

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 2016.

Capitol Foundry of Virginia, Inc., Appellant,

against Record No. 150517
Circuit Court No. CL13-6364

Nancy C. Jimenez, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the circuit court.

On December 10, 2013, Nancy C. Jimenez, a shareholder of Capitol Foundry of Virginia, Inc., filed a complaint in the circuit court seeking to dissolve Capitol Foundry pursuant to Code § 13.1-747. Capitol Foundry filed an election “to purchase all shares owned by [Nancy] at the fair value of the shares.” Code § 13.1-749.1. The circuit court ruled that Nancy’s shares would be “valued as of December 31, 2013,” and that the “price and terms of the purchase and sale shall be determined by further Order.”¹ Following a bench trial, the circuit court ruled that the fair value of the 5 shares owned by Nancy as of December 31, 2013, is \$1,643,235.

¹ Code § 13.1-749.1(C) provides that if “the parties reach agreement as to the fair value and terms of purchase of the petitioner’s shares, the court shall enter an order directing the purchase of petitioner’s shares upon the terms and conditions agreed to by the parties.” If the parties are unable to reach agreement, “the court, upon application of any party, shall stay the proceedings . . . and determine the fair value of the petitioner’s shares as of the day before the date on which the petition . . . was filed or as of such other date as the court deems appropriate under the circumstances. Code § 13.1-749.1(D).

Capitol Foundry argues that the circuit court erred in permitting David Timms, Nancy's expert, to offer an opinion that was premised on speculation and in basing its determination of the value of Nancy's shares upon unsupported assumptions. Nancy called Timms to testify regarding his opinion on the fair value of Capitol Foundry and Nancy's shares as of the valuation date of December 13, 2013.² Timms testified that he first valued Capitol Foundry as of December 31, 2013, at \$7,642,000, using the adjusted net asset value method based on the balance sheet from the 2013 corporate tax return.³ After this Court issued its opinion in Jimenez v. Corr, 288 Va. 395, 764 S.E.2d 115 (2014), Timms adjusted the value of Capitol Foundry to \$3,286,465.⁴ Timms explained that he decreased the value of the company by the liability it would incur in purchasing the 30.6 shares held by Norma Corr's estate because under the holding in Jimenez those shares must be sold to the company or shareholders. Timms assumed that the

² Timms is a Certified Public Accountant and a Certified Valuation Analyst. He is accredited in business valuation by the American Institute of Certified Public Accountants and specializes in business valuation and litigation support. Capitol Foundry stipulated to his qualification as a business evaluator.

³ Timms prepared an initial valuation report dated October 7, 2014. Although a copy of the report was provided to the circuit court and referred to by Timms during his testimony, the report was not admitted into evidence at trial.

⁴ In Jimenez, a separate case arising from a dispute among the shareholders of Capitol Foundry, we held that the shareholders agreement entered into by the shareholders controlled disposition of the shares being held by Norma Corr's estate. At the time of Norma's death, she owned 95 shares of Capitol Foundry stock. After her death, Capitol Foundry purchased 64.4 shares of Norma's stock, leaving 30.6 shares held by her estate. Because the shareholders agreement "requires Norma's personal representatives to sell all of her Capitol Foundry shares to either the Company or the remaining shareholders upon Norma's death," we remanded the case to the circuit court "so that the parties may, in the first instance, attempt to resolve who will purchase Norma's 30.6 shares, and in what quantities." Jimenez, 288 Va. at 414-416, 764 S.E.2d at 124-125. We stated that "[i]f the parties cannot reach such an agreement," the shareholders agreement "require[d] the shareholders, including Norma's executors on Norma's behalf, to ensure that Norma sells all 30.6 of her shares to Capitol Foundry." Id. at 416, 764 S.E.2d at 125.

remaining shareholders, Nancy and Lewis Corr, each of whom held 5 shares, would be unable to reach an agreement to purchase the shares themselves, thus requiring purchase of the shares by Capitol Foundry.⁵ Because the purchase by Capitol Foundry of the 30.6 shares held by Norma's estate would leave only 10 shares outstanding, each share was valued by Timms at \$328,646.50, rounded to \$328,647.⁶ Since Nancy owns 5 shares, Timms valued her shares at \$1,643,235.⁷

We disagree that Timms' opinions were speculative or that the circuit court's determination of value was based on unfounded assumptions. Timms' opinion of the value of Capitol Foundry was based on the financial statements contained in the corporate tax return and was adjusted by him to account for the purchase of the shares held by Norma's estate. His adjustment to value was based on the liability carried by Capitol Foundry, effective in the year 2012, calculated by him in accordance with the controlling terms of the shareholders agreement, which set forth both the purchase price of the estate's shares and the effective date of closing. His determination of 10 shares outstanding as of December 31, 2013, was based on Capitol

⁵ Timms calculated the liability for the company's purchase of the shares based on the purchase price set forth in the terms of the shareholders agreement.

