

EXCERPT

Business Valuation

# CASE LAW YEARBOOK

2024



In-depth analysis for business valuation case law.



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# **Business Valuation Case Law Yearbook 2024 Edition**

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Print ISBN: 978-1-62150-270-8

PDF ISBN: 978-1-62150-271-5

Print ISSN: 2689-971X

PDF ISSN: 2689-9728

# Table of Contents

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<b>INTRODUCTION.....</b>	<b>5</b>
<b>COURT CASE SUMMARY TABLE.....</b>	<b>12</b>
<b>COURT CASE DIGESTS.....</b>	<b>17</b>
<i>Albaad USA, Inc. v. GPMI, Co. (In re GPMI, Co.)</i> .....	17
<i>B.M. v. R.C.</i> .....	20
<i>In re Marriage of Bainbridge</i> .....	22
<i>Bennetti v. Oxford Restructuring Advisors LLC (In re Community Providers of Enrichment Services AZ Liquidating, Inc.)</i> .....	24
<i>Brooks v. Comm’r</i> .....	26
<i>Brown v. Brown</i> .....	29
<i>Buccieri v. New Hope Realty, Inc.</i> .....	31
<i>Chalasanani v. Bollempalli</i> .....	34
<i>Champions Retreat Golf Founders, LLC v. Comm’r</i> .....	36
<i>Chase v. Chase</i> .....	39
<i>City of Fort Collins v. Open Int’l, LLC</i> .....	42
<i>Clampitt v. Clampitt</i> .....	47
<i>Cummings v. Cummings</i> .....	48
<i>Dentists Ins. Co. v. Yousefian</i> .....	49
<i>Donnelly v. ProPharma Grp. Topco LLC</i> .....	50
<i>EILDan Corp. v. Steele (In re EILDan Corp.)</i> .....	52
<i>Endless River Techs. LLC v. Trans Union LLC</i> .....	54
<i>ES NPA Holding, LLC v. Comm’r</i> .....	56
<i>Estate of Cecil v. Comm’r</i> .....	59
<i>Fordeley v. Fordeley</i> .....	63
<i>Furrer v. Siegel &amp; Rouhana, LLC</i> .....	65
<i>Gamache v. Hogue</i> .....	68
<i>Ghaly v. Riverside Cmty. Healthplan Med. Grp.</i> .....	70
<i>In re Marriage of Gill</i> .....	74
<i>Golock Capital, LLC v. VNUE, Inc.</i> .....	76
<i>Gore v. Gore</i> .....	79
<i>Griggs v. Griggs</i> .....	83
<i>Gutierrez v. Padilla</i> .....	84
<i>GWG Holdings, Inc. v. Fifth Season Investments, LLC (In re GWG Holdings, Inc.)</i> .....	87
<i>HBK Master Fund L.P. v. Pivotal Software, Inc.</i> .....	90
<i>Herremans v. Fedo (In re Herremans)</i> .....	96
<i>In re Hettinga</i> .....	99
<i>In re Hillman</i> .....	101
<i>Jayawardena v. Daka</i> .....	103
<i>JBrick, LLC v. Chazak Kinder, Inc.</i> .....	105
<i>Johnston v. Vincent</i> .....	108
<i>Koch v. Koch</i> .....	113
<i>Kwak v. Bozarth</i> .....	120
<i>Lamm v. Preston</i> .....	122
<i>Laurilliard v. McNamee Lochner, P.C.</i> .....	127

