**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 28, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2844** **Cir. Ct. No. 2012FA249**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**REBECCA LYNN STERNAT,**

**JOINT PETITIONER-RESPONDENT,**

**V.**

**SHAWN WILLIAM STERNAT,**

**JOINT PETITIONER-APPELLANT.**

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

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Shawn Sternat appeals the property-division portion of the judgment divorcing him and Rebecca Sternat after a ten-year

marriage. He contends that the testimony of Rebecca's business valuation expert failed to meet the ***Daubert*** reliability standard for expert testimony[1] and that the court erroneously concluded that Rebecca's failure to pay tax liabilities did not constitute marital waste. We affirm.

¶2 Rebecca formed Elite Nurses, Inc., a health care staffing agency, in 2005. She repeatedly failed to pay payroll taxes. She defaulted several times on a formal repayment plan with the IRS but continued on her own to make "good faith" payments. She also got several loans from a business mentor to try to address the debt and to keep Elite afloat. At the time of the divorce, nearly $172,000 was owed in taxes and penalties and about $30,000 to her mentor.

¶3 At the two-day bench trial, the parties presented business valuation experts, both CPAs. Shawn's expert, Marcia Teal, testified that Elite's fair market value was $230,000, despite its sizable liabilities. Rebecca's expert, Kris Disbrow, testified that Elite's value was zero because the business no longer was a going concern. The trial court accepted Disbrow's testimony over Shawn's objection. It ruled that the approximately $200,000 in outstanding debts were not marital waste but marital debt subject to equal division, awarded Rebecca the business at zero value, and ordered Shawn to sell the marital residence to make a $178,923 equalization payment. After his motion for reconsideration was denied, Shawn filed this appeal.

[1] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993). WISCONSIN STAT. § 907.02(1) (2013-14) adopted the ***Daubert*** reliability standard. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Shawn first contends that the trial court erred in admitting as expert testimony Disbrow's opinions on Elite's value. We review a trial court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. We will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). The valuation of marital assets, however, entails making findings of fact that we will not upset unless clearly erroneous. ***Id.***; *see also* WIS. STAT. § 805.17(2).

¶5 Shawn contends Disbrow's expert testimony is inadmissible under WIS. STAT. § 907.02(1). He essentially asserts that Disbrow is unqualified as an expert because he has fewer credentials and professional affiliations and less business-valuation experience than does Teal. He also contends Disbrow's opinion is not reliable because it is based only on his direct working knowledge of Elite's particular financials, whereas Teal based her opinion on a broader array of data and valuation methods. We disagree.

¶6 The ***Daubert*** gate-keeping obligation extends beyond scientific testimony to all expert testimony. *See* ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 147 (1999). A court has "the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." ***Id.*** at 142. An expert witness may rely on his or her personal knowledge and experiences. *See* ***id.*** at 150.

¶7 Disbrow testified that he has been a CPA for twenty years, has his own practice, is affiliated with other accounting firms, specializes in working with

"problem tax clients," and has done business valuations for both buyers and sellers. He confirmed that he was "intimately familiar" with Elite's income and expenses, and knowledgeable about its tax debt. The worth of Disbrow's testimony thus is a question of its weight, not its admissibility.

¶8 Furthermore, while the trial court found that Teal was "eminently qualified," "did a very good job," and "might have come out ahead" had the question been who was "the better expert on the issue of business valuation," it concluded that the core issue was whether Elite was a "going concern," i.e., "likely to still be in business in 12 months." Teal herself testified that to have any marketable value, Elite would have to be a going concern.

¶9 Disbrow testified to the facts of his dealings with the IRS on Elite's behalf, the nature of the tax debt, and the unlikelihood of resolving it. Rebecca testified about her attempts to service Elite's considerable debt. Elite's accountant confirmed that, despite Rebecca's efforts, Elite "continually bled money" and that the taxes and penalties owed "continued to grow … beyond control." Ample evidence supported the court's conclusion that Elite was not a going concern. Valuation thus was a non-issue. Therefore, allowing Disbrow to present his opinion as an expert, even if error, was harmless, as it did not affect Shawn's substantial rights. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶¶30, 32, 246 Wis. 2d 67, 629 N.W.2d 698 (no reasonable possibility that error contributed to outcome).

¶10 Shawn next contends that the trial court erred in ruling that the outstanding debts are a joint liability. He asserts that they stem from Rebecca's mismanagement of the business and, under ***Covelli v. Covelli***, 2006 WI App 121, 293 Wis. 2d 707, 718 N.W.2d 260, constitute marital waste.

¶11 "The division of the marital estate is discretionary." ***Id.***, ¶13. A court may deviate from the presumed equal division after considering the WIS. STAT. § 767.61(3) factors. *See* ***Covelli***, 293 Wis. 2d 707, ¶29 (construing predecessor statute to § 767.61). The property-division statute permits a court to consider "each party's efforts to preserve marital assets" and may require one party to fully shoulder "the debts arising from his or her squandering of marital assets or the intentional or neglectful destruction of property." ***Covelli***, 293 Wis. 2d 707, ¶29 (citations omitted). "Depending on the circumstances of the case, one spouse's failure to pay tax debts clearly can be considered the mismanagement or dissipation of assets and therefore marital waste." ***Id.***, ¶30. Whether there has been waste is a discretionary determination. *See* ***id.***, ¶29.

¶12 The trial court observed that Rebecca's own expert summed up the cause of Elite's financial straits in "one word. Mismanagement." It also found that not paying payroll taxes "wasn't a very smart business decision, in fact, it was probably very bad" and likely would "cause the collapse of this company," yet it declined to find marital waste "as that word is used as a legal term of art."

¶13 The trial court's decision to jointly assign the debt was based on the following facts of record. Both parties were involved in the business. Rebecca was the president and, initially, Shawn did payroll processing and invoicing. Shawn was aware that payroll taxes went unpaid almost from the beginning,[2] and testified that the debt did "not really" cause a problem between him and Rebecca. Rebecca made efforts, without success, to resolve the debt. The court's findings

[2] Shawn testified that he calculated payroll taxes but was not responsible for paying them.

that both parties benefited from the business when its fortunes were better and that the debts were incurred in the interest of the marriage are not clearly erroneous.

¶14 Shawn is correct that, in ***Covelli***, this court affirmed the trial court's finding that the husband wasted marital assets by failing to pay his tax obligations. ***Id.***, ¶32. He insists that ***Covelli*** compels a similar conclusion here. We disagree. The facts are similar but not identical. More importantly, as we said, determining whether marital waste occurred is within the trial court's discretion. Here, the court's reasoned refusal to deviate from an equal division of the accumulated debt reflects a proper exercise of discretion. We thus need not address Shawn's additional argument that the trial court committed "manifest error" by not holding as the ***Covelli*** trial court did. And, for the reasons stated above, we reject his argument that the court's ruling is not supported by sufficient evidence.[3]

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] We remind counsel that an appellate brief must contain "[r]eference to the parties by name, rather than by party designation, throughout the argument section." WIS. STAT. RULE 809.19(1)(i).