

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT

BARBARA ZOLDAN,

Appellant,

vs.

ROBERT ZOHLMAN and ARTHUR ZOHLMAN,  
as Co-Curators of the Estate of Charles Zohlman, Deceased,

Appellees.

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CASE NO: 3D08-947  
LT CASE NO: 96-24764

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On Appeal from the Circuit Court of the  
Eleventh Judicial Circuit of Florida (Miami-Dade County)

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**ANSWER BRIEF OF APPELLEES**

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## INTRODUCTION

This is the answer brief of Robert Zohlman and Arthur Zohlman, as Co-Curators of the Estate of Charles Zohlman, deceased.

In this Answer Brief, the Appellees will cite the trial transcript as ("Trial Tr.") followed by the applicable page and line number. For the purpose of this brief, the trial transcript will refer only to the trial which took place on February 28th and 29th of 2008.

This Brief is accompanied by an Appendix which will be cited as ("Answer Br. App.").

The Appellees will also cite documents referenced in the Appellant's Appendix, and will cite the Appellant's Appendix as ("Initial Br. App.").

## ISSUES PRESENTED

### ARGUMENT I

THE EVIDENCE PRESENTED AT TRIAL DEMONSTRATES THAT THE APPROPRIATE STANDARD FOR VALUING BARBARA ZOLDAN'S DAMAGES IS FAIR MARKET VALUE.

### ARGUMENT II

DAVID PRATT WAS A QUALIFIED EXPERT ON THE PROPER STANDARD OF VALUATION TO BE USED TO DETERMINE THE VALUE OF ESTATE ASSETS FOR PURPOSES OF SATISFYING AN OBLIGATION TO MAKE A BEQUEST WHICH HAS BEEN BREACHED, AND NOT, AS THE INITIAL BRIEF SUGGESTS, AS A VALUATION EXPERT ON ECONOMIC DAMAGES FOR BREACH OF CONTRACT BECAUSE THE VALUES FOR THE DAMAGES UNDER THE TWO STANDARDS AT ISSUE WERE AGREED TO BY STIPULATION.

## STATEMENT OF THE CASE AND OF THE FACTS

The Appellees believe the Appellant's Initial Brief accurately sets forth the procedural history of this case and the underlying facts. However, there are several factual and procedural issues which require additional emphasis.

By the time of the trial in February 2008, there was little in the way of factual disputes between the parties. The issue to be tried was framed by the court's March 9, 2007 Partial Summary Judgment for Defendant. Prior to the Partial Summary Judgment Order, the Zohlmans, in an effort to comply with the post-nuptial agreement, tendered to Barbara Zoldan an assignment of a 1/4 interest in Charles Zohlman's 99% limited partnership interest in Zohlman Family Limited Partnership ("FLP"). (Answer Br. App. A). Barbara Zoldan refused this tender and argued that she was entitled to money damages rather than a partnership interest. The court agreed with Zoldan and, in its March 9, 2007 Partial Summary Judgment framed the issue for the subsequent trial as follows:

. . . Defendant Zoldan is entitled to a judgment for money damages in an amount equal to the value of sharing in Mr. Zohlman's estate equally with his own children *per stirpes*. That entitlement is not satisfied by an assignment of a 25% interest in Mr. Zohlman's 99% limited partner interest in Zohlman Family Limited Partnership, rather becomes a charge against the assets of his estate, which includes all assets that would be listed on a federal estate tax return.

(Initial Br. App. 3)(emphasis added).

Under his estate plan, Charles Zohlman provided that each of his three sons (Robert, Arthur and Scott) would receive a 1/3 interest in the limited partnership interests. (Answer Br. App. B). Under Charles Zohlman's estate plan Barbara received no beneficial interest, and it was Charles' failure to provide an equal interest to Barbara that constituted the breach of the post-nuptial Agreement. Had Barbara been treated equally, she would have received a 1/4 interest in the limited partnership interests.

The sole issue at trial was this: how much is the 1/4 interest in the FLP worth? The matters to be considered by the court at trial were further limited by stipulations reached by the parties. The parties agreed that the issue for the court to decide was whether to use the "Fair Market Value" standard of valuation or the "Fair Value" standard of valuation. There was no need for the court to consider numbers because the parties stipulated in advance of the trial as to the amount of damages Barbara would receive under both the Fair Market Value and the Fair Value standards. (Initial Br. App. 6). Accordingly, the trial was not about value - the values were agreed to. The trial was solely about which of the two standards of valuation the court would adopt. If the court chose Fair Market Value, it was agreed that the value of Zoldan's 1/4 share would be \$2,247,573.00. (Initial Br. App. 1, p.2). If the court chose Fair

Value, it was agreed that the value of Zoldan's 1/4 share would be \$6,450,937.00. (Initial Br. App. 1, p.2). Both sides presented expert witnesses to testify before the court regarding which of the standards should be applied. No other witnesses testified.

