Circuit Court for Montgomery County
Case No. 119882-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2303

September Term, 2017

LAURA HULTZ

v.

KENNETH KUHN

Graeff,
Friedman,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: February 21, 2019

In this divorce case, the sole issue on appeal involves the valuation of Kuhn Tree Services, Inc. ("KTS"), a business owned by appellant Laura Hultz, but acquired during her marriage with appellee Kenneth Kuhn. In its "Order of Divorce and Marital Property Distribution" dated May 23, 2016, the Circuit Court for Montgomery County found that KTS had a marital property value of $76,044 and, pursuant to Md. Code (1984, 2012 Repl. Vol.), § 8-205 of the Family Law Article ("FL"), granted Mr. Kuhn a monetary award in the amount of $39,694.61. Ms. Hultz filed for in banc review pursuant to Md. Rule 2-551.[1] In her memorandum filed pursuant to Rule 2-551(c), Ms. Hultz challenged the circuit court's valuation of KTS. Agreeing with Ms. Hultz that the circuit court erred in valuing KTS, the in banc panel vacated the $39,594.41 monetary award and remanded the case to the circuit court for further proceedings. Pursuant to that remand, the circuit court held a two-day evidentiary hearing concerning the valuation of KTS. As a result of that hearing, the circuit court found that KTS had a value of $204,000 and, after consideration of the FL § 8-205(b) factors, granted Mr. Kuhn a monetary award of $103,500. Ms. Hultz noted a timely appeal, and presents the following question for our review, which we have

[1] Md. Rule 2-551(a):

> **Generally.** When review by a court in banc is permitted by the Maryland Constitution, a party may have a judgment or determination of any point or question reviewed by a court in banc by filing a notice for in banc review. Issues are reserved for in banc review by making an objection in the manner set forth in Rules 2-517 and 2-520. Upon the filing of the notice, the Circuit Administrative Judge shall designate three judges of the circuit, other than the judge who tried the action, to sit in banc.

consolidated and slightly rephrased as follows:

> Whether the trial court erred in determining the value of KTS based on the opinion of appellee's expert?

Perceiving no error, we affirm.[2]

FACTS AND PROCEEDINGS

Because the issue on appeal deals solely with the valuation of KTS, we provide only a brief summary of the divorce proceedings. Ms. Hultz and Mr. Kuhn were married on November 29, 1997. The parties voluntarily separated on or about August 26, 2012, and were granted an absolute divorce on May 23, 2016. As part of the judgment of absolute divorce, the circuit court granted Mr. Kuhn a monetary award in the amount of $39,694.61 based in part on KTS's value, which the court found to be $76,044.

The circuit court's basis for the monetary award stemmed primarily from its valuation of KTS. Kuhn started KTS, a tree-cutting business, in 1980. Ms. Hultz started working exclusively in the company's office in the early 1990's. She was responsible for "everything inside the office" and Mr. Kuhn "took care of everything outside the office[.]" On January 11, 2006, Ms. Hultz incorporated KTS and became its sole shareholder. The business was apparently successful for many years. Sometime in 2014, Mr. Kuhn stopped working for KTS. Ms. Hultz continued to operate the business, although she claimed that it had not been doing well in the years immediately preceding the divorce. The circuit

[2] In her appellate brief, Ms. Hultz also asked us to resolve whether the trial court erred in holding an evidentiary hearing on the issue of KTS's value based on the in banc panel's remand order. At oral argument, however, Ms. Hultz withdrew this issue from her appeal.

court, after noting the paucity of evidence concerning KTS's valuation, found that KTS had a fair market value of $76,044 based upon the value of KTS's assets as reflected on Schedule L of its 2014 federal tax return.

In her petition for in banc review, Ms. Hultz challenged the trial court's finding that KTS had a fair market value of $76,044.[3] Ms. Hultz argued that there was insufficient evidence for the trial court to determine KTS's value and, in any event, the evidence showed that "KTS had consistently lost money and had substantial debt."[4] She alleged that the trial court "failed to properly determine the fair market value of KTS[,] and it further valued the assets of KTS without consideration of the liabilities of KTS."

On December 23, 2016, the in banc panel, in relevant part, vacated Mr. Kuhn's monetary award "for the reasons given in [c]ourt on December 2, 2016"[5] and remanded the case for further proceedings.

On January 11, 2017, the trial court issued an order directing the assignment office to set a hearing "regarding the monetary award in this matter." The court, citing *St. Cyr v. St. Cyr*, 228 Md. App. 163, 197 (2016), noted that "once remanded, the [c]ourt may conduct further proceedings and 'may accept additional evidence on those issues.'" The parties

[3] Ms. Hultz presented two other issues to the in banc panel, neither of which she raises in this appeal.