<i>LCT Capital, LLC v. NGL Energy Partners LP</i> .....	131
<i>Lieberman-Massoni v. Massoni</i> .....	134
<i>Maher v. Cmejrek</i> .....	136
<i>Mamone v. Mamone</i> .....	138
<i>In re Marriage of Marasco</i> .....	141
<i>Mekhaya v. Eastland Food Corp.</i> .....	143
<i>Mikalacki v. Rubezic</i> .....	146
<i>In re Navidea Biopharmaceuticals Litig.</i> .....	148
<i>NetApp, Inc. v. Cinelli</i> .....	151
<i>Nix v. Nix</i> .....	156
<i>Novosel v. Azcon Inc.</i> .....	157
<i>O’Mahony v. Whiston</i> .....	160
<i>Paramount Fin. Commc’ns, Inc. v. Broadridge Inv’r Commc’n Sols., Inc.</i> .....	163
<i>Pemberton v. Pemberton</i> .....	164
<i>Ramcell, Inc. v. Alltel Corp.</i> .....	167
<i>Rosenthal v. Erber</i> .....	172
<i>Rothwell v. Rothwell</i> .....	174
<i>In re Marriage of Sommerville</i> .....	177
<i>Taylor Precision Prods. v. Larimer Grp., Inc.</i> .....	180
<i>Tennebaum v. Deshpande</i> .....	182
<i>In re Tesla Motors Stockholder Litig.</i> .....	183
<i>Thomasee v. Thomasee</i> .....	191
<i>In re Trapp</i> .....	192
<i>VeroBlue Farms USA Inc. v. Wulf</i> .....	194
<i>Vieira v. Think Tank Logistics, LLC (In re Levesque)</i> .....	197
<i>Walsh v. Preston</i> .....	202
<i>White Buffalo Env’t, Inc. v. Hungry Horse, LLC</i> .....	209
<i>WL All. LLC v. Precision Testing Grp. Inc.</i> .....	213
<i>Wong v. Wong</i> .....	215
<i>Zamfir v. CasperLabs, LLC</i> .....	219

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## Introduction

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Dear Reader,

Time to check in on what happened in case law in 2023. As usual, we added approximately 70 cases to *BVLaw*. That brings us to approximately 4,300 cases total in the database. The cases are all related in some way to valuation, economic damages and lost profits, and other litigation. We published an article in the July 2023 issue of *Business Valuation Update* on the process that we go through to select and prepare the cases that we include in *BVLaw*.<sup>1</sup> So let's highlight a few of the cases that were of particular interest in 2023. We will also include as exhibits to this article some of the cases that we feel were of high importance to the valuation and expert witness community during 2023. We are providing two exhibits to give the reader the important cases from two different perspectives.

Michelle Gallagher of Adamy Valuation co-presented a webinar for Business Valuation Resources<sup>2</sup> in which she included the list of the cases that she felt were the most important for 2023. Her edited list is included as Exhibit 1 to this article. She drew all of the cases in her list from the *BVLaw* entries for 2023. In addition, I, along with family law attorney Drew Soshnick and CPA expert witness Jim Ewart, present a webinar three or four times a year titled *BVLaw* Case Update. We provide a summary of about six cases<sup>3</sup> in each webinar that we then discuss and provide the attendee with the important points from each case. Exhibit 2 is a list of all of the cases we discussed in the *BVLaw* Case Update webinars that we presented this year.<sup>4</sup>

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1 R. James "Jim" Alerding and Monique Nijhout-Rowe, "BVLaw: A Look Behind the Curtain," *Business Valuation Update*, Vol 29, No. 7, July 2023. A copy of the article is available at [bvresources.com/products/bvlaw#downloads](https://bvresources.com/products/bvlaw#downloads).

2 BV 2023, Year in Review: Top 10 List, [bvresources.com/TrainingEvent.asp?WebinarID=1824](https://bvresources.com/TrainingEvent.asp?WebinarID=1824).