After considering the evidence, the court chose to apply the Fair Market Value standard of valuation. The court explained this ruling in the final judgment under review:

After hearing the testimony of these witnesses, reviewing the legal memoranda submitted by counsel, analyzing the evidence presented and hearing the arguments of counsel, this Court has determined, for the purpose of computing damages, that a 25% interest in the estate (including the limited partnership) is to be valued at its Fair Market Value as of February 11, 1999. The Court has previously determined that Zoldan's interest represents an interest in an estate. Interests in an estate for distribution and other purposes, under Florida law, are valued using a Fair Market Value standard. *See Fla. Stat. §733.810; Fla. Stat. §732.2055; Fla. Stat. 733.604.* Moreover, the limited partnership was listed on the decedent's Form 706 U.S. Estate Tax Return, where it was valued using a Fair Market Value standard, and significant discounts were recognized and accepted by the IRS. The Court has determined that the "Fair Value" standard asserted by Zoldan applies to appraisal rights arising from limited partnership conversions and mergers, or to oppression of a minority shareholder in a corporate context, but this "Fair Value" concept does not apply to the instant facts, and this standard should not be applied to the instant facts by analogy.

(Initial Br. App. 1, p. 3). As detailed in this answer brief, the trial court's ruling was correct and should be affirmed.

### SUMMARY OF ARGUMENT

As a result of stipulations reached by the parties before the trial, the only issue to be considered by the trial court was whether to value Zoldan's 1/4 interest in the family limited partnership using the Fair Market Value standard or the Fair Value Standard. In its earlier Partial Summary Judgment ruling the trial court ruled that Zoldan's 1/4 interest in the limited partnership represented an interest in the Estate of Charles Zohlman. Under Florida law, estate assets are valued using the Fair Market Value standard. The Fair Value standard is not applicable to valuation of the asset at bar. Valuation testimony was not necessary because the parties had already stipulated to the measure of damages under the Fair Market Value standard.

The only witnesses at trial were expert witnesses. The witness testifying for the Appellees, David Pratt, is a practicing probate and trust attorney, and accordingly, was qualified to testify concerning the proper standard used to value estate assets under Florida law. The expert testifying for the Appellants, Gary Trugman, was a valuation expert but was not qualified to testify regarding the proper legal standard to be used to value the limited partnership interest. There was no need for expert

testimony on valuation because the parties had stipulated to value under the standards at issue. The court was correct in agreeing with Mr. Pratt that Fair Market Value was the proper standard.

### **STANDARD OF REVIEW**

With regard to determining the appropriate standard for valuation, the issue is reviewable *de novo*. With regard to whether Appellee's expert, David Pratt, was a qualified expert concerning the appropriate standard of valuation to be used, the applicable standard of review is abuse of discretion. Accordingly, the trial court's determination of whether David Pratt was a qualified expert to opine on the appropriate standard of valuation should not be disturbed absent a clear abuse of discretion by the trial judge. Gershank v. Department of Professional Regulation, Board of Medical Examiners, 458 So.2d 302, 305 (Fla. 3d DCA 1984).

Whether or not the trial court decided to accept David Pratt's testimony is reviewable using the competent substantial evidence standard. See, e.g., Kendall v. Kendall, 677 So.2d 48 (Fla. 4th DCA 1996). Under this standard, the trial court's findings are not to be disturbed by the Appellate Court if the trial record contains substantial competent testimony to support the ruling. Ames v. Ames, 153 So.2d 737, 739 (Fla. 2d DCA 1963); see also Houlihan's Restaurants, Inc. v. Apac-Florida, Inc., 911 So.2d 816, 818 (Fla. 1st DCA 2005); 3 Fla. Jur Appellate Review § 336 ("For

purposes of the "substantial competent evidence" standard of review applicable to findings of fact challenged on appeal, evidence is "substantial" if a reasonable mind might accept it as adequate to support a conclusion.")

### ARGUMENT I

#### **THE EVIDENCE PRESENTED AT TRIAL DEMONSTRATES THAT THE APPROPRIATE STANDARD FOR VALUING BARBARA ZOLDAN'S DAMAGES IS FAIR MARKET VALUE.**

This was a trial about the appropriate measure of damages for the breach of the post-nuptial agreement by Charles Zohlman. (Initial Br. App. 1, p.1). Damages for breach of contract are "intended to place the injured party in the same position he or she would have been in had the breach not occurred." Telemundo Network, Inc. v. Spanish Television Services, Inc. 812 So.2d 461, 464 (Fla. 3d DCA 2002).

[T]he law is clear that the purpose of an award of damages in a breach of contract action is to place the injured party in the same financial position as he would have occupied if the contract had been fully performed.

Juvenile Diabetes Research Foundation v. Rievman, 370 So.2d 33, 35 (Fla. 3d DCA 1979).

