed to enterprise goodwill. The appellate court found that the nature of the husband's business did not generate any goodwill outside of him.[6]

The decisions in *Lankford* and *Foley* found personal goodwill in the businesses at issue because those businesses relied upon the ability of the owners to obtain customers. However, Mr. Wilson is not needed in order for the Hunter Company to obtain customers, because its only customer is National Land Company.[7] And, as previously shown, National Land company was prepared to continue using the Hunter Company regardless of Mr. Wilson's presence.

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[6]The circuit court also cited to the decision in *Bertholet v. Bertholet*, 725 N.E.2d 487 (Ind. Ct. App. 2000). That case involved the issue of whether personal or enterprise goodwill existed in a bail bond company. The appellate court did not decide the issue because the record was inadequately developed. The case was remanded for a determination of the issue.

[7]Even if I assumed that the people who purchased National Land Partners' properties were customers of the Hunter Company, there was not a shred of evidence showing that such customers would stop purchasing National Land Partners' properties if Mr. Wilson left the Hunter Company.

Morever, the circuit court and majority opinion supported their conclusion of personal goodwill based upon the erroneous conclusion that Mr. Wilson was the only employee of Hunter Company. This finding is simply disingenuous. During the proceeding before the family court, Mr. Wilson put on evidence that the Hunter Company had 20 employees. Mrs. Wilson presented evidence that the company had 25 employees. Further, the management agreement between the Hunter Company and National Land Company required the Hunter Company to arrange for the employment of persons to manage, operate, develop and market the properties.[8] In spite of this evidence that Mr. Wilson was not the only employee of the Hunter Company, the circuit court and majority opinion found that Mr. Wilson was the only employee. This illogical conclusion had to be reached in order to justify finding that Mr. Wilson had personal goodwill in the Hunter Company.

In sum, the only credible evidence of goodwill was that provided by Mrs. Wilson's expert, who found that only enterprise goodwill existed in the Hunter Company. This Court stated in syllabus point 2 of *May* "'[e]nterprise goodwill' is an asset of the business and may be attributed to a business by virtue of its existing arrangements with

[8]The management agreement also required the Hunter Company to utilize a company called Inland Management Corporation to act as paymaster for the employees. The Hunter Company was also able to utilize the services and employee benefit packages of Inland Management Corporation. The majority opinion contorted the arrangement with Inland Management to make appear as though the Hunter Company employees were in fact employees of National Land Company.

suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business." Under the management agreement between National Land Company and the Hunter Company, National Land Company was committed to being the sole client of the Hunter Company regardless of who its manager was. This type of commitment is enterprise goodwill.

It is critical to understand the significance of what the majority opinion did in affirming the circuit court's personal goodwill finding. The circuit court summarily found personal goodwill, without any expert testimony, because it had determined that the Hunter Company had a negative value. In other words, the circuit court's order did not place a value on the purported personal goodwill because it had found the Hunter Company was, in essence, bankrupt. Insofar as the circuit court was concerned, the issue of personal goodwill was meaningless because Mr. Wilson could not benefit from such a finding. The majority opinion has now placed an unknown value on that personal goodwill, because it has determined that Mr. Wilson should have a second opportunity to place a value on the Hunter Company. This is a grave injustice because Mrs. Wilson did exactly what the law required in providing expert testimony on the issue of personal goodwill and enterprise goodwill. Mr. Wilson flaunted our legal requirements and is being rewarded with a second opportunity to show that he has personal goodwill that could exceed ninety percent of the value of the Hunter Company, when he failed, in the first instance, to provide any expert testimony to

prove that he in fact had personal goodwill in the company.

The ultimate result of the majority opinion is that expert testimony is no longer needed to decide the issue of whether personal goodwill exists. Litigants can now simply come into court with lay testimony on the issue of personal goodwill, and thereafter provide lay testimony as to the valuation to be assigned that personal goodwill.

For the reasons set out, I dissent. I am authorized to state that Justice Benjamin joins me in this dissenting opinion.