

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 29, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

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**Appeal No. 02-1007**

**Cir. Ct. No. 00-FA-293**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**GWEN ANN FRANZEN,**

**PETITIONER-RESPONDENT,**

**V.**

**RICHARD LEROY FRANZEN,**

**RESPONDENT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 SNYDER, J. Richard Leroy Franzen appeals from a judgment of divorce and order denying his motion for reconsideration regarding the valuation of his interest in a closely-held corporation, Rick & Vic's Foods, Inc. (Rick &

Vic's). Richard argues that the trial court's valuation of Rick & Vic's was contrary to the great weight and clear preponderance of the evidence; specifically, Richard argues that his expert established the actual fair market value of Rick & Vic's and the valuation method relied upon by the trial court, the earnings before interest, taxes, depreciation and amortization method (EBITDA), was not a reliable valuation method because it failed to account for Rick & Vic's non-operational debt. We disagree and affirm the judgment and order.

### FACTS

¶2 Gwen Ann Franzen and Richard were married on March 30, 1980. Richard is a 50% shareholder in Rick & Vic's. Rick & Vic's operates and manages a Piggly Wiggly store in Fond du Lac, Wisconsin, pursuant to a 1992 franchise agreement with Schultz Sav-O Stores, Inc. (Schultz). Under this franchise arrangement, Rick & Vic's acquired the equipment, fixtures and inventory with financing arranged for and guaranteed by Schultz.

¶3 In 1994, Schultz established Rick & Vic's in a new Piggly Wiggly store; at that time, Rick & Vic's entered into a new sublease agreement. In 1998, the financial arrangement with Schultz was refinanced, with Rick & Vic's borrowing \$1,200,000 from Firststar Bank Milwaukee, which was again arranged for and guaranteed by Schultz.

¶4 Gwen filed a petition for divorce in Fond du Lac county on June 21, 2000. A two-day final hearing was scheduled for July 17 and 18, 2001. On the first day of trial, the parties reached an agreement on maintenance and property division, except for the value of Richard's interest in Rick & Vic's. This agreement was entered on the record by oral stipulation of the parties. On the second day of trial, the trial court heard testimony and received valuation evidence

presented by each party's expert witnesses. At the time of trial in July 2001, Rick & Vic's owed Schultz \$212,812, owed \$500,000 to Firststar Bank and had an unfunded pension liability of \$138,833.

¶5 At trial, Gwen's expert, Wayne M. Wallschlaeger, a certified public accountant, presented his valuation report for Rick & Vic's, which consisted of averaging the results of four different valuation methods he used in conjunction with information from the corporate tax returns for calendar years 1998 through 2000, and the June 2001 financial statement. Wallschlaeger utilized the income approach, which yielded a value of \$1,425,504, the market approach, which yielded a value of \$1,382,289, the EBITDA approach, which yielded a value of \$1,289,844, and the cost approach, which yielded a value of \$1,389,434.

¶6 After averaging his four results, and applying a 20% marketability discount, Wallschlaeger arrived at a discounted equity value of \$1,097,414 for Rick & Vic's. He then multiplied that figure by 50% to arrive at the value of Richard's interest, \$548,707.

¶7 Richard's first expert was William K. Jacobson, senior vice president of retail operations and development for the former Schultz, now known as Fresh Brands Distributing (Fresh Brands). Jacobson testified that he was significantly involved and set the price for all sales of Piggly Wiggly franchise stores. In evaluating Rick & Vic's, Jacobson prepared his standard operational projection which he used in evaluating the value of all Piggly Wiggly stores. His operational projection determined that the non-operational cash flow was insufficient to support the debt necessary to acquire the equipment, fixtures and inventory of the corporation; as a result, he concluded that Rick & Vic's had a negative value.

¶8 Richard's second expert was William K. Nortman, a certified public accountant with experience in acquisitions and mergers. Nortman testified that he represents nineteen Piggly Wiggly franchises with Fresh Brands, including Rick & Vic's, and this comprised between 33% to 40% of his practice for the past five years. Additionally, Nortman indicated that he had represented five buyers and two sellers involving the transfer of a Piggly Wiggly franchise within the last five years. Nortman testified that the valuation method presented by Jacobson was the same one, with some minor adjustments in a couple of instances, used to establish the sale price in all seven of his transactions with Fresh Brands involving the transfer of a Piggly Wiggly franchise store.

¶9 Nortman testified that he had never seen three of the four valuation methods utilized by Wallschlaeger. Nortman did acknowledge familiarity with the EBITDA method and testified that other than his dealings with Fresh Brands, this was the primary method he used in valuing a business. Nortman testified that he had never used this valuation method in negotiating a sale or purchase of a Piggly Wiggly franchise store.

¶10 Nortman further testified that Wallschlaeger's application of the EBITDA formula was incomplete for a number of reasons. Nortman claimed that Wallschlaeger incorrectly used a three-year average of earnings (1998-2000) instead of a weighted average, giving the least weight to 1998 and the greatest weight to the first half of year 2001. Nortman further claimed that the EBITDA multiple used by Wallschlaeger in his analysis was high given the financial performance of Rick & Vic's. Finally, Nortman testified that Wallschlaeger should have adjusted his EBITDA valuation for non-operational debt, in particular the \$500,000 fixed debt to Firststar, the \$212,812 owed to Fresh Brands, the negative cash of \$43,049 and the unfunded pension liability of \$138,833.