3 Each case is also drawn from *BVLaw*.

4 Some cases were originally included in both lists, so we edited any duplicate cases out of Michelle's list.

**Exhibit 1. View From a Professional—Michelle Gallagher**

<b>Case Name</b>	<b>Case Type</b>	<b>Jurisdiction</b>	<b>Case Synopsis</b>
<i>Zamfir v. CasperLabs</i>	Intellectual Property	Federal/ California	U.S. District Court Grants in Part and Denies in Part Motions of Dismissal by Company Against Blockchain Researcher
<i>Ramcell, Inc. v. Alltel</i>	Securities Litigation	Delaware	Delaware Chancery Court Cites Differences in Cash-Flow Assumptions as Cause for Large Discrepancy in Value
<i>Chase v. Chase</i>	Marital Dissolution/ Divorce	Tennessee	Tennessee Appeals Court Affirms Trial Court Decision on Spousal Support and on the Value of Husband's Medical Practice
<i>Brown v. Brown</i>	Marital Dissolution/ Divorce	Mississippi	Mississippi Appeals Court En Banc Remands for Valuation of a Small Used-Car Business With Dissents From Several Judges
<i>Walsh v. Preseton</i>	ESOP	Federal/ Georgia	U.S. District Court Decides Some Issues for Government and Some for Defendants But Very Little in Damages in an ERISA ESOP Case
<i>Novosel v. Azcon Inc.</i>	ESOP Valuations	Federal/ Illinois	ESOP Case Motions Revolve Primarily Around an Interim Valuation and Consideration of a PPP Loan
<i>Donnelly v. ProPharma Grp. Topco LLC</i>	Securities Litigation	Federal/ Delaware	In a Breach of Contract Suit, the U.S. District Court Denies Motions to Exclude Valuation Experts
<i>VeroBlue Farms USA Inc. v. Wulf</i>	Economic Damages and Lost Profits	Federal/ Texas	U.S. District Court (Texas) Allows Testimony of Damages Expert Despite Alleged 'Flawed Opinions'
<i>Fordeley v. Fordeley</i>	Marital Dissolution/ Divorce	Ohio	Ohio Appellate Court Remands Value of Businesses for Determination of Active Appreciation
<i>O'Mahony v. Whiston</i>	Economic Damages and Lost Profits	New York	New York Court Awards Lost Corporate Opportunity and Punitive Damages in Restaurant-Related Case
<i>Jayawardena v. Daka</i>	Securities Litigation	North Carolina	North Carolina Appeals Court Affirms Decisions on Value of Businesses Under Buy-Sell Agreements
<i>White Buffalo Env't, Inc. v. Hungry Horse, LLC</i>	Breach of Fiduciary Duty/ Economic Damages and Lost Profits	Federal/ New Mexico	Expert Survives <i>Daubert</i> —Allowed to Testify as to Lost Business Value
<i>Gutierrez v. Padilla</i>	Economic Damages and Lost Profits	New Mexico	New Mexico Appeals Court Affirms Awards of Damages to Both Parties on Claims of Breach of Contract
<i>Gamache v. Hogue</i>	ESOP Valuations	Federal/ Georgia	U.S. District Court in Georgia Allows Testimony of Attorney as to ESOP Transaction Process for Employment Agreements
<i>ES NPA Holdings, LLC v. Comm'r T.C. Memo</i>	Federal Taxation	Federal	On Liquidation Tax Matters, Partner Would Not Receive Any Proceeds, Interest Received Would Be Nontaxable Profits Interest
<i>Lieberman- Massoni v. Massoni</i>	Marital Dissolution/ Divorce	New York	New York Appellate Court Affirms Award of Value of Husband's Class B Units in Lieu of Actual Distribution of Share of Units
<i>City of Fort Collins v. Open Int'l</i>	Contract	Federal/ Colorado	U.S. District Court (Colorado) Rules on Motions to Exclude Testimony of Expert Witnesses
<i>Mekhaya v. Eastland Food Corp.</i>	Shareholder Dissent/ Oppression	Maryland	Maryland Court of Appeals Reverses Dismissal of an Oppression Claim—Finds There Could Be Disguised Dividend Issue
<i>In re Tesla Motors Stockholder Litig.</i>	Securities Litigation	Delaware	Delaware Supreme Court Upholds 'Entire Fairness' of a Tesla Acquisition
<i>In re Hillman</i>	Bankruptcy	Federal/ New York	Bankruptcy Court Decides on Debtor Qualification as a 'Small Business' Under Chapter 11
<i>Bennetti v. Oxford Restructuring Advisors LLC</i>	Bankruptcy/ESOPs	Federal/ 9th Circuit	Bankruptcy Appellate Panel Denies Employee Members of ESOP Claims Against Debtors
<i>In re Marriage of Marasco</i>	Marital Dissolution/ Divorce	Iowa	Iowa Court of Appeals Affirms Value of Husband's Business Determined by Wife's Expert and Includes Total Value as Marital Property
<i>Mamone v. Mamone</i>	Marital Dissolution/ Divorce	Nevada	Nevada Appellate Court Affirms Value of Husband's Business and His Separate Property Value in the Business
<i>Golock Capital, LLC v. VNUe, Inc.</i>	Expert Testimony/ Contract	Federal/ New York	U.S. District Court (New York) Rules Interest Rates on Loans Are Not Usurious
<i>Albaad USA, Inc. v. GPMI</i>	Bankruptcy	Federal/ 9th Circuit	Bankruptcy Appeals Panel Affirms Confirmation of Chapter 11 Plan Despite Objection of Largest Unsecured Creditor
<i>Endless River Techs. LLC v. Trans Union LLC</i>	Economic Damages and Lost Profits	Federal/ Ohio	U.S. District Court Overturns Jury Award for Consequential Damages
<i>In re Marriage of Sommerville</i>	Marital Dissolutions/ Divorce	Iowa	Appellate Court Remands for New Determination of Husband's Earnings, Affirms No Dissipation of Assets