Had there not been a breach of the post-nuptial agreement, Barbara would have received what Robert, Arthur and Scott received - an equal limited partnership interest. Because the plan effectuated by Charles Zohlman giving his three sons a 1/3

interest in the FLP constituted a breach of the post-nuptial agreement, such a breach is remedied by reallocating the limited partnership interests in the FLP by providing Barbara, Robert, Arthur and Scott with 1/4 each. This is precisely what the Appellees attempted to do when they tendered to Barbara a 1/4 interest in the FLP, along with the income which had accrued on this one-quarter interest. (Answer Br. App. A and C; Initial Br. App. 1, p3). Barbara refused to accept this tender and instead contended that she was entitled to select her remedy, and the remedy she selected was receipt of money damages instead of the 1/4 interest in the FLP. (Initial Br. App. 1, p.3; Trial Tr. p. 292, l. 11-18; Answer Br. App. D). A hearing on this discreet issue was held before the trial court in February 2007. In its March 9, 2007 Partial Summary Judgment ruling, the trial court determined that Barbara could indeed select her remedy for the breach of contract. She elected to receive money damages rather than the actual 1/4 partnership share. (Initial Br. App. 3). In the same Partial Summary Judgment Order, the court also made it clear how the amount of the damage award was to be measured. Barbara was "entitled to money damages in an amount equal to the value of sharing in Mr. Zohlman's estate equally with his own children, per stirpes." (Initial Br. App. 3)(emphasis added). The court further stated that any such damage award "becomes a charge against the assets of his estate, which includes all assets that would be listed on a federal estate tax return." (Initial Br. App.

3)(emphasis added). Clearly the court had determined that Barbara's interest was to be measured as if it was an interest in the Estate of Charles Zohlman.

**Standard of Valuation - Fair Market Value v. Fair Value**

The February 2008 trial was not the first time the decedent's interest in the FLP was valued for estate purposes. Following the death of Charles Zohlman, the Appellees, as Co-Curators of the Estate of Charles Zohlman, filed a Form 706 Estate Tax Return with the IRS. The decedent's interest in the FLP was valued at a discount on the 706. After an extensive audit by the IRS, an adjusted discount was accepted by the IRS and the estate. (Trial Tr. p. 171, l. 8-10; p. 198, l. 4-10). The value was discounted on the estate tax return and by the IRS because FLP interests are typically not freely marketable and the FLP is not subject to the control of the owner of the interest. (Trial Tr. p. 99, l. 20-25, p. 100, l. 1-10; p. 107, l. 16-25; p. 236, l. 1-9). When he died, Charles Zohlman owned a 99% interest in the FLP, but his interest was that of a limited partner. As a limited partner, Charles Zohlman had no control of the purchase and sale of the assets of the FLP. (Trial Tr. p. 236, l. 10-21). Moreover, Charles Zohlman's interest in the FLP was not as easily marketable as stocks or bonds. (Trial Tr. p. 236, l. 10-21 ). It is this lack of control and lack of marketability which accounts for the discounts when valuing limited partnership interests. (Trial Tr. p. 99-100, l. 20-25; p. 107, l. 16-25; p. 236, l. 1-21).

The standard of valuation which recognizes discounts for lack of marketability and lack of control is Fair Market Value. Simply stated, the Fair Market Value of an asset is what a willing buyer would pay to a willing seller in an arms-length transaction. Makowski v. Makowski, 613 So.2d 924, 926 (Fla. 3d DCA 1993). The Fair Market Value standard uses discounts if an asset is not subject to control by the owner and if the asset is not freely marketable. Parry v. Parry, 933 So.2d 9, 15 (Fla. 2nd DCA 2006). Fair Market Value is the standard employed to value minority interests in closely held entities. Christians v. Christians, 732 So.2d 47 (Fla. 4th DCA 1999); Weinstock v. Weinstock, 634 So.2d 775 (Fla. 5th DCA 1994); Williams v. Williams, 683 So.2d 1119, 1121 (Fla. 3d DCA 1996). Most importantly to the issues at bar, Fair Market Value is the standard of valuation used on estate tax returns, which is why the IRS recognized a discount at bar. (Trial Tr. p. 107, l. 7-25; p. 225, l. 19-25 -p. 226, l. 1-11).

As mentioned above, in his estate plan, Charles bequeathed a 1/3 of this interest in the FLP to each of his three sons. The interest inherited by the three sons was, and is, subject to the same restrictions on control and marketability as Charles Zohlman's interest. (Trial Tr. p. 224, l. 5-9). Moreover, each son's individual interest represents a minority share of the decedent's limited partnership interest.

Following the trial court's Partial Summary Judgment ruling, these 1/3 interests

would become 1/4 interests. At trial the Appellee's successfully argued that the proper standard for valuing Zoldan's 1/4 share was Fair Market Value, which would include discounts for lack of marketability and lack of control. Zoldan argued that the court should adopt "Fair Value" as the standard of valuation. In essence, Zoldan argued that Fair Value was simply a standard that, in the instant circumstances, does not discount the interest for lack of control and lack of marketability. Zoldan was attempting to treat the FLP as if it did not exist.

The court was given a stark choice: 1) Fair Market Value, with discounts, or 2) Fair Value, without discounts. As mentioned above, the parties stipulated to the value of Zoldan's interest under both standards.

