

**IN THE SUPREME COURT OF OHIO**

VOLZ EXCAVATING, INC., et al.

Appellees

v.

DONALD K. LYNCH

Appellant

CASE NO. 2007-1941

On Appeal from the Butler County Court  
of Appeals, Twelfth Appellate District

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**MEMORANDUM OF APPELLEES, VOLZ EXCAVATING, INC.  
AND MARK VOLZ, IN OPPOSITION TO JURISDICTION  
OF THE SUPREME COURT OF OHIO**

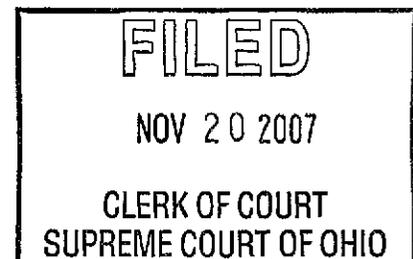
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**I. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves the question of whether an individual can be an employee of a corporation, as well an officer, director and shareholder. Despite Appellant's protestations to the contrary, this is *not* an issue of public or great general interest. In fact, this very issue has been addressed on a number of occasions in the past by the courts of the State of Ohio, including the Ohio Supreme Court. All have answered the question affirmatively: an individual can be an employee, as well as an officer, director and shareholder, depending on the particular facts of the case. That being said, a much more detailed recitation of the facts than Appellant provided is necessary in order for this Court to have a complete and accurate understanding of the relationship of the parties and the circumstances at issue.

Appellee, Volz Excavating, Inc., is an excavation and construction company engaged in the business of subdivision development. The company was incorporated in June of 2000, and its sole shareholders and directors were at all times pertinent hereto, Appellee, Mark Volz, and Appellant, Donald K. Lynch. The two of them adopted a Code of Regulations and a Close Corporation Agreement, and the two were elected as officers of the corporation. Volz is President and Secretary, and Lynch, even today, is Vice President and Treasurer.

Throughout the litigation between the parties, Lynch has argued that he was not an "employee of the company, separate and apart from his role as an officer and director." He has alleged that he was "employed" as an officer and director only. However, this is simply not factually or legally accurate. First of all, Lynch has admitted that both he and Mark Volz:

... performed labor on behalf of the corporation, i.e., they would do anything that was necessary to insure [sic] that the work undertaken by the corporation was completed, ... .

His “labor on behalf of the corporation” involved driving the company truck on which tools were stocked, and operating heavy equipment, such as loaders, bulldozers, scrapers and other machinery on a daily basis. He was also required to perform manual labor, like shoveling dirt and shoveling gravel. It was also his responsibility to maintain the company’s equipment and keep it in good operating condition.

The evidence, all of which is uncontroverted, establishes unequivocally that while Lynch may have had duties as an officer, director and shareholder of the corporation, he also regularly performed ordinary day-to-day duties as an employee, in furtherance of the company’s business. These day-to-day duties were different and distinct from any official duties he had as an officer or director, or his role as a shareholder.

This is not a case of public or great general interest because whether one individual can wear these “different hats” at the same time has been addressed by a number of different courts, including the Ohio Supreme Court, all of which have concluded that an individual can be an employee while, at the same time, being an officer, director and shareholder, and that the roles are distinct.

Almost 70 years ago, in *Kuehnl v. Industrial Commission* (1939), 136 Ohio St. 313, the Ohio Supreme Court considered whether an individual who was a shareholder, president and general manager could also be an “employee” of the corporation entitled to participate in the Ohio workers’ compensation system for injuries received. The claimant’s duties on behalf of the corporation in *Kuehnl* consisted not only of overseeing workmen, hiring and discharging employees, securing contracts with the company, and buying and selling material but, at times, consisted of manual labor in construction and repair work. *Id.* at 314. The Ohio Supreme Court noted:

... that the individual business of hundreds and perhaps thousands of small corporations organized in this state is not sufficiently large to warrant the employment of full-time executives, and that while of necessity the heads of such corporations are nominal executives devoting a portion of their time to executive duties, *they are also often engaged in performing manual labor necessary in the prosecution of the business.* [Emphasis added.]

*Id.* at 316. Under the facts of that case, the Ohio Supreme Court concluded that the claimant was not only a shareholder, officer and director of the corporation, but also an employee, entitled to participate in the Ohio workers' compensation system.

In *Hillenbrand v. Industrial Commission* (1<sup>st</sup> Dist. 1943), 72 Ohio App. 427, the First District Court of Appeals considered a scenario where, as in our case, an officer of the corporation was engaged in ordinary day-to-day duties and received pay therefor, at times performing duties that fell within the category of manual labor. *Id.* at 430. The Court of Appeals noted that the individual in question's daily labor and efforts on behalf of the corporation involved "performing an act which is palpably distinct from official duties" as an officer and, therefore affirmed the trial court's holding that the "officer" was also an "employee" of the corporation.