[4] At the initial hearing before the circuit court, Ms. Hultz testified about the value of KTS and introduced some of the company's financial records. Mr. Kuhn did not testify about KTS's value and neither party sought to admit expert testimony on the subject.

[5] Despite this Court's Order requiring Ms. Hultz to obtain a transcript of the December 2, 2016 proceedings, no transcript has been provided.

attended a status hearing on February 1, 2017, and the court held a two-day evidentiary hearing on November 27 and 28, 2017.

At the hearing, both Ms. Hultz and Mr. Kuhn presented expert testimony concerning the value of KTS. The court recognized Mr. Kuhn's expert, Charles McBee, "as an expert in accounting and business valuation" without objection. It also recognized Ms. Hultz's expert, Jeffrey Barsky, "as an expert in forensic accounting and business valuation" over Mr. Kuhn's objection.

On December 18, 2017, the circuit court issued a "Supplemental Marital Property Distribution Opinion." Relying on Mr. McBee's testimony, the court valued KTS at $204,000. The court "declin[ed] to accept [Mr. Barsky's] opinion that the business [had] no value[.]" In rejecting Mr. Barsky's valuation, the court stated that it could not

> reconcile [Mr. Barsky's] zero valuation with the fact that the business employs 11 people[;] . . . it pays the employee who took over [Mr. Kuhn's] job, $65,000 annually; [Ms. Hultz] paid herself $40,000 in 2014 and 2015; [Ms. Hultz] gives the employees raises and bonuses; there were no transactions on the company credit card in 2015; in 2014, the business leased additional space at a cost of $3,500 monthly; and [Mr. Barsky's] opinion relied solely on information provided by [Ms. Hultz] about how the company was performing.

After considering the FL § 8-205(b) factors, the court granted Mr. Kuhn a monetary award in the amount of $103,500. On appeal, Ms. Hultz challenges that monetary award, arguing that it must be vacated because the circuit court improperly relied on Mr. McBee's testimony as to the value of KTS.[6]

[6] Ms. Hultz does not allege any error in the court's consideration of the FL § 8-205(b) factors.

DISCUSSION

The Circuit Court Did Not Err in Determining the Value of KTS

On appeal, Ms. Hultz argues that the trial court erred when it "failed to properly determine the fair market value of KTS as a whole and instead valued the assets of KTS without consideration of the liabilities of KTS." Specifically, she argues that the circuit court did not consider KTS's payroll tax liability or its accounts payable. Ms. Hultz also argues that Mr. McBee's opinion was "speculative and [was] not based upon an adequate foundation or sound reasoning."

In response, Mr. Kuhn argues that Ms. Hultz waived any right to challenge the court's reliance on Mr. McBee's testimony because she did not object or move to strike any part of his trial testimony. Mr. Kuhn further argues that the circuit court's reliance on Mr. McBee's valuation of KTS was not clearly erroneous.

At the remand hearing, Mr. McBee testified that he requested KTS's financial statements, QuickBooks file, and tax returns in order to perform the business valuation. He only received "the last four tax returns" representing tax years 2012 to 2015 and the QuickBooks file. Unfortunately, the tax returns and the QuickBooks file did not "match up" from an accounting standpoint. This, and the other "tax work that [he] saw," gave Mr. McBee "concerns about the general accounting" for KTS.[7] As a part of the valuation

[7] Mr. McBee testified that he never

> got an asset listing on the property equipment[,] . . . [a]ccounts payable had
> (continued . . .)

process, Mr. McBee sent a list of fifteen questions to KTS's tax preparer, but Mr. McBee indicated that the tax preparer "might have answered one" of the submitted questions. Mr. McBee also submitted questions to KTS management through counsel, but received no response.

At the evidentiary hearing, Mr. McBee testified that, in accordance with recognized business valuation principles, he considered the three distinct approaches to valuation: income, asset, and market. Mr. McBee ultimately used the market approach to establish KTS's value. He explained his analytical approach:

> Now, typically we would like to use the income approach in a small business like this . . . [but] because of the accounting and the losses without the explanation for the losses and without the explanation for the expenses, we then looked at another approach. We always look at all three approaches. Let me just be clear on that. When we do a calculation of value, our calculations are pretty thorough. So we like to start with the income approach, so that means I go through the company's reported earnings every year. I didn't get good answers on why the company wasn't making money but was still in business somehow, so then we went to the asset approach.
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> The asset approach, we noticed about $400,000 or $500,000 worth of equipment on the company's books, so we did something we call a cost to create, which [has] held up in other cases we've done. That means instead of liquidating the business and saying it's worthless, we say, what would it cost to start a business that could generate these kind of sales? And so basically, you just . . . take the depreciation away from the equipment, and then any other assets, minus any of the liabilities, is your value. So I think

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> a negative balance, just simply because . . . the tax preparer incorrectly used cash basis in QuickBooks and didn't adjust for it[,] . . . [and] payroll liabilities . . . did not match up with the notices they were getting from the IRS.
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> And then, as we analyzed performance over the years, we noticed some troubling trends regarding . . . revenues to operating costs . . . as time had passed. So we noticed that sales were declining, yet expenses were increasing, so we had a lot of reservations about the quality of the work[.]

