FOURTH DIVISION
RICKMAN, C. J.,
DILLARD, P. J., and PIPKIN, J.

June 6, 2023

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A23A0088. KITCHENS v. FOYE et al.

PIPKIN, Judge.

Appellant Phillip E. Kitchens appeals from the entry of final judgment on a jury verdict awarding Appellee Edward J. Foye -- both individually and derivatively on behalf of Southern Waste & Recycling, Inc. ("SWR") -- approximately $7 million in damages and attorney fees.[1] On appeal, Kitchens argues, among other things, that the trial court abused its discretion in denying his motion to exclude Foye's valuation expert. Because there has been no showing that the trial court abused its broad discretion in this regard, we affirm.

---

[1] The final amended verdict reflects the following: $720,657.87 plus interest for Foye's derivative claims; $531,955 plus interest for Foye's direct claims; $683,670.62 plus interest as attorney fees and expenses of litigation; and $5 million in punitive damages.

Foye and Kitchens formed SWR in 2001, with Kitchens owning 70% of the company and Foye owning 30% of the company. In October 2018, Foye, both individually and derivatively on behalf of SWR, filed a complaint against Kitchens alleging that Kitchens had, for years, used SWR funds to finance "a lavish personal lifestyle" and had transferred hundreds-of-thousands of dollars from SWR banking accounts to non-SWR accounts -- including to accounts associated with a competing business operated by Kitchens -- that served no legitimate business purpose. In his original and amended complaints, Foye alleged a number of direct and derivative claims, including breach of fiduciary duty, conversion, corporate waste, usurpation of corporate opportunity, misappropriated distributions, and fraud; Foye sought compensatory and punitive damages, as well as attorney fees.

In support of his claims, Foye hired Roy A. Adams as an expert, who was

> expected to testify concerning (a) the value of [SWR]; (b) the value of subchapter S-distributions [Foye] should have received from SWR but for [Kitchens'] breaches of fiduciary duty and other wrongful acts; (c) many of [Kitchens'] expenditures from SWR accounts were for personal, rather than business[] purposes, and the effect(s) of such expenditures on the operations and value of SWR; (d) required documentation of expenditures for meals, entertainment, and related business expenses, and [Kitchens'] failure to maintain required documentation; and (e) damages sustained by [Foye] and SWR as a result of [Kitchens'] conduct.

More specifically, Adams was expected to testify that SWR would have been worth over $1.7 millions dollars but for Kitchens' wrongful conduct and that Foye, as a shareholder, sustained $531,355 in lost value; that Foye would have been entitled to $370,568 in distributions in previous years; that Kitchens' wrongful personal expenditures totaled at least $380,393, which materially harmed both SWR and Foye; and that the total damages sustained by Foye – including the lost value of SWR, unpaid distributions, and years of interest – totaled $1.045 million dollars.

After Kitchens identified his own expert to rebut Adams and both experts had been deposed, Kitchens moved to exclude Adams from testifying, relying on OCGA § 24-7-702. In his motion, Kitchens asserted that Adams had failed to utilize three of the "most appropriate" methodologies for the valuation at issue; had used a "multiple of earnings approach for which there is no particular name"; had used the term "adjusted earnings" in his valuation though it is not an accounting term of art; had used a "multiple of 4" in his valuation based on a "rule of thumb" rather than relying on databases of comparable transactions; had improperly adjusted SWR's earnings to account for the improper transfers rather than adding the amount back into his valuation; had applied a 17.61 % growth rate based on two years of data rather than researching and applying industry growth rates; and had used the wrong date in

valuating SWR. Kitchens also argued that, in the event that Adams' testimony were to be excluded, he would be entitled to a summary judgment.

In his response, Foye argued that Adams was not required to use any one methodology; that the "multiple of earnings" approach was a reliable valuation method that is generally accepted in the field; that Adams had explained his basis for using that valuation method; that Adams' use of the "multiple of 4" was sound methodology; that Kitchens' only complaint with Adams' use of the "multiple of 4" was how he arrived at that multiplier, not that its use resulted in an incorrect valuation; that Adams' growth rate assessment was proper given that Kitchens' wrongdoing likely adversely affected the growth of SWR in later years; and that Adams' date of valuation was proper. Foye supplemented his response with an affidavit from Adams, attached to which was, among other things, literature discussing both the "multiple of earnings" approach in valuing closely-held corporations and the "multiplier" methodology.