In *Gigax v. Repka* (2<sup>nd</sup> Dist. 1992), 83 Ohio App.3d 615, the plaintiff, Gigax, made the same argument as Lynch is making here: that he was a shareholder, director and officer of the close corporation, but not an employee. After reviewing the facts in the case, the Montgomery County Court of Appeals succinctly stated " ... partners in a close corporation or a partnership *are employees.*" (Emphasis added.) *Id.* at 623.

Lynch and Volz were usually the only two workers who performed the excavating services for Volz Excavating, Inc., occasionally hiring help on a project-by-project basis. At those times when Lynch was engaged in manual labor and equipment operation and maintenance, he was performing the excavation and construction services for which Volz

Excavating was organized. Such duties were separate and distinct from his executive duties as an officer and director of the corporation, or his status as a shareholder. Appellees would suggest that, in fact, such labor as Lynch performed is not typically thought to be performed while wearing one's "officer" or "director" hats. Instead, Lynch was wearing his "employee" hat when he engaged in these duties, and such status exposed him to the possibility that his employment could be terminated. As more fully explained below in response to Appellant's Proposition of Law, Lynch was, in fact, properly terminated, and that termination then triggered the requirement that he offer to sell his shares of stock in the corporation either to the corporation or the other shareholder, Mark Volz, in the manner mandated by the Close Corporation Agreement.

Appellant suggests several different times in his memorandum that the question here is whether an officer, director and shareholder of a corporation "becomes an employee at will" by performing work or tasks for the corporation. (Appellant's Memorandum pp. 1, 3) More properly phrased, the question is whether one individual can wear "many hats." Appellees submit that the question has already been answered in the affirmative by a number of different courts – one individual can, in fact, wear "many hats" – and the particular facts of this case are not of public or great general interest. While they are significant to the parties involved here, it is highly unlikely that they are of any interest to anyone else.

Appellant also asserts the following:

Thus, the Court of Appeals held that one shareholder who owns half of the shares of stock can call a meeting unilaterally and terminate the other shareholder's employment. The Court of Appeals held that because Donald Lynch was "terminated as a laborer," he thus departed as a shareholder and "was no longer an employee of the corporation." This decision is not only unique in the State of Ohio, but as near as defendant can tell, is unique in the United States.

(Appellant's Memorandum pp. 2-3) Appellant has misrepresented the holding of the Court of Appeals. The Twelfth District held "that the procedures followed by Volz were proper for terminating Lynch as an employee." (Opinion ¶14) Then, in accordance with the Close Corporation Agreement, the Court of Appeals found "that a departing shareholder must offer to sell his shares to the corporation or the other shareholders at a purchase price defined in the agreement." *Id.* As explained in more detail in Appellees' response to Appellant's proposition of law below, the Court of Appeals' decision was based on the very language which Volz and Lynch agreed to when they entered into the Close Corporation Agreement. The decision is not unique but, instead, is based upon the parties' contractual obligations under the Close Corporation Agreement.

This case is not a case of public or great general interest. Instead, this is a case with facts perhaps unique to the parties involved, but which falls squarely within existing case law and legal principles. Therefore, this Court should decline to accept jurisdiction of the appeal.

## **II. APPELLEES' RESPONSE TO APPELLANT'S PROPOSITION OF LAW**

**An individual may be an employee of a corporation whose employment may be terminated, as well as an officer, director and/or shareholder of the corporation.**

To reiterate, the issue here is whether an individual can wear different hats, and be an employee of a corporation at the same time he or she is an officer, director and shareholder. As indicated above, that question has been repeatedly answered in the affirmative.

Donald Lynch's employment with Volz Excavating as an employee was terminated. However, he was not terminated as officer or director of the corporation, as Lynch would have this Court believe. Section 4.2 of the Code of Regulations of Volz Excavating, Inc. provides that "[s]pecial meetings of the Board of Directors may be held any time upon the call of the

Chairperson of the Board, the President, any Vice President, or any two Directors.” Section 4.4 of the Code of Regulations provides that “[n]otice of the time and place of any regular or special meeting of the Board of Directors ... shall be given to each Director by personal delivery ... at least forty-eight (48) hours before the meeting, which notice need not specify the purpose of the meeting.”

On July 1, 2005, Lynch was hand-delivered a Notice of Special Meeting of the Directors of Volz Excavating, Inc. The special meeting had been called by the President, Mark Volz, and was scheduled for July 12, 2005. The Notice specified that the meeting was being called “for the purpose of terminating the employment of Donald K. Lynch and transacting such other business as may come before the meeting.”