## Exhibit 2. View From BVR's Legal Editor–Jim Alerding

Case Name	Case Type	Jurisdiction	Case Synopsis
<i>Thomasee v. Thomasee</i>	Marital Dissolution/ Divorce	Louisiana	Louisiana Appeals Court Affirms Husband's Business Is Not a Professional Business and Has Value Other Than Personal Goodwill
<i>Goicochea v. Goicochea</i>	Marital Dissolution/ Divorce	Maryland	Maryland Court Affirms the Value of Husband's Minority Interest in an Ambulatory Surgery Center
<i>Fair v. Fair</i>	Shareholder Dissent/ Oppression	Louisiana	Appellate Court Rules on the Value of the Marital Business as to Personal Goodwill, Minority, Liquidity, and Marketability Discounts
<i>Simons v. Simons</i>	Marital Dissolution/ Divorce	Nebraska	Nebraska Supreme Court Allows Fair Value Determination for Family-Owned Business and Does Not Allow Discounts
<i>Pinto v. Schinitzky</i>	Shareholder Dissent/ Oppression	New York	New York Court Denies Claims in Three Damages Categories, Denies <i>Daubert</i> Motion to Exclude Experts
<i>Mikalacki v. Rubezic</i>	Marital Dissolution/ Divorce	Arizona	Arizona Appeals Court Affirms Trial Court's Acceptance of a Calculation of Value
<i>In re Marriage of Bainbridge</i>	Marital Dissolution/ Divorce	Iowa	Value of Husband's Business Affirmed Based on Trial Judge's Reasonable Discretion
<i>Griggs v. Griggs</i>	Marital Dissolution/ Divorce	Vermont	Vermont Supreme Court Allows Inclusion of PPP Proceeds in Cap Earnings Cash Flow for Determination of Value
<i>Kwak v. Bosarth</i>	Marital Dissolution/ Divorce	Massachusetts	Massachusetts Trial Court Rejects Wife's Nonexpert Value of Her Dental Practice—Appeals Court Affirms
<i>Lamm v. Preston</i>	Marital Dissolution/ Divorce	Idaho	Idaho Supreme Court Affirms Magistrate Judge's Opinion Regarding Personal Goodwill
<i>Rothwell v. Rothwell</i>	Marital Dissolution/ Divorce	Utah	Utah Appellate Court Excludes Personal Goodwill, Disallows Reduction for Taxes on Hypothetical Sale
<i>Dentists Ins. Co. v. Yousefian</i>	Economic Damages and Lost Profits	Federal/ Washington	Plaintiff's Expert Waives Work Product Protection
<i>Elldan Corp. v. Steele</i>	Bankruptcy	Federal/ Minnesota	Despite Rejection of Franchise Agreements in Bankruptcy, Debtor Remained Obligated Not to Compete
<i>BM v. RC</i>	Marital Dissolution/ Divorce	Alaska	The Supreme Court of Alaska Affirms the Use of a Range of Value to Determine the Value of a Business
<i>Clampitt v. Clampitt</i>	Marital Dissolution/ Divorce	South Carolina	South Carolina Appeals Court Affirms Value of Family Business—Within Evidence Presented
<i>Laurillard v. McNamee Lochner, P.C.</i>	Shareholder Dissent/ Oppression	New York	New York Court Allows Enforcement of Under-Market-Value Buy-Sell and Approves At-Will Termination of Shareholder-Employees
<i>Pemberton v. Pemberton</i>	Marital Dissolutions/ Divorce	Minnesota	Appellate Court Affirms Value of Businesses and Tax Liability Issue
<i>Rosenthal v. Erber</i>	Judicial Dissolution	New York	Fair Value Decision Analyzes Valuation Issues
<i>Tennebaum v. Deshpande</i>	Marital Dissolution/ Divorce	Minnesota	Valuation of Husband's Business Interest Considers Credibility, Personal Goodwill, and Other Issues
<i>Vieira v. Think Tank Logistics, LLC (In re Levesque)</i>	Bankruptcy, <i>Daubert</i>	Federal/ South Carolina	Bankruptcy Court (South Carolina) Grants in Part and Denies in Part Motions to Exclude Experts in <i>Daubert</i> Motions