Following a hearing, the trial court denied the motions to exclude and for summary judgment. In its order, the trial court cited OCGA § 24-7-702, and discussed recent decisions from this Court concerning the application of that rule, including the

role of *Daubert*[2] in resolving a motion to exclude under Rule 702. The trial court noted that Adams holds an advanced degree in accounting, has worked as a CPA for decades, is a member of his professional organization and is familiar with its guidelines for business evaluations, has prepared hundreds of business evaluations, has worked as an expert witness in dozens of cases, and has testified approximately 15 times. The trial court concluded that Adams' qualifications were sufficient and that his business valuation model -- the multiple of earnings approach -- was sound. The trial court determined that Kitchens was merely challenging the "details" of Adams' approach to the valuation and concluded that Kitchens' concerns went "to the weight rather than admissibility" of Adams' testimony; the trial court emphasized that Adams could be thoroughly cross-examined on his valuation approach. This appeal follows.

At the time of the trial court's decision,[3] OCGA § 24-7-702 provided as follows:

> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

---

[2] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U. S. 579 (113 SCt 2786, 125 LE2d 469) (1993).

[3] The trial in this case occurred in April 2022. OCGA § 24-7-702 was amended effective July 1, 2022. See 2022 Ga. Laws, p. 201, § 1 (amending OCGA § 24-7-702).

> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

As we recently explained in *Emory Univ. v. Willcox*, Rule 702 requires a trial court to act as a "gatekeeper" of expert testimony and requires a trial court to assess "both the witness' qualifications to testify in a particular area of expertise and the relevancy and reliability of the proffered testimony." (Citation and punctuation omitted.) 355 Ga. App. 542, 543 (1) (844 SE2d 889) (2020). In making this assessment, the trial court should engage in a "rigorous three-part inquiry," which requires the trial court to determine

> whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U S 579 (113 SCt 2786, 125 LE2d 469) (1993); and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. While there is inevitably some overlap among the basic requirements -- qualification, reliability, and helpfulness -- they remain distinct concepts and the courts must take care not to conflate them.

(Citations and punctuation omitted.) Id. at 543 (1).

That said, "the trial court may not exclude an otherwise sufficient expert opinion simply because it believes that the opinion is not -- in its view -- particularly strong or persuasive." (Citation and punctuation omitted.) *Wilson v. Redmond Constr., Inc.*, 359 Ga. App. 814, 819 (2) (860 SE2d 118) (2021). Indeed, the Eleventh Circuit has recognized that, under the federal counterpart to Rule 702, "the rejection of expert testimony is the exception rather than the rule." (Citations and punctuation omitted.) *Moore v. Intuitive Surgical, Inc.*, 995 F3d 839, 850 (11th Cir. 2021). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Id. The admissibility of expert testimony rests soundly with the trial court, and "[w]e will not disturb the trial court's determination absent a manifest abuse of discretion." (Citation and punctuation omitted.) *Wilson*, 359 Ga. App. at 819 (2).

As an initial matter, the parties agree that Kitchens' motions to exclude and for summary judgment were heard at a December 2021 hearing, and the trial court's order reflects that the trial court reached its decision after considering the parties' motions, *the arguments of counsel*, and *the evidence in the case*. However, there is no transcript of the hearing before us, and there is no indication that the December 2021 hearing was

taken down.[4] Without the benefit of knowing what, if any, evidence was presented to the trial court at that hearing and what arguments were made by counsel at that hearing -- or perhaps any possible factual concessions or waivers -- this Court cannot adequately consider Kitchens' appeal. See *Jenkins v. Blue Moon Cycle, Inc.*, 277 Ga. App. 733, 735 (1) (627 SE2d 440) (2006) ("Absent the hearing transcript, we do not know what arguments [Appellant] made on behalf of his motion . . . and thus, we must affirm the trial court."), rev'd on other grounds, 281 Ga. 863 (642 SE2d 637) (2007).