#### **Evidence in Support of Fair Market Value**

Both sides presented an expert witness. The Appellees expert was David Pratt, a Florida attorney who practices exclusively in the areas of trusts and estates, estate and gift taxation and federal income taxation. (Trial Tr. p. 186, l. 21-23). Mr. Pratt is board certified by the Florida Bar in wills, trusts and estates and he is also board certified in tax. (Trial Tr. p. 188, l. 19-23). He is a fellow of the American College of Trusts and Estates Counsel (ACTEC), a fellow of the American College of Tax Counsel, and at the time of trial he was the chair-elect of the Florida Bar Tax Section. (Trial Tr. p.189, l. 5-12). This is not an exhaustive list of all the professional

associations and organization Mr. Pratt is affiliated with. With regard to his day-to-day practice, Mr. Pratt testified that he represents personal representatives of probate estates and trustees of trusts and that he has an extensive probate and trust administration practice. (Trial Tr. p. 189, l. 18-22). As Mr. Pratt testified, such a practice often requires obtaining valuation of assets for the purpose of being reported to the IRS on estate tax returns, and in connection with preparation of probate inventories and probate distributions. (Trial Tr. p. 190, l. 2-8; p. 204-206).

Mr. Pratt testified that in his practice when assets are valued for the purpose of making a distribution from a probate estate or a trust, the assets are valued using a Fair Market Value standard of valuation. (Trial Tr. p. 190, l. 15-17). Mr. Pratt also testified that assets on a probate estate inventory are valued using the Fair Market Value standard. (Trial Tr. p. 190, l. 1-24). Mr. Pratt testified that Fair Market Value is the only standard of valuation he uses in his probate and trust administration practice:

The standard of Fair Market Value is pervasive through the Florida probate and trust code. There is no other standard. . . Fair Market Value is the only indication of value for the purposes that would be used in the Florida Statutes pertaining to trusts and estates.

(Trial Tr. p. 191, l. 19-21, 24-25 - p. 192, l. 1). In order to determine the Fair Market Value of a closely held business interest such as an interest in a partnership, Mr. Pratt

typically hires a qualified business appraiser to perform the valuation. (Trial Tr. p. 192, l. 21-25 - p. 193, l. 1-2). Mr. Pratt testified that he has retained expert appraisers to determine the Fair Market Value of limited partnership interests for use on estate tax returns and for determining distributions from a trust or an estate. (Trial Tr. p. 203, l. 3-7).

We obtain that fair market value by an appraisal. We defer to the appraiser for his expertise on that value and including - and included in that analysis of fair market value will be the appropriate discounts that would apply to a limited partnership interest.

(Trial Tr. p. 226, l. 2-7).

During the trial, Mr. Pratt was asked how he would advise a fiduciary presented with a circumstance such as the one at bar - where an estate has a 99% interest in a family limited partnership with four beneficiaries, but one of the beneficiaries does not want a 1/4 interest in the partnership interest, and instead wants money of a value equal to the value of the 1/4 partnership interest. Mr. Pratt testified as follows:

I would hire a business appraiser to determine the fair market value of that individual's interest in the limited partnership. Once the appraiser provided the fair market value of that limited partnership interest, that would be the value - that would be money damages or cash that that partner would be entitled to, to redeem out his or her partnership interest.

(Trial Tr. p. 237, l. 10-17). Mr. Pratt further testified that to give the partner who

wanted cash 1/4 of the undiscounted value of the assets in the partnership would subject the fiduciary to liability for breach of fiduciary duty to the remaining beneficiaries for making a distribution in excess of what the one beneficiary was entitled to receive. (Trial Tr. p. 238, l. 9-13).

At one point during Mr. Pratt's testimony the trial court asked direct questions. The court asked Mr. Pratt how a surviving spouse's 30% elective share interest would be valued under the probate code. An elective share is generally the minimum share of an estate a surviving spouse is entitled to receive. §732.201, Fla. Stat. Under Florida's probate code, generally the surviving spouse is entitled to elect to receive 30% of the elective estate. §732.2065, Fla. Stat. Mr. Pratt testified that the elective share statute clearly provided that the value of this 30% interest, as well as the elective estate, would be determined by using the Fair Market Value standard. (Trial Tr. p. 219-220). The Statute itself is explicit in this regard. §732.2055(5), Fla. Stat.

Mr. Pratt also testified that the probate code values assets which must be valued prior to distribution by using a Fair Market Value standard. (Trial Tr. p. 190, l. 15-17); §733.810, Fla. Stat.; Nebraska Methodist Hospital v. Wilson, 523 So.2d 1220 (Fla. 1st DCA 1988); §733.810(4), Fla. Stat. provides that assets to be distributed to satisfy devisees from an estate are to be distributed "at values as finally determined for federal estate tax purposes." It is not disputed by either party that assets reflected on

estate tax returns are valued using the Fair Market Value standard. (Trial Tr. p. 142, l. 14-17; p. 225, l. 19-25 - p. 226, l. 1). According to Mr. Pratt, this statute applied directly to the instant facts, given the directive of the court in its Partial Summary Judgment Order. As has been discussed above, that Partial Summary Judgment Order provides that Zoldan is entitled to "money damages in an amount equal to the value of sharing in Mr. Zohlman's estate equal to his own children." (Initial Br. App. 3)(emphasis added). The same Order also indicated that the damage award in Zoldan's favor would be a charge against the estate of Charles Zohlman, "which includes all assets that would be listed on a federal estate tax return." (Initial Br. App. 3). The court clearly indicated that Zoldan's interest was to be valued as that interest would be valued in an estate. Mr. Pratt unequivocally testified that valuing such an asset for estate distribution purposes requires a Fair Market Value standard:

The value of sharing in Mr. Zohlman's estate which, when I read that, I would say, okay, well, if there is an asset in Mr. Zohlman's estate that would be distributed to Mr. Zohlman's children, she would be entitled to the exact same value of that asset. The only way to describe the value of what would be distributed to the Zohlman children would be to look to the statute that we just referred to that refers to a distribution based on fair market value. So, I suppose it's not by analogy, Mr. Smith. I think it's directly on point.