> we had a value under that method. Not the highest value, but it did provide an indication of value for the going concern.
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> We then went to the market approach, which we always look at. Now, the market approach is probably pretty easy to understand, so . . . we're going out to a couple of resources we have. One is called First Research. One is called Pratt['s] Stats. And what they do is, they provide multiples on transactions, so there will be multiples of earnings, multiples of sales, multiples of gross profit. Obviously, the earnings, we couldn't get to an earnings number based on the figures we had, so we used a multiple of sales, which is a good -- kind of a good test, typically, for our income approach. And it did turn out that these companies do [sell] for a multiple of sales.

Mr. McBee explained that the market approach for valuation requires the examination and analysis of data from known sales of comparable companies. In this case, Mr. McBee used information from a database known as "Pratt['s] Stats," which he indicated was a source regularly used by business analysts. The Pratt's Stats database provided a compilation of 515 sales of tree and landscaping businesses, but Mr. McBee explained that he narrowed that list down to the sales of nineteen companies which he believed were "most representative" of KTS's business. Using the sales of the nineteen companies generated by the database, he opined:

> So this was . . . a challenging subject company because of the poor performance historically, but again, it was deemed to be a going concern, and we have never valued a going concern at zero. So we used the market approach[.] . . . The market multiple was 50 percent of sales that we used. The average multiple was a little higher. So we used [KTS's] sales in 2015, noticed that was the lowest year of sales as we looked at the whole study period, '12, '13, '1[4], '15. As we got longer in, sales became less, which is unfortunately not uncommon in a divorce scenario. So we multiplied the 50 percent approximate market multiple of sales and determined a value of $400,000.
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> Now, there's more to it than that. . . . [W]hen my partner looked at this and looked at the performance, we were a little skeptical that [this] company could sell for [$]400,000. So in a divorce matter, we're afforded a discount for lack of marketability, just the appropriate technique that

> [Certified Valuation Analysts] use. We gave it a very heavy discount for lack of marketability because of the poor performance of the company. So we brought that [$]408,000 fair value down to $204,000 as the final fair market value [of KTS].

Although Ms. Hultz vigorously cross-examined Mr. McBee, she did not lodge an objection to the admissibility of Mr. McBee's methodology or his ultimate opinion that KTS's fair market value was $204,000.

To the extent that Ms. Hultz challenges Mr. McBee's methodology in arriving at a fair market value for KTS, we agree with Mr. Kuhn that any such objection has not been preserved for appellate review. Maryland Rule 2-517(a) states that "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." In *Hollander v. Hollander*, we applied this rule to an almost identical situation. 89 Md. App. 156 (1991). There, in a divorce case, the husband argued that his wife's expert witness used an improper method to determine the value of his dental practice. *Id*. at 170. Specifically, the husband only objected that the expert used the wrong date for valuation purposes, and therefore the opinion had "an improper basis in fact." *Id*. at 171. The husband lodged no other objections during the expert's testimony. *Id*. We held that the husband's appellate challenge to the expert's methodology was not preserved for review. *Id*. at 174.

Here, Ms. Hultz never lodged an objection to Mr. McBee's methodology in determining KTS's fair market value. Mr. McBee's opinion was therefore admitted without

objection.[8] We see no challenge to the admissibility of Mr. McBee's testimony in Ms. Hultz's appellate brief. Indeed, she fails to even mention Rule 5-702, which governs the admissibility of expert testimony, and provides, in relevant part, that a trial court must determine "whether a sufficient factual basis exists to support the expert testimony." Accordingly, as in *Hollander*, we conclude that Ms. Hultz may not challenge Mr. McBee's methodology on appeal as the issue is not preserved.

