

IN THE SUPREME COURT OF OHIO

11-0024

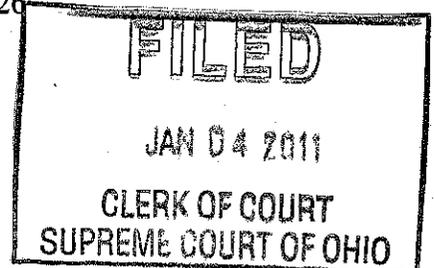
MURRAY A. MILLER, et al.)	CASE NO. _____
)	
Appellees)	On Appeal from Trumbull County
)	Court of Appeals, Eleventh
v.)	Appellate District
)	
SAM M. MILLER, et al.)	Court of Appeals
)	Case No. 2009-T-0061
Appellants)	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SAM M. MILLER**

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R.C. 1701.13(E)(2) and (E)(5) provide, respectively, for (a) the post-litigation reimbursement and (b) the current advancement of attorneys fees incurred by a corporate director who has been sued by the corporation or by any of the corporation's shareholders and directors. Contrary to the holding of the Court of Appeals, those statutory provisions are not limited to - - and, indeed, have no application to - - a lawsuit filed by a director to secure a benefit for the corporation.

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In order for a corporation to avoid the mandatory duty imposed by 1701.13(E)(5), the corporation must include in its articles of incorporation or code of regulations a specific statement that the provisions of 1701.13(E)(5) do not apply to that corporation.

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC
AND GREAT GENERAL INTEREST**

If allowed to stand, the decision of the Eleventh District Court of Appeals in this matter will have enormous consequences for every person who serves, or who is asked to serve, as a director of an Ohio corporation, since that decision totally nullifies an Ohio statute that was enacted in 1986 for the protection of such persons. That statute - - R.C. 1701.13(E)(5) - - enables a director who has been sued for breach of fiduciary duty to have his attorney's fees "paid by the corporation as they are incurred." As has been pointed out by several courts, "advancement" statutes such as this provide corporate directors with "immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." The availability of that right is therefore "an inducement for attracting capable individuals into corporate service." *Homestore, Inc. v. Tateen*, 888 A.2d 204, 211 (Del. 2005). Accord: *Ridder v. CityFed. Financial Corp.*, 47 F.3d 85, 87 (3rd Cir. 1991); *Westbrook v. Swiatek*, 2010-Ohio 2868 at ¶ 24 (5th Dist.).

Now, however, the Eleventh District has issued a stunning decision that will negate R.C. 1701.13(E)(5) in its entirety. For in the course of reversing a trial court order directing a corporation to pay the attorneys fees incurred by a director who has been sued for breach of fiduciary duty, the majority imposed four separate limitations on the applicability of the statute that are directly contrary to its language and purpose. Even worse, each of those limitations will, in most cases, prevent directors of Ohio corporations from ever again invoking the protection of that statute when sued for breach of fiduciary duty.

Thus:

(1) Even though the clear purpose of divisions (1), (2), (3) and (5) of R.C. 1701.13(E) is to provide both post-lawsuit **indemnification** and current **advancement** of the attorneys fees incurred by a corporate director who **has been sued** by shareholders, by the corporation itself or by other persons, the Eleventh District held that the statute only allows indemnification and advancement for a director who is a **plaintiff** in a lawsuit and “who seeks to procure a judgment **in favor of the corporation.**” Such an interpretation of the statute is the exact opposite of what the statute actually says and of what the General Assembly obviously intended. The result is that a director who has been sued for breach of fiduciary duty can no longer obtain “advancement” of his attorney’s fees, or even post-lawsuit indemnification, from the corporation.

(2) Even though division (E)(2) (post-lawsuit indemnification) and division (E)(5) (advancement) are clearly intended to cover corporate directors who have been sued for allegedly having committed acts or omissions that are **contrary** to the best interests of the corporation, the Eleventh District held that a director may obtain indemnification and/or advancement of his or her attorneys fees **only** if the director’s wrongful acts are alleged to have been “**on behalf** of the corporation.” Here again, the Eleventh District’s interpretation is the exact opposite of what the General Assembly intended and renders the statute virtually useless to corporate directors.

(3) Even though division (E)(5) expressly states that the “advancement” of legal fees provided for therein applies to all corporations “[u]nless * * * the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation,” the Court of Appeals majority held that a literal interpretation of this language is “incongruous.”

Instead, relying upon a decision of a Virginia U.S. district judge, the majority held that division (E)(5) applies only to Ohio corporations that have provided for post-litigation **indemnification** in their articles or by-laws. Inexplicably, however, the majority then concluded that the corporation involved in this case is not subject to the requirements of division (E)(5), even though that corporation **does** have an indemnification provision in its articles. Hence, under the majority decision, division (E)(5) can no longer be invoked by the director of **any** Ohio corporation.

(4) Even though lawsuits against a director for breach of fiduciary duty customarily allege that the director's conduct violated his or her "duty of good faith" to the corporation, one of the majority judges declared (in a concurring opinion) that division (E)(5) can not be utilized by a director who is alleged to have violated that duty. Rather, division (E)(5) can only be invoked by a director whose alleged conduct is protected by "the business judgment rule." This, then, is yet another limitation on the availability of (E)(5) that will preclude directors from obtaining the benefit of that statute in probably ninety percent of the lawsuits that are filed against directors.