(Trial Tr. p. 267, l. 14-24)

Mr. Pratt's testimony clearly established that the only standard to be used to

value Zoldan's 1/4 interest in the decedent's FLP interest is Fair Market Value.

### Evidence in Support of Fair Value

The Appellant's expert witness was a valuation expert named Gary Trugman. While Mr. Trugman is certainly well credentialed on the valuation of assets, he is not an attorney, and he does not administer trusts and estates. (Trial Tr. at p. 66-67; p. 82, l. 8-9). Accordingly, Mr. Trugman was not qualified to testify as an expert on the central issue in the case - what legal standard of valuation should be used to value the 1/4 limited partnership interest as if it were an asset of the Florida probate estate. (Answer Br. App. E); Edward J. Seibert, AIA Architech and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So.2d 889, 892-93 (Fla. 2d DCA 1990); Lee County v. Barnett Banks, Inc., 771 So.2d 34 (Fla. 2d DCA 1997).

Nevertheless, Mr. Trugman was permitted to testify regarding which standard of valuation was appropriate under the circumstances. His testimony was that Zoldan's interest should be valued using a "Fair Value" standard which did not recognize discounts for lack of marketability and lack of control. Mr. Trugman testified that Fair Value lacks clear definition as a standard, unlike Fair Market Value, which he acknowledged has a clear and widely understood definition. (Trial Tr. p. 81, l. 12-15). Trugman explained that the basic philosophy behind the Fair Value

concept "is to try to treat people fairly." (Trial Tr. p. 81, l. 21). When Mr. Trugman suggested that the role of the court at trial was "to determine what's fair," the court interjected in the following manner:

**The Court:** Well, this is not a case in equity, correct?

**Mr. Fleisher:** Correct. Absolutely.

**The Court:** So we're not dealing with the concept of me just trying to be fair to people.

**Mr. Trugman:** I understand that.

**The Court:** I'm trying to be equal, if you will - -

**Mr. Trugman:** I understand.

(Trial Tr., p. 74, l. 20; p. 75, l. 4) This was a breach of contract case, and Florida courts maintain that equitable arguments are inapplicable when an express contract exists. Ocean Communications, Inc. v. Bubeck, 956 So.2d 1222, 1225 (Fla. 4th DCA 2007).

As applied at bar, Trugman's conception of Fair Value was to simply value Zoldan's 1/4 interest based upon its pro-rata share of assets owned by the partnership. In other words, Trugman did not feel it was appropriate to apply any discounts for lack of marketability and lack of control. His rationale was based entirely on his unfounded assumption that the Zohlman brothers would dissolve the limited

partnership after Zoldan's interest was satisfied, which he further assumed would result in each brother ultimately receiving the actual assets owned by the partnership without being burdened with the control and marketability restrictions imposed by the partnership agreement. While Mr. Trugman acknowledged that Charles Zohlman was absolutely within his rights to set up the family limited partnership structure, he felt that this structure could be ignored when valuing Zoldan's interest because the sons of Charles Zohlman, being brothers, would act together. The following excerpt illustrates Mr. Trugman's conception:

**Mr. Fleisher:** Q. But none of the Zohlman sons as limited partners have the individual ability to dissolve the limited partnership?

**Mr. Trugman:** A. No. Individually none of them do. Collectively they certainly do.

**Mr. Fleisher:** Q. Ok. But Barbara Zoldan - - under the postnuptial agreement Charles Zohlman agreed to treat Barbara equally with the sons. So if Arthur doesn't have the ability to dissolve the partnership then - - and Barbara doesn't also have the ability to dissolve the partnership isn't that equal?

**Mr. Trugman:** A. In terms of rights, yes.

**Mr. Fleisher:** Q. Yes.

**Mr. Trugman:** A. Maybe not in terms of dollars though when you look at what actually can happen.

**Mr. Fleisher:** Q. So you're just taking the position that they're viewed as a group, that the three sons are just viewed as a group? Irrespective of what the terms of the partnership say the sons you're viewing them as a group?

**Mr. Trugman:** A. Considering the fact that they own the general partnership it doesn't really matter what the terms of the partnership agreement says because as general partners they can determine what happens to that partnership. For all intents and purposes their rights as limited partners don't mean anything because they can turn around tomorrow as the general partners and effectuate a complete change to the partnership agreement. So hiding behind limited partnership when they're in fact the general partners is really somewhat misleading.