With that as background, the remainder of this article will discuss some of the more important cases for 2023.

**Tax-related cases.** Two tax-related cases of note were decided in December 2023. The first case was *Hoensheid v. Comm'r (In re Estate of Hoensheid)*.<sup>5</sup> There were two significant points for valuation analysts in this case. First, the Tax Court found that the effective date for the gift of stock of the

<sup>5</sup> *Hoensheid v. Comm'r (In re Estate of Hoensheid)*, T.C. Memo 2023-34 ; 2023 Tax Ct. Memo LEXIS 33 (March 15, 2023).

company that was sold was after it was considered certain that the sale transaction of the business being sold would occur. Given that conclusion by the court, the income for the gain on the stock being sold and transferred as a gift to a charity was taxable to the selling owner and did not reside with the receiving charity.

It was not so much that the concept that was important here had long been settled law, but rather the actions of the selling owner that had a lot to do with the result. The owner insisted on holding onto ownership of the stock until he was certain that the sale would occur. That was a recipe for losing on that issue. He did this despite advice from his tax attorney that the gift be made earlier.

The second, and perhaps more important, decision was the determination that the taxpayers did not obtain a “qualified appraisal” and, thus, the claimed charitable contribution was disallowed. Once again, the selling stockholder had a firm hand on the mistake made that resulted in the disallowance. Once again, despite the urging of his tax attorney that he engage a qualified appraiser (under the rules prescribed by the IRS), the donor taxpayers decided to use an appraisal that the financial advisor to the charity receiving the stock as a gift performed.

The court’s opinion enumerated the information required for a qualified appraisal and further noted the requirements to be a qualified appraiser as follows:

[A] “qualified appraiser” is an individual who (I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations, (II) regularly performs appraisals for which the individual receives compensation, and (III) meets such other requirements as may be prescribed ... in regulations or other guidance.

The IRS argued that the appraisal was defective in a number of ways as outlined in the opinion. The petitioners did not meaningfully dispute that their appraisal had at least some defects and relied on the theory of “substantial compliance and the statutory reasonable cause defense.” The court noted that, “if the appraisal discloses sufficient information for the Commissioner to evaluate the reliability and accuracy of a valuation, we may deem the requirements satisfied.” (*Bond*, 100 T.C. at 41-42)

However, the taxpayers’ appraisal was defective with respect to key substantive requirements. The IRS argued that the taxpayers’ appraiser, Dragon, was not a qualified appraiser. He did not hold himself out as an appraiser and did not hold any certifications. Also, Dragon’s mere familiarity with the type of property being valued did not make him qualified. “Mr. Dragon testified that he conducted valuations ‘briefly’ and only ‘on a limited basis’ before starting at FINNEA in 2014, the year before the appraisal. Mr. Dragon also testified that he now performs (presumably gratis) business valuations for prospective clients ‘once or twice a year’ in order to solicit their business for FINNEA.” The taxpayers have failed to show that Dragon was a qualified appraiser. By not engaging a qualified appraiser, the taxpayers failed to show substantial compliance with the regulations.