Having determined that Mr. McBee's valuation of KTS was admitted and properly before the trial court, we turn our attention to whether the court was clearly erroneous in determining KTS's value. *See* Md. Rule 8-131(c) ("When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]"). The weight given to expert testimony is a question for the trier of fact. *Walker v. Grow*, 170 Md. App. 255, 275 (2006). "The trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced. We may not—and obviously could not—decide upon an appeal how much weight must be given, as a minimum to each item of evidence." *Id.* (quoting *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977)); *see also Edsall v. Huffaker*, 159 Md. App. 337, 342 (2004) ("A [trier of fact] is not required to accept the testimony of an expert witness."). Finally, "[i]n non-jury cases, this Court must

[8] The circuit court admitted Mr. McBee's written report over Ms. Hultz's objection. Later in the trial – after Mr. McBee had been excused as a witness – Ms. Hultz moved to strike various schedules appended to Mr. McBee's report. The circuit court denied that motion. The propriety of those rulings concerning the written report have not been challenged in this appeal.

assume the truth of all evidence tending to support the findings of the trial court, and may simply inquire 'whether there is any evidence legally sufficient to support those findings.'" *Skrabak v. Skrabak*, 108 Md. App. 633, 650 (1996) (quoting *Weisman v. Connors*, 76 Md. App. 488, 500 (1988)).

In its written opinion, the circuit court expressly rejected Ms. Hultz's expert's opinion that KTS had no value. Instead, the court found Mr. McBee credible:

> On the other hand, Mr. McBee, a CPA who is also a certified valuation analyst (CVA), detailed at length the three approaches to business valuation, specifically, the income, asset and market approaches. He opined that he elected to use the market approach for two main reasons. First, the accounting being conducted on behalf of the company was poorly done and in his opinion, erroneous. He stated that, after a review of the QuickBooks records and four years of tax returns (excluding 2016), he found that the records did not reconcile. Furthermore, he noted that the balance sheet did not list any assets, yet the 2015 tax return showed assets valued at $426,000. Second, he stated that in requesting information about the company finances from [Ms. Hultz], he did not receive "good answers," and therefore was unable to reconcile [Ms. Hultz's] contention that the company had not been making any money since 2013 with the fact that it remained in business. He noted that since the divorce, the company experienced a decline in sales each year, yet the sales still were more than $900,000 annually. Ultimately, Mr. McBee testified that he did not think any of the tree service financials (QuickBooks or tax returns) were accurate.
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> Adopting the market approach, Mr. McBee used "Pratt's Stats" and looked at the sales of 19 tree trimming companies across the country to assist in assessing the value of the business. From that comparison, he valued the business at $408,035. However, a 50.00% valuation discount for lack of marketability brought the valuation down to $204,000. Mr. McBee used a significant discount of the valuation because he factored in the payroll tax notice of intent to levy. He recognized that the significant payroll tax liability would reduce the likelihood of someone purchasing the business.

(Footnote omitted).

The trial court's findings are amply supported by the evidence. We reject Ms.

Hultz's assertion that the trial court determined KTS's value based on its assets – to the contrary, the court relied on Mr. McBee's valuation based on the market approach. We likewise reject Ms. Hultz's contention that KTS's payroll tax liability was not taken into account in Mr. McBee's valuation of the company. As the trial court correctly noted, Mr. McBee accounted for the payroll tax liability when he applied a substantial discount to value based on the company's lack of marketability.[9]

Finally, Ms. Hultz challenges Mr. McBee's opinion as "speculative" and "not based upon an adequate foundation or sound reasoning." Ms. Hultz takes issue with Mr. McBee basing his valuation of KTS on the sales price of nineteen companies found in the Pratt's Stats database. During Ms. Hultz's cross-examination of Mr. McBee, Mr. McBee acknowledged that certain aspects of the nineteen companies he used in his analysis could substantially differ from KTS. For instance, Mr. McBee recognized that some of the nineteen companies could have had more commercial sales and long-term contracts than KTS, and that some of those companies could have had better management than KTS. Although Ms. Hultz raised valid concerns about the underlying data used by Mr. McBee, "these criticisms go to the weight, not the admissibility, of his testimony." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 483 (2013) (citation omitted). The finder of fact, however, "may believe or disbelieve, credit or disregard, any evidence introduced, and a reviewing court may not decide on appeal how much weight must be given to each item of evidence."

[9] We see no error in Mr. McBee's failure to expressly consider KTS's alleged accounts payable. Mr. McBee opined that KTS's accounting records were unreliable and therefore he did not rely on them.

Santiago v. State, 458 Md. 140, 156-57 (2018) (quoting *Great Coastal Express, Inc.*, 34 Md. App. at 725). Finally, we note that, although Mr. McBee acknowledged that the market approach was not his preferred valuation method, he felt compelled to use that approach rather than the income or asset method because he considered KTS's financial records unreliable, and both Ms. Hultz and KTS had been uncooperative in providing information relevant to his analysis.

In conclusion, it was within the province of the trial judge as the trier of fact to credit Mr. McBee's expert testimony concerning the value of KTS. *Walker*, 170 Md. App. at 275. Because Mr. McBee's opinion was not "totally devoid of logic," we discern no error and affirm. *Fox v. Fox*, 85 Md. App. 448, 459 (1991).

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.