⁶ Pursuant to section 3(a) of the shareholders agreement, the offer for purchase of the deceased shareholder's shares is deemed made and accepted on the 90th calendar day following the date of death. Section 5 of the shareholders agreement provides that the closing shall occur within 60 days following the date the shares are deemed offered. Since Norma died on May 22, 2012, the purchase of her shares is effective in the year 2012.

⁷ The opinion Timms rendered regarding the valuation of Capitol Foundry and the shares owned by Nancy was contained in a second report he prepared after this Court issued its October 31, 2014, opinion in Jimenez. Prior to trial, the circuit court denied Capitol Foundry's motion to exclude testimony from Timms regarding the valuation contained within the second report. At trial, the circuit court denied Capitol Foundry's motion to strike the evidence related to the second report. The second report was not admitted into evidence.

Foundry's purchase of the estate's shares, effective in 2012 pursuant to the shareholders agreement.

We reject Capitol Foundry's argument that Timms' assumption that Capitol Foundry, rather than the remaining shareholders, would purchase the estate's shares, was speculative or that he failed to consider variables bearing upon his opinion of value. The assumption that Capitol Foundry would purchase the shares was a reasonable inference deduced from the remaining shareholders' contentious relationship and history of disagreement. Although Capitol Foundry complains that Timms improperly assumed that the obligation undertaken by Capitol Foundry to pay for the estate's shares would be satisfied, Timms testified that in accordance with the applicable standards of valuation, the obligation to pay would constitute a liability on the balance sheet and the shares would be treated as redeemed even if held as collateral.⁸ In sum, Timms' opinion was based on the facts known to him and the reasonable inferences thereof and was not speculative. See Code § 8.01-401.1; Va. R. Evid. 2:701 and 2:703(a). Cf. Vasquez v. Mabini, 269 Va. 155, 161, 606 S.E.2d 809, 812 (2005) (expert evidence based on unfounded assumptions inadmissible). Therefore, his opinion was admissible and supported the circuit court's determination of the value of Capitol Foundry and Nancy's shares.

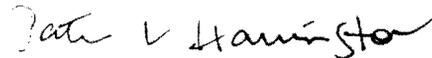
⁸ Capitol Foundry did not offer a different opinion of the value of the company or Nancy's shares but only presented testimony from its expert, Gary Baum, who stated that his opinion of the value does not change as a result of this Court's October 31, 2014, holding in Jimenez, because there were too many variables as to the disposition of the estate's shares. This difference in opinion as to the extent to which the valuation should take into consideration the disposition of the estate's shares presented a classic "credibility battle" among experts. "Conflicting expert opinions constitute a question of fact" for the factfinder. Riner v. Commonwealth, 268 Va. 296, 329, 601 S.E.2d 555, 574 (2004) (quoting Mercer v. Commonwealth, 259 Va. 235, 242, 523 S.E.2d 213, 217 (2000)). The circuit court resolved this question of fact in favor of Nancy.

For the foregoing reasons, we affirm the judgment of the circuit court.⁹ The appellant shall pay to the appellee damages according to law.

This order shall be certified to the said circuit court.

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Teste:



Clerk

⁹ Capitol Foundry asserts that the trial court erred “in ruling, as a matter of law, that this Court’s October 31, 2014 Opinion in Record No. 140112 required that the 30.6 shares of stock held by the Estate of Norma F. Corr be retroactively disregarded or treated as already redeemed for purposes of valuing Ms. Jimenez’ shares as of December 31, 2013.” It is unnecessary for us to address this assignment of error or the comments made by the circuit court at trial because Timms did not base his opinion on the circuit court’s interpretation of our opinion or treat the shares as being retroactively redeemed by virtue of our opinion. He based his opinion on the assumption that the shares would be redeemed by Capitol Foundry, effective 2012 under the shareholders agreement. As we hold herein, his opinion was admissible and supported the circuit court’s determination of value of Capitol Foundry and Nancy’s shares.