Pursuant to the Notice described above, on July 12, 2005, the special meeting took place at 9:00 a.m. Lynch failed to attend, despite his receipt of the Notice of Special Meeting. Pursuant to the vote of all Directors present, the employment of Lynch was terminated.

Paragraph 6(D)(ii) of the Close Corporation Agreement provides, in pertinent part, the following:

Upon the Departure of a Shareholder, that Shareholder or the Shareholder's guardian or estate, (any of which may herein be referred to as the “Selling Shareholder”), must offer to sell all Shares held by the Selling Shareholder to the Corporation or the other Shareholders at the Purchase Price. ... [Emphasis added.]

The phrase “Departure of a Shareholder” is defined in paragraph 6(D)(i) of the Close Corporation Agreement as follows:

The death, Termination of Employment or Disability of a Shareholder (these events being hereinafter collectively referred to as “Departure of a Shareholder”) shall have no effect upon the continued existence of the Corporation. [Emphasis added.]

Paragraph 6(A)(vii) defines “Termination of Employment” to be:

... that event (other than death or Disability) which results in a Shareholder no longer being an employee of the Corporation.

Thus, pursuant to the Close Corporation Agreement, in the event of a Termination of Employment, the Departing Shareholder must offer to sell his shares of stock in the corporation either to the corporation or to the other shareholders at the Purchase Price. Here, Lynch's employment was properly terminated. This constituted the Departure of a Shareholder, triggering the contractual requirement that Lynch sell his shares of stock in the manner mandated by the Close Corporation Agreement.

Mark Volz, as President of Volz Excavating, Inc., was authorized to and did, in fact, call the special meeting of the Board of Directors on July 12, 2005. It is undisputed that Lynch received proper notice of it, since on July 1, 2005, he was hand-delivered a Notice of Special Meeting of the directors of Volz Excavating, Inc. The Notice even specified that the meeting was being called "for the purpose of terminating the employment of Donald K. Lynch and transacting such other business as may come before the meeting." For whatever reason(s), Lynch chose to not attend the meeting. Had he attended, he would have had an opportunity, as a director, to vote on whether his employment with the company would be terminated. However, he was not there, and the vote to terminate his employment was unanimous.

Mark Volz's reasons for voting to terminate Lynch's employment included Lynch's excessive unexcused absenteeism, tardiness and an inability to perform job duties. While Lynch may now dispute the validity of these reasons, he simply was not present at the special meeting called specifically to address his termination from employment.

As indicated above, Lynch continues to argue that he was not a regular "employee" of Volz Excavating, Inc., separate and apart from his role as an officer and director. Again, this is simply not factually or legally accurate. Appellees' will not reiterate here the facts and law set

forth above. Suffice it to say that it cannot reasonably be argued that Lynch was not an employee of Volz Excavating, Inc. He had certain day-to-day job duties, including operating company equipment and performing manual labor, which conclusively demonstrate his status as an employee. See, *Kuehnl v. Industrial Commission, supra*; *Hillenbrand v. Industrial Commission, supra*; *Gigax v. Repka, supra*. It was this status which was the subject of the July 12, 2005 special meeting that he chose to not attend. Mark Volz, as President, called that special meeting, giving Lynch appropriate notice. Since Mark Volz represented one-half of the Directors, there was a quorum present, and his single vote to terminate Lynch's employment made the decision unanimous.

As he did before the Trial Court and the Court of Appeals, Lynch continues to emphasize in his Memorandum in Support of Jurisdiction that shareholders of a close corporation owe a fiduciary duty to each other since they more closely resemble partners in a partnership than shareholders of an actual corporation. (Appellant's Memorandum pp. 7-8) We agree that members of a close corporation, such as Volz Excavating, Inc., generally do owe each other a fiduciary duty to deal in utmost good faith with each other. See, *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 107; *Gigax v. Repka, supra*. This duty may be heightened in certain situations to prevent *majority* shareholders in close corporations from exercising their control "to prevent the *minority* from having an equal opportunity in the corporation." (Emphasis added.) *Crosby v. Beam, supra* at 109. However, in the case of Volz Excavating, Inc., *Lynch is and was not a minority shareholder*. The shares are evenly divided between Mark Volz and Lynch, each owning 50% of the corporation. Therefore, the heightened fiduciary duty does not apply in this case because Lynch was not in the vulnerable position of being a minority shareholder. See, *Herbert v. Porter* (Seneca Co. 2006), 165 Ohio App.3d 217, 2006-Ohio-355, ¶13.