Additionally, “[t]he failure to include a description of [Dragon’s] experience in the appraisal was a substantive defect. We have previously described the qualifications requirement as important

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because it ‘provide[s] necessary context permitting the IRS to evaluate a claimed deduction.’” (*Alli*, T.C. Memo. 2014-15) The petitioners also stated an incorrect date for the contribution, which was also a substantive defect. The petitioners did not establish substantial compliance with the law and regulations for a charitable contribution of the 1,380 shares.

So why did the taxpayers go with a nonqualified appraiser and appraisal? Very simply because the appraisal they used was “free.” So, instead of obtaining a qualified appraisal that would likely have cost no more than \$50,000,<sup>6</sup> the taxpayers incurred almost \$650,000 in additional tax.

This case should be in every valuation analyst’s briefcase.

The second tax-related case, *Connelly v. United States*,<sup>7</sup> was an appeal decision from the 8th Circuit Court of Appeals. The trial court in this case was the United States District Court for the Eastern District of Missouri—St. Louis.

This case asked the question did the value of corporate-owned life insurance designed to fund the redemption of a deceased shareholder’s stock impact the fair market value of the subject company and the value of the decedent’s gross estate? The IRS believed the life insurance proceeds should be included in the value of the company for estate tax purposes. The IRS and both the trial court and the appellate court agreed that not only should the proceeds be included in the estate value of the company, but also there was no offset of the redemption obligation, which would result in a net zero increase in the value of the company.

The decision here was in direct conflict with the decision in *Estate of Blount v. Comm’r*.<sup>8</sup> In August 2023, the Connelly estate filed a petition to the U.S. Supreme Court to resolve the differences between the 8th and 11th Circuits.

**Other cases.** In *B.M. v. R.C.*,<sup>9</sup> the Alaska Supreme Court reviewed the decision of the trial court. The husband in this divorce case did not present any evidence as to the value of his business, but the wife did. Her valuation expert arrived at a range of values, explaining that he lacked some information and that the information he did have regarding the financial status of the business did not reconcile. As a result, he set a range of values and determined that a range was the most appropriate way to determine the value.

The trial court took an average of the range to determine the value for purposes of the marital estate. The Supreme Court affirmed the lower court decision to average the values. Since the valuator was skeptical of the information, he utilized a calculation rather than a valuation engagement. Both courts accepted the calculation.

All of the major BV standards allowed the use of a range of values. However, the range here was used to filter out the skepticism of the information received. The expert felt it necessary to use a

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6 Probably it would not have cost that much.

7 *Connelly v. United States*, 70 F.4th 412; 2023 U.S. App. LEXIS 13629; 2023-1 U.S. Tax Cas. (CCH) P60,737 (June 2, 2023).

8 *Estate of Blount v. Comm’r*, T.C. Memo. 2004-116 (May 12, 2004).

9 *B.M. v. R.C.*, 2023 Alas. LEXIS 102 (Oct. 11, 2023). (Note that there is no appellate court in Alaska, so any appeals go directly to the Supreme Court.)

calculation, which the lower court, then affirmed by the Supreme Court, accepted. Query: Should the expert have declined to complete the engagement? Would the new Rule 702 result in a rejection of the witness in this case?

In another divorce case, *Pemberton v. Pemberton*,<sup>10</sup> among the issues was the value of the two businesses the husband owned in whole or part. The district court determined values based on the wife's expert's valuation report. The husband's expert was not engaged to give a valuation opinion but to rebut the wife's expert's report. The appellate court did not take the husband's expert's criticisms and comment on value into account.

This was another case where the court can only deal with actual evidence admitted in the case. The husband's expert did not give an opinion of value because he was not engaged to do so. The trial court, therefore, chose not to take his criticisms into account. Often experts were engaged to rebut and not to give a separate opinion. This put that in a different light. You ran the risk of not having your opinion even considered.