**Mr. Fleisher:** Q. All right. So if the partnership agreement was identical in every other respect, the terms of the agreement are the same, but the partners are different would you value Barbara Zoldan's interest any differently? Let's say the other limited partners were - I was one, you were one, the court reporter was one, we're limited partners and the general partnership is controlled by Judge Miller. Okay. Would you value the interest any differently under those circumstances.

**Mr. Trugman:** A. Under fair market value then I would take discounts. I believe then there would be justification for taking the discounts - -

**Mr. Fleisher:** Q. Right.

**Mr. Trugman:** A. - - because you have arms length people working in, you know, conjunction with the agreement. Here you have people that control the agreement and ultimately control the entity. I think that overrides the limited partnership interest from the

standpoint of value.

**Mr. Fleisher:** Okay

**The Court:** Are you assuming the brothers are not operating at arm's length?

**Mr. Trugman:** Well, they're not. They're family members. I mean - -

**Mr. Fleisher:** Q. That's an assumption?

**Mr. Trugman:** A. Yes, that's absolutely an assumption.

**Mr. Fleisher:** Q. You are assuming?

**Mr. Trugman:** A. I am assuming. I am assuming.

(Trial Tr. p. 123, l. 10-25, p. 124, p. 125, l. 1-16). As the trial court recognized at the end of this excerpt, Mr. Trugman's testimony that discounts shouldn't apply at bar was based entirely on the assumption - his assumption - that the Zohlman brothers would act together after Zoldan was paid and dissolve the partnership. However, there was absolutely no evidence - none- presented at trial that the Zohlman brothers intended to dissolve the partnership. Mr. Pratt later testified that Zoldan's effort to have the court determine a value of an estate asset based upon potential future conduct was not consistent with trusts and estates practice:

There is nothing in the statutes or in case law anywhere that tells us to look at what may happen in the future. On the contrary this partnership could continue. So, it's not

fair to speculate particularly when the law is very clear in the state that says that the only date that matters is the date of distribution. So, you must look at the fair market value of the assets on the date of distribution, no matter what may happen in the future.

(Trial Tr. p. 213, l. 15-23). Indeed, there was a great deal of testimony by both experts, including Trugman, regarding the many continuing benefits of family limited partnerships, benefits which would be lost if the partnership was dissolved. These benefits include protection from creditors, ease in making gifts, creating economies of scale, the creation of broad investment powers in the partnership agreement, and later estate discounts in valuing the assets due to lack of control and lack of marketability. (Trugman Trial Tr. p. 94-101); (Pratt Trial Tr. p.196, l. 4-25). Mr. Pratt testified that of all the FLP's he has established for clients - he estimated he had established several hundred - he could not recall any that had been dissolved. (Trial Tr. p. 227, l. 5-7, 25; p. 228).

It bears repeating that the purpose of the trial was to value one of the four partnership interests. The discounts are not the product of the identity of the holder of that interest, but rather, are the product of the structure created by the agreement. (Trial Tr. p. 236, l. 7-9; p. 99, l. 20-25; p. 100, l. 1-10). Accordingly, the value of the interest of each of the Zohlman sons is no different than the value of Barbara Zoldan's

interest. Trugman himself acknowledged that any one of the Zohlman sons, acting alone, could not liquidate the partnership. (Trial Tr. p. 153, l. 11-12). Trugman further acknowledged that if one brother sold his interest, he would have to sell it at a discount (at Fair Market Value). (Trial Tr. p. 130, l. 11-15). Thus, Trugman acknowledged that each individual interest lacks the element of control and is not freely marketable. His only rationale for ignoring these discounts is the familial relationship of the brothers and his assumption that the brothers would ultimately act together to dissolve the partnership.

Mr. Fleisher: Your suggestion is that because the three sons have the ability, hypothetical ability, whether they do it or not because they have the ability to dissolve the partnership that that fact alone under your thinking warrants - means that their interest should not be considered as a discounted interest; correct?

Mr. Trugman: Yes.

(Trial Tr. p. 134, l. 11-18). Of course, Trugman had to concede that it was also possible that the brothers would not get along and act together. (Trial Tr. p. 135, l. 6-9). Yet, as the court pointed out, such considerations are speculative.

But that makes assumptions that we don't have answers for. We can't. The assumptions are not - they're somewhat speculative, if you would.

(Trial Tr. p. 148, l. 5-8).