Moreover, whatever fiduciary duty Mark Volz and Lynch owed to each other is satisfied, we submit, by their adoption of the Code of Regulations and the Close Corporation Agreement. Volz and Lynch entered into these contractual agreements to protect their rights and interests. As set forth above, the Close Corporation Agreement provides a mechanism for calling a special meeting, which Mark Volz did for the purpose of voting on the termination of Lynch's employment. As the Trial Court stated:

[Lynch] had the opportunity to address the issues of "just cause" at the meeting, and he chose not to avail himself of the opportunity. Where there are two shareholders of a corporation, each holding an equal number of shares and each given an equal opportunity to cast his votes in a proper manner and participate, one party's failure to exercise fully his voting rights does not give rise to a challenge to the validity of the vote. *State of Ohio, ex rel. Michael Miller v. Goldberg* (June 23, 1983), Franklin App. No. 82AP-770 discussing *State of Ohio, ex rel. Price v. DuBrul* (1919), 100 Ohio St. 272.

Lynch begins the argument section of his Memorandum in Support of Jurisdiction by complaining that no annual meeting of the shareholders of the corporation was held on December 15, 2005, as he claims is required by Article III, Section 1 of the corporation's Code of Regulations. However, that statement is both blatantly misleading and totally irrelevant to the issues in this suit. That same section of the Code of Regulations, Section 1.1 of Article III, provides as follows:

In the event the annual meeting is not held ... a special meeting may be called and held for that purpose or such action may be taken by written consent.

Immediately following the foregoing statement in the Code of Regulations are citations to Section 1701.38(A) and Section 1701.39 of the Ohio Revised Code. These provide legal authority for the quoted statement, that a special meeting or action by written consent is permissible in the event that no annual meeting is held. In fact, pursuant to Article III, Section 1.2, Lynch, himself, could have called a special annual meeting if he had wanted to.

More importantly, however, the lack of an actual annual meeting has in no way been demonstrated by Lynch to somehow be pertinent to whether or not he was an employee of the corporation, or whether his employment was properly terminated. This argument is, in reality, irrelevant to the issues in this case.

The evidence demonstrates conclusively that Lynch was not only an officer, director and shareholder of Volz Excavating, Inc., but he was also an employee with day-to-day job duties. His employment was properly terminated at the July 12, 2005 special meeting, and he must, therefore, sell his shares of stock as mandated in the Close Corporation Agreement.

### **III. CONCLUSION**

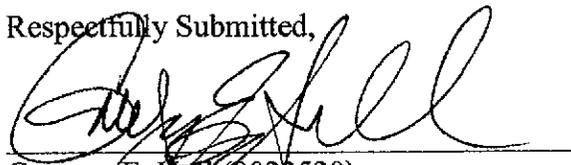
This is not a case of public or great general interest. Instead, it is a case involving an issue which has been decided on a number of occasions by several courts in Ohio, including this Supreme Court. As indicated above, in *Kuehnl v. Industrial Commission, supra*, this Court held that the claimant was entitled to workers' compensation benefits because he was "engaged in an employment palpably separate and distinct from the official duties falling upon him as an officer of the corporation." Thus, he was acting as an employee of the corporation. *Id.* at 319-320. Though the present matter does not involve workers' compensation, the reasoning of the Supreme Court in *Kuehnl* is instructive, if not controlling.

As Lynch has acknowledged, he performed labor on behalf of Volz Excavating, Inc. and engaged in day-to-day employment activities consisting of whatever was necessary to be done to run the company. These duties, distinct from his role as officer, director or shareholder, involved operating and servicing equipment and manual labor. He was an employee of the corporation, as well as an officer, director and shareholder. Such status as an employee exposed him to possible termination and the resulting ramifications under the Close Corporation Agreement. His

employment was properly terminated by a vote of the Directors at the July 12, 2005 special meeting called for the purpose of voting on his termination from employment. That termination constituted his departure as a shareholder under the applicable provision of the Close Corporation Agreement, which triggered the requirement that he offer to sell his shares of stock in the corporation either to the corporation or to the other shareholder, Mark Volz, in the manner mandated by the Close Corporation Agreement.

This Court should decline to exercise jurisdiction over this case.

Respectfully Submitted,



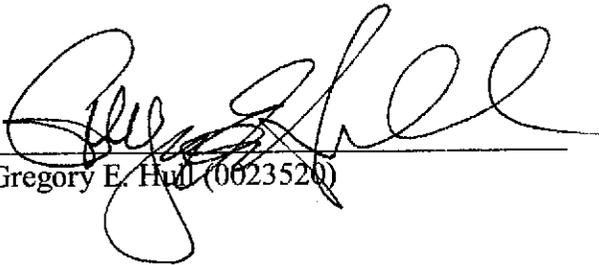
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Inc. and Mark Volz

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been sent by regular U.S. Mail on this 19<sup>th</sup> day of November, 2007, to:

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