In *Kwak v. Bosarth*,<sup>11,12</sup> the Massachusetts Appellate Court took up the issue of reliability of evidence presented. The wife appealed the trial court's judgment asserting that the judge erroneously overvalued the wife's dental practice. The trial court received at trial two opinions of value: the wife's own opinion (\$662,452) and the opinion of the husband's expert (\$2,230,000). The trial court ultimately rejected the wife's value and largely credited the husband's expert's value and concluded a value of \$2,074,000 for the practice. The husband was to receive 25% of that value, or \$518,500.

The judge found the husband's expert's valuation methodology, the capitalization of earnings method, "generally appropriate." The judge also credited the husband's expert's application of a 21% goodwill discount, reflecting the estimated loss of clients that would occur if the wife left the practice. The judge was not required to credit the wife's testimony and implicitly did not do so.

Once again, this showed the importance of having expert testimony. The wife gave her own value, and that was insufficient to the judge. Judges like to have something to hang their hat on. The husband's expert apparently explained his methodology and conclusions in his report in detail. Often in litigation, more was better than less. It was also better explained in a report than in testimony only. The breakdown between personal and entity goodwill was always subjective, but it was helpful and perhaps even necessary to provide a methodology for that determination.

The central issue in *Dentists Ins. Co. v. Yousefian*,<sup>13</sup> a December 2022 case, was the defendant's claim for business property damages to tenant improvements in his former orthodontics suite. The parties disagreed over the definition of tenant improvements that the policy covered. The plaintiff's damages expert, Troy Brogdon, separated the damaged property into two categories: building and tenant improvements. The plaintiff contended it was only responsible for the latter category. The

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10 *Pemberton v. Pemberton*, 2023 Minn. App. Unpub. LEXIS 485; 2023 WL 4066631 (June 20, 2023).

11 *Kwak v. Bosarth*, 2023 Mass. App. Unpub. LEXIS 179; 102 Mass. App. Ct. 1116; 2023 WL 2817904 (April 7, 2023).

12 Thanks to James D. Ewart, CPA, for his assistance on the write-up and takeaways for this case.

13 *Dentists Ins. Co. v. Yousefian*, 2022 U.S. Dist. LEXIS 230000 (Dec. 21, 2022).

defendant claimed this was a novel argument and argued that the plaintiff's counsel, Lether Law, instructed Brogdon to make the separation into the two categories.

The defendant cited an email from Brogdon to the defendant's expert stating that "[w]e were merely tasked by Lether Law with parsing out the work for the repairs into two categories based on the review of Olympus' documents." The defendant's second request for production asked for communications between Lether Law and Brogdon. "Defendant responds that plaintiff has waived any claimed privilege through the disclosure made by Mr. Brogdon in his email to defendant's expert witness."

Since disclosure was made to the defendant's expert, it increased the opportunities for the defendant to obtain the information. The standard for waiver (of the client privilege) had been met. The waiver applied only to the matters disclosed. Communications relating only to the subject of separating the two categories of damages was waived, but other communications that were protected were not waived.

Normally experienced experts understand this rule and would not disclose such information. Both counsel and experts should be on guard for this issue and have a good communication between each other on what can and cannot be disclosed and to whom. Experts were sometimes asked to collaborate to assist in reaching a settlement. You should consult with your attorney in advance to determine what can and cannot be discussed or disclosed.

This is a sampling of the new cases that have been digested and placed into *BVLaw*. As we noted, over 70 cases have been added in just this year. If you are a subscriber to *BVLaw*<sup>14</sup> and/or *BVResearch Pro*,<sup>15</sup> you can access all of the cases in addition to the ones cited and discussed in this article and noted in the two exhibits. We look forward to continuing to expand our knowledge base through *BVLaw* in 2024!

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<sup>14</sup> [bvresources.com/products/bvlaw](https://bvresources.com/products/bvlaw).

<sup>15</sup> [bvresources.com/products/bvresearch](https://bvresources.com/products/bvresearch).



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