Additionally, Mr. Trugman suggested that under Florida law, the Fair Value

standard should be used because this term is seen in Florida's partnership statutes. §620.2113; §620.2114. However, none of the conditions or events giving rise to the application of these partnership statutes are present at bar. In order for these statutes to apply to Zoldan, she would have to be a limited partner. Zoldan was never a limited partner. She was tendered an interest in the partnership, but she rejected it. (Answer Br. App. A). Additionally, these statutes are only applicable in circumstances involving consummation of a merger or consummation of a conversion. Trugman agreed that there was no merger or conversion taking place with regard to this partnership. (Trial Tr. p. 159, l. 21-22). He further acknowledged that these statutes (as well as corporate statutes mentioning a Fair Value standard) had no direct application in the instant matter, but were instead being used "more as an analogy than anything else." (Trial Tr. p. 157, l. 11-12). In the Initial Brief, the Appellant continues to try to analyze inapplicable law to the instant case. For example, the Appellant cites a case from the United States District Court for South Carolina, Morrow v. Martschink, 922 F.Supp. 1093 (D.S.C. 1995), to suggest that the value of an interest in a family business may actually be enhanced by its lack of marketability. However, the Appellant's effort to rely on this case ignores the stipulations reached by the parties and the limited issue to be considered by the court. Whether lack of marketability of a family business increases or decreases the value

of the asset under South Carolina corporate statutes is of no relevance at bar. The Appellant and the Appellees agreed, before trial, that if the court adopted the valuation standard recognizing discounts (Fair Market Value), that the amount of the discounts under the standard was the amount set forth in the stipulation. In addition, the South Carolina corporate statutes relied on by the Morrow court are fact specific to particular corporate events - none of which are applicable or relevant to the instant facts. If Florida corporate statutes are inapplicable to the instant case, as the trial court determined, then valuation standards under South Carolina corporate statutes are clearly inapplicable. As indicated above, Florida provides how Florida estate interests are to be valued. Accordingly, commentary in a case under South Carolina law about marketability discounts for closely held corporations in that state have no application to the instant matter.

Ultimately the court refused to apply what it believed to be an inapplicable standard to the case at bar:

**The Court:** . . .but I believe that the whole concept of Fair Value is limited by the legislature to very specific instances and I'm not going to rewrite the law.

I think that to use Fair Value outside of those instances has speculation as part of its foundation, therefore, is not as determinable with a sufficient degree of accuracy to be deemed to be a measure, a proper measure of damages in a breach of contract case. . .

(Trial Tr. p. 291, l. 5-14). Ironically, case law cited by Zoldan before the trial court clearly indicated that it was inappropriate to apply the Fair Value standard provided by a corporate oppression statute by analogy to a non-corporate oppression circumstance. Erb v. Erb, 976 So.2d 1234 (Fla. 2d DCA 2008); (Trial Tr. p. 163-167).

At trial, Zoldan rested after Trugman completed his testimony. Zoldan offered no other witnesses. Trugman's testimony clearly failed to justify application of the Fair Value standard to the instant case. Again, Mr. Trugman, while a qualified valuation expert, was not qualified to opine on the proper legal standard to be applied in valuing an estate asset. Moreover, there was no evidentiary basis for his suggestion that discounts should not apply because it can be assumed that the Zohlman brothers will dissolve the partnership after Zoldan's interest is satisfied. Finally, Trugman acknowledged that the Florida Statutes which use the Fair Value standard do not apply to the instant case. David Pratt, on the other hand, testified that Fair Market Value is the standard used to value estate assets.

## ARGUMENT II

**DAVID PRATT WAS A QUALIFIED EXPERT ON THE PROPER STANDARD OF VALUATION TO BE USED TO DETERMINE THE VALUE OF ESTATE ASSETS FOR PURPOSES OF SATISFYING AN OBLIGATION TO MAKE A BEQUEST WHICH HAS BEEN BREACHED, AND NOT, AS THE INITIAL BRIEF SUGGESTS, AS A VALUATION EXPERT ON ECONOMIC DAMAGES FOR BREACH OF CONTRACT BECAUSE THE**

**VALUES FOR THE DAMAGES UNDER THE TWO STANDARDS AT ISSUE WERE AGREED TO BY STIPULATION.**

As indicated above, the issue at trial was clearly articulated by the trial court in its March 9, 2007 Partial Summary Judgment for Defendant:

Defendant Zoldan is entitled to a judgment for money damages in an amount equal to the value of sharing in Mr. Zohlman's estate equally with his own children *per stirpes*.

(Initial Br. App. Tab 3). The measure of damages was clearly defined by the court's Order. Zoldan was entitled to money damages but the amount of the damage award had to be equal to the amount received by each of the decedent's sons from the decedent's estate. It is undisputed that each son received a 1/3 interest in the FLP and now that it had been determined that Barbara was entitled to be treated equally, the sole issue to be determined at trial was the value of Barbara's 1/4 interest in the FLP. The value of this 1/4 interest would be the measure of damages.

The trial was simplified and shortened because the parties narrowed this dispute to one discreet issue - whether the court should value Barbara's interest using the Fair Market Value standard or the Fair Value standard. (Trial Tr. p. 10, l. 17-20). The parties even stipulated as to the exact amount Barbara would receive under each standard. Thus, there was no dispute regarding valuation of Zoldan's interest. The only dispute was which standard should apply given the court's ruling in the Partial