¶11 At the conclusion of the trial, the trial court took the issue under advisement, established a briefing schedule and advised that an oral decision would be rendered on September 21, 2001.

¶12 At the September 21, 2001 hearing, the trial court recognized the varying opinions of the experts on how to value Rick & Vic's. The trial court determined that Wallschlaeger's EBITDA approach was the appropriate method for valuing the business, with some modifications. As a starting point for its findings, the trial court used yearly earnings for 2001, which were \$196,885. The trial court chose this number as opposed to using the average used by Wallschlaeger because the trial court believed it more appropriately represented the decrease in earnings the store had experienced.

¶13 The trial court then multiplied the 2001 earnings times Standard and Poors 5.5 multiplier and arrived at the value of \$1,082,868. The trial court then discounted this amount by 20% for lack of marketability and by another 20% for lack of control, and found the fair market value of Rick & Vic's to be \$649,720.50. The trial court then valued Richard's 50% interest at \$324,860.20. The trial court accepted Wallschlaeger's testimony and concluded that a reduction in value for debt owed by the store was not appropriate because of the accelerated rate at which the debt was being paid down. The trial court determined that the debt would be paid off in a short time, resulting in a substantial increase in Richard's equity. In addition, the trial court explained that there was insufficient evidence to show that the value should be reduced by the amount of the unfunded pension liability. The trial court then entered its Findings of Fact, Conclusions of Law and Judgment of Divorce on January 10, 2002.

¶14 Richard moved the trial court for reconsideration and asked it to make additional findings that its fair market value be further adjusted for non-operational debts. The trial court acknowledged that it had to make a choice between the experts but explained that it found Wallschlaeger's testimony, approach and valuation "convincing." After conducting an additional hearing on March 11, 2002, the trial court denied Richard's motion on April 4, 2002. Richard appeals.

### DISCUSSION

¶15 It is well-established law in Wisconsin that the valuation of a marital estate in a divorce matter is within the discretion of the trial court. *Sharon v. Sharon*, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). Furthermore, the valuation of a closely-held business is a factual determination which we will not disturb unless it is clearly erroneous. *Siker v. Siker*, 225 Wis. 2d 522, 532, 593 N.W.2d 830 (Ct. App. 1999). In exercising its discretion in determining the market value of a closely-held corporation, the trial court must weigh the credibility of the experts, including their experience and background, as well as the analysis used by them in arriving at their conclusion. *Schorer v. Schorer*, 177 Wis. 2d 387, 399, 501 N.W.2d 916 (Ct. App. 1993).

¶16 We will not overturn a discretionary decision unless it is apparent that the court's discretion was exercised arbitrarily or on the basis of completely irrelevant factors. *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 181, 311 N.W.2d 673 (Ct. App. 1981). As in all discretionary acts of the court, the question is whether the trial court considered the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15,

320 N.W.2d 175 (1982). Factual findings of the court will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2). When we test the sufficiency of the facts of record to sustain a decision, we do not search for facts contrary to it; instead, we will look for reasons to sustain the trial court's decision. *See Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶17 In essence, Richard argues that his expert, Jacobson, offers a more credible valuation than the one used by the trial court and that the EBITDA method is not a reliable valuation method for valuing Rick & Vic's. His first argument can be disposed of summarily: the reliability and credibility of expert testimony is an issue for the trier of fact. *State v. Davis*, 2002 WI 75, ¶22, 254 Wis. 2d 1, 645 N.W.2d 913. Reliability of expert testimony is something that is subject to challenge on cross-examination in Wisconsin. *Id.* The trier of fact must then determine the reliability of such evidence in light of differing opinions by experts. *Id.* For this reason, we leave any determination on reliability of such evidence to the trier of fact. *Id.* Here, the trial court heard testimony from three experts, two of whom were Richard's experts; the trial court acknowledged it had to make a choice between the experts but explained that it found Wallschlaeger's testimony, approach and valuation "convincing." We must leave this determination to the trial court.

¶18 Richard next argues that the EBITDA method is not a reliable valuation method for valuing Rick & Vic's. Richard cites no authority for this proposition and again, Richard relies solely on the testimony of his expert, Nortman, to demonstrate that EBITDA was not reliable. As we just stated, the trial court implicitly found Wallschlaeger's testimony more credible and reliable

than both Nortman and Jacobson and we must leave such determinations to the trial court.

¶19 Both Wallschlaeger and Nortman testified that the EBITDA approach was the most commonly used formula in business valuation. Furthermore, Nortman himself acknowledged familiarity with EBITDA and even admitted this was the primary method he used in valuing a business. Without any citation to any binding or persuasive legal authority, we are unmoved by this argument.

### CONCLUSION

¶20 We disagree with Richard's arguments that the trial court's valuation of Rick & Vic's was erroneous and unreliable and that his expert established the actual fair market value. We therefore affirm the judgment and order of the trial court.

*By the Court.*—Judgment and order affirmed.

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