Additionally, while the trial court's order painstakingly lays out and applies the proper standard for evaluating the admissibility of expert testimony under Rule 702, Kitchens's principle brief on appeal cites nothing more than the statutory text of Rule 702 and a handful of cases -- one of which was decided under the old evidence code -- to set out a general standard for evaluating the admissibility of expert-witness testimony. Indeed, the cases cited by Kitchens are applicable only to the extent that they involve the admissibility of expert testimony; the cases do not involve business valuation testimony, but, instead, they involve *scientific and medical* testimony related to *causation*.[5] See *McClain v. Metabolife Intl., Inc.*, 401 F3d 1233, 1237 (11th. Cir.

[4] The 11 volumes of transcript before us are all related to the April 2022 trial, and neither parties cites to a transcript of the hearing.

[5] Adams expressly testified that he was not providing testimony as to causation.

2005) (addressing admissibility of causation testimony from two medical professionals); *Wadley v. Mother Murphy's Laboratories, Inc.*, 357 Ga. App. 259, 263-265 (1) (850 SE2d 490) (2020) (considering causation testimony of biologist in toxic tort case); *Smith v. CSX Transp., Inc.*, 343 Ga. App. 508, 510-511 (1) (a) (806 SE2d 890) (2017) (considering admissibility of causation testimony from physician in FELA case). Kitchens' failing here is meaningful because, as the Eleventh Circuit has recognized, while the same standard of admissibility may apply to both, the inquiry into scientific testimony may differ from that involving economic or statistical analysis. See *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F3d 548, 566 n.25 (11th Cir. 1998).

Kitchens' failing is further apparent when looking at the actual argument he makes on appeal. Specifically, he contends that Adams' testimony should have been excluded because, Kitchens says, Adams' testimony "was not the product of reliable principles and methods applied reliably to the facts of the case." This argument not only inexplicably conflates subsections (b) (1) and (b) (2) of Rule 702, but Kitchens actually fails to address either prong; instead, he simply makes nearly inscrutable factual arguments. This is problematic because subsection (b) (2) calls for the application of *Daubert*, which should come as no surprise to Kitchens given that this is addressed in the trial court's order and that Kitchens actually refers to the trial court's order denying

his "*Daubert* motion." Not only does Kitchens fail to engage in the relevant analysis, but he fails to even cite *Daubert* until the final pages *of his reply brief.* While Foye may have had the initial burden of showing that Adams' testimony was admissible, it is now Kitchens' burden to demonstrate error on appeal, a burden that Kitchens has seemingly neglected. See *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F3d 1333, 1342 (II) (B) (11th Cir. 2003) (recognizing that an *appellant* bears the burden of demonstrating that a trial court erroneously qualified an expert).

Moreover, none of the factual arguments advanced by Kitchens suggests that the trial court manifestly abused its discretion. As an initial matter, Kitchens' preliminary arguments are premised on his contention that Adams' valuation method -- the multiple of earnings approach -- is "similar" to the market approach; Kitchens then faults Adams for failing to properly apply the "market approach." This classic strawman argument must fail. Kitchens cannot fault Adams for failing to properly apply the "market approach" methodology when Adams' undisputed testimony was that he did not use the market approach, even if that approach is similar to the valuation method he did use. As to the multiple of earnings approach that Adams actually used, the record includes academic literature explaining that such an approach is imminently

appropriate for the valuation of closely held corporations.[6]

Kitchens next faults Adams for using a 17.61% growth rate in calculating damages. However, this argument hinges on Kitchens' position that Adams was using a "market approach," which, as explained above, Adams did not. Moreover, Adams gave a detailed explanation for this growth rate. Adams reviewed SWR's sales data from a variety of years and relied on a span of time -- from 2012 through 2014 -- that, in his professional estimation, represented accurate sales data before Kitchens' actions began harming SWR; Adams then applied this average growth rate for all years in his damages calculation. On this point, Adams pointed out that SWR's sales were strong for several years, but then, "in 2015 the rate of growth declined significantly[] [a]nd then in 2017 actually diminished in amount." Adams testified that the company was growing at a significant rate, and, according to Adams, one would expect such a "fairly