## Summary Judgment Order.

The Appellees freely concede that David Pratt is not an appraiser or an individual who performs valuations of assets. At trial, Mr. Pratt himself acknowledged that when, in his probate and trust administration practice, he needs to have an asset valued, he hires a qualified appraiser. (Trial Tr. p.226, l. 2-7; p. 237, l. 10-12). The purpose of David Pratt's testimony was not to determine a value for Zoldan's interest, but to advise the court as to what standard of valuation is used by a probate and trust attorney who administers probate and trust estates. (Trial Tr. p. 31, l. 17-24). As mentioned earlier in this brief, Mr. Pratt has practiced as a trust and estates attorney for many years. He testified that Fair Market Value is the only standard of valuation used in trust and estate administration. (Trial Tr. p. 191, l. 24-25 - p. 192, l. 1). Attorneys with knowledge in a respective area of law are qualified to testify as expert witnesses on such issues. Guy v. Knight, 431 So.2d 653, 656 (Fla. 4th DCA 1983). Zoldan never attempted to disqualify Pratt as an expert witness relating to this issue, and she cannot now, on appeal, challenge his qualification as an expert for the first time. Solomon v. National Car Rental System, Inc., 247 So.2d 101 (Fla. 3d DCA 1971); Gonzalez v. Largen, 790 So.2d 497, 500 (Fla. 5th DCA 2001).

There was simply no need for a valuation expert because the values were not

in dispute. This is why, at trial, the Appellees attempted to disqualify Mr. Trugman as an expert. The only issue was the legal standard of valuation for an estate asset, and Mr. Trugman is not an attorney and does not administer probate and trust estates. (Answer Br. App. E). There was only one qualified expert to testify as to the appropriate standard and that was David Pratt.

In the initial brief, the Appellant focuses on two portions of Mr. Pratt's testimony in order to discredit him as an expert. In one portion (Trial Tr. p. 239, line 19 through p. 241, line 25), which occurs during cross examination, Mr. Pratt acknowledges that he does not perform appraisals himself and instead hires people to perform this task. The Appellant then contends that Pratt acknowledged that he was not testifying regarding what the Appellant now asserts is the issue - valuation of damages for economic breach of contract. Pratt was not testifying regarding valuation of damages for breach of contract in general, but as he said, he was testifying as to what that standard should be if, as the court Order mandated, it was applied for estate distribution and estate tax purposes. Again, the court indicated that Zoldan's measure of damages in this breach of contract case would be an amount equal to what the Zohlman brothers received from the estate. Pratt was testifying regarding what the proper standard of value would apply to such an estate asset.

The other quote to which the Appellant attaches great significance is Mr.

Pratt's use of the word "surmise" when responding to a question from the trial court. (Trial Tr. p. 217, l. 22 - p. 218, l. 8). The court had asked Mr. Pratt if he was aware of any provision of the probate code which specifically addresses valuation of damages for someone wrongfully excluded from a family limited partnership. Pratt indicated that he was not aware of such a provision, but he "surmised" that if such a provision were created, it would likely use a Fair Market Value standard. This is because, as Mr. Pratt testified repeatedly, the only standard used in the probate code for valuing estate assets - any estate asset - is Fair Market Value. It is also worth noting that counsel for Zoldan objected to the use of the word "surmise", and the trial judge agreed that he would discount use of that word. It is inappropriate for the Appellant to argue that error occurred because a word such as "surmise" was used by Mr. Pratt when that word was not considered by the Judge after the Appellant's own objection.

Mr. Pratt was not offered as an expert on economic damages in breach of contract cases. He is not a litigator. He is a trust and estates specialist with years of practice who knows what standard of valuation is used when valuing assets of an estate. Since the issue presented by the court's March 9, 2007 Partial Summary Judgment Order was how to value Zoldan's 1/4 interest in the FLP as if it were an asset of the estate, Mr. Pratt was well qualified to testify on this issue. The court

obviously agreed.

CONCLUSION

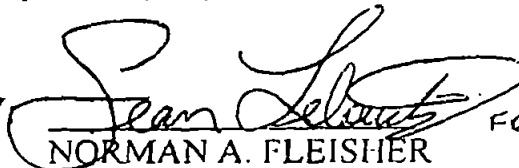
For the reasons stated above, the final judgment should be affirmed. The Appellees are not pursuing their cross appeal, of the March 9, 2007 Partial Summary Judgment for the Defendant.

DATED this 22<sup>nd</sup> day of January, 2009.

Respectfully submitted,

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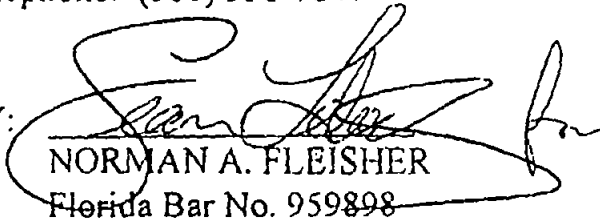
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to D. CULVER SMITH, ESQ., Fox Rothschild, LLP, Attorneys for Appellant, 222 Lakeview Avenue, Suite 700 Esperante, West Palm Beach, FL 33401 and to W. TODD BOYD, ESQ., Boyd Santini Parker & Colonnelli, P.L., Attorneys for Frankel/Parson & Brown, Bank of America Tower at International Place, 100 Southeast Second Street - 36th Floor, Miami, FL 33131, this 22<sup>nd</sup> day of January, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that undersigned counsel has complied with the font requirements of the applicable rules of Appellate Procedure.

  
NORMAN A. FLEISHER