[6] Indeed, numerous federal courts from around the country have recognized that the "multiples of earning" approach is a valid valuation method. See, e.g., *Custom Chrome, Inc. v. C.I.R.*, 217 F3d 1117, 1124 n. 10 (9th Cir. 2000); *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 FSupp 1051, 1069 (SDNY 1996). Relying on his expert, Kitchens also faults Adams for failing to use *other* valuation methods, and again attempts to recharacterize the nature of Adams' valuation. However, Kitchens cites no authority suggesting that an expert must use a specific methodology, and the mere fact that competing experts disagree does not render either opinion inadmissible. See *Fireman's Fund Ins. Co. v. Holder Constr. Group, LLC*, 362 Ga. App. 367, 373 (1) (a) (868 SE2d 485) (2022).

simple company" to stay consistent. Given the record support for Adams' valuation approach, as well as Adams' detailed explanation for his calculations on this point,[7] there is nothing indicating that the trial court manifestly abused its discretion as to this issue. See *United States v. 0.161 Acres of Land, more or less, situated in City of Birmingham, Jefferson County, Ala.*, 837 F2d 1036, 1040 (11th Cir. 1988) ("Certainly where an expert's testimony amounts to no more than a mere guess or speculation, a court should exclude his testimony. . . . But where the expert's testimony has a reasonable factual basis, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert's factual basis.") (citations omitted).

Kitchens next asserts that "Adams employed a 'rule of thumb' to arrive at the multiple of 4 he used in his valuation, as opposed to researching online databases to assess the earnings multiples that have been applied in the purchase and sale of companies [similar] to SWR." However, as mentioned above, the record includes literature discussing both the "multiple of earnings approach," as well as the multiplier that should be used during the scope of such a valuation; indeed, one article reflects that

[7] Kitchens also faults Adams for using the term "adjusted earnings," claiming that it it "is not an accounting term." However, this argument seemingly takes Adams' testimony out of context. Adams was not purporting to use a "term of art" by using the phrase "adjusted earnings," instead it was a literal description of Adams' decision to *adjust the earnings* of SWR to account for Kitchens' wrongdoing.

most businesses are sold for a multiple of 3-5, while another article reflects that a multiplier of 4.2 would be appropriate "across all private company sectors." Moreover, Kitchens acknowledges in his brief that the "rule of thumb" may be part of a valuation process -- though he asserts that it must be used in conjunction with other research – and his own expert could not say that Adams was wrong in using the multiplier. "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion *per se* inadmissible." *Amorgianos v. Nat. R. Passenger Corp.*, 303 F3d 256, 267 (II) (B) (2d Cir. 2002). Given the support in the record for both Adams' approach and his multiplier -- and given that Kitchens was permitted to adduce testimony from his own expert and thoroughly cross-examine Adams on this purportedly "shaky" aspect of the valuation -- there is no apparent manifest abuse of discretion in this regard. See *Cummings v. Standard Register Co.*, 265 F3d 56, 65 (A) (2) (1st Cir. 2001) ("[W]hatever shortcomings existed in [the economic expert's] calculations [of future losses] went to the weight, not the admissibility, of the testimony[.]").

Finally, Kitchens argues that Adams erroneously valued SWR as of December 31, 2019, because, he says, "the evidence is that substantially all of the assets of SWR were transferred to [another company] in 2017." However, this position is premised on

what *Kitchens'* expert believed to be the date on which SWR was sold. Adams, on the other hand, valued SWR as of December 31, 2019, because he did "not believe that the sale of SWR's assets . . . was a legitimate, arms-length transaction for which SWR received fair consideration." Indeed, it appears that Kitchens' expert did not consider whether the sale of SWR was legitimate, and there was disagreement at trial as to the legitimacy of the sale. Again, these factual disagreements do not render Adams' opinion inadmissible, and nothing suggests that the trial court manifestly abused its discretion in permitting the jury to resolve this factual issue.[8]

There has been no showing that the trial court abused is broad discretion when it allowed Foye to present Adams' testimony, and, thus, the judgment of the trial court is affirmed.[9]

Judgment affirmed. Rickman, C. J., and Dillard, P. J., concur.

---

[8] Kitchens' remaining enumeration is rendered moot by our decision on the admissibility of Adams' testimony.

[9] We do not authorize the reporting of this opinion because it does not announce a new rule or policy, or involve an interpretation of law that is not already precedent. See Court of Appeals Rules 33.2 (b), 34.