Each of these four limitations on R.C. 1701.13(E)(5) is sufficient, by itself alone, to vitiate that statute and the salutary public purpose behind it, which is to give corporate directors "interim relief" from the financial burden engendered by lawsuits. That is why the instant case is probably the most significant corporate law case to come before this Court in many years. Indeed, so significant, and so disruptive of the public policy of this state, is the Eleventh District's decision that the Board of Governors of the Ohio State Bar Association has authorized the filing of an amicus curiae brief urging this Court to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

This lawsuit is a **derivative action** filed in 2003, in the Common Pleas Court of Trumbull County, by Murray A. Miller and Samuel H. Miller, “as shareholders * * * and as directors of Trumbull Industries,” against director Sam M. Miller (“Sam M.”), who is also a shareholder of Trumbull.¹ Plaintiffs allege that Sam M. “breached his fiduciary duty as a director” of the corporation by “usurping a business opportunity” that involved the creation of a separate company that would purchase and then resell certain plumbing products under a “private brand” name. According to plaintiffs, Sam M. failed to present that “opportunity” to Trumbull’s four-person board of directors and therefore “breached his fiduciary duty of utmost loyalty and good faith to his fellow shareholders.” (Defendant Sam M.’s position is that he **did** present “the Private Brand opportunity” to his fellow directors on December 4, 2002, in the form of a nine-page memorandum, but that the two plaintiffs immediately told him that they had no interest in allowing Trumbull to engage in such a venture. Sam M. and a third person then proceeded to set up a “Private Brand” company on their own.) Accordingly, plaintiffs ask the Common Pleas Court to issue an order requiring Sam M. to pay over to the corporation all of the profits that he has realized from the Private Brands venture.

In addition, the two plaintiffs have caused Trumbull Industries to pay all of **their** legal fees and expenses, even though the corporation’s divided board of directors never approved such payments, let alone the filing of the lawsuit against Sam M. See *Kenneth Miller v. Samuel H. Miller, et al.*, 2005 Ohio 5120 (11th Dist.) at P5 and P15. So far, plaintiffs’ legal fees have cost the corporation more than \$600,000.

¹ The two plaintiffs, who are brothers, each own 25% of the shares of Trumbull. Defendant Sam M. Miller and his brother, Kenneth Miller, cousins of the plaintiffs, also each own 25%.

In the meantime, defendant Sam M. formally requested Trumbull Industries to pay **his** legal expenses in this matter, as prescribed by Ohio R.C. 1701.13(E)(5). That statute, adopted in 1986, requires an Ohio corporation to pay the attorneys fees of a corporate director who has been sued for his or her acts or omissions in any “proceeding referred to in 1701.13(E)(2),” i.e., “an action or suit by or in the right of the corporation,” as “they are incurred, in advance of the final disposition of the action,” **if** the director gives the corporation a written undertaking to repay such money “if it is [subsequently] proved by clear and convincing evidence in a court of competent jurisdiction” that his conduct was “undertaken with reckless disregard for the best interests of the corporation.” (Division (E)(5) is set forth in full at page 8 below.)

In September, 2005, defendant Sam M. Miller executed the written undertaking required by the statute. Plaintiffs, however, moved the Common Pleas Court for an order declaring that defendant Sam M. nevertheless had no right to have his legal fees “advanced” by the corporation. In January, 2007, the Court rejected that motion and entered an order expressly directing Trumbull Industries to pay defendant Sam M.’s legal fees as they were incurred.

In July, 2008, plaintiffs’ counsel informed the Court that Trumbull Industries was not going to comply with the January, 2007 order and invited that Court to enter an order of contempt. On July 24, 2008, the Common Pleas Court entered such an order. Plaintiffs then appealed that order to the Eleventh District Court of Appeals, pursuant to R.C. 2705.09.

On November 22, 2010, the Court of Appeals, in a two-to-one decision, reversed the contempt order, holding that “1701.13(E)(5) does not apply to this action.” Each of the three judges wrote a separate opinion. The first two opinions set forth, in the

aggregate, four separate reasons as to why R.C. 1701.13(E)(5) is “inapplicable to this case” - - or, for that matter, to virtually any breach of fiduciary lawsuit filed against a corporate director. The third opinion was a dissent, wherein Judge O’Toole concluded that 1701.13(E)(5) is mandatory and that “the trial court properly followed the law by ordering Trumbull Industries to pay the attorney fees of Sam M.”

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: R.C. 1701.13(E)(2) and (E)(5) provide, respectively, for (a) the post litigation reimbursement and (b) the current advancement of attorneys fees incurred by a corporate director who has been sued by the corporation or by any of the corporation’s shareholders and directors. Contrary to the holding of the Court of Appeals, those statutory provisions are not limited to - - and, indeed, have no application to - - a lawsuit filed by a director to secure a benefit for the corporation.

A. The Structure of R.C. 1701.13(E)

1. The Provisions for Post-Litigation Indemnification

R.C. 1701.13(E) establishes two separate mechanisms for the payment by a corporation of the attorneys fees incurred by a corporate director who has been sued for his or her conduct as a director.

The first of those two mechanisms - - which is found in divisions (1), (2), and (3) of R.C. 1701.13(E) - - is permissive and allows the corporation to **indemnify** the director **after** the litigation (or threatened litigation) against the director has been concluded and the director “has been successful on the merits.” Thus, division (E)(2) provides:

(2) A corporation **may indemnify** or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit **by or in the right of the corporation to procure a judgment in its favor**, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee,

member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably **incurred by him in connection with the defense or settlement** of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation * * * *

Division (E)(1), in turn, is worded almost identically to division (E)(2), except that division (E)(1) provides for the indemnification of corporate directors, officers, etc. who have been sued in actions “**other than** an action by or in the right of the corporation.” Division (E)(3) then provides that the indemnification of a director, officer, etc., who has “been successful on the merits” shall extend to “expenses, including attorney’s fees, actually and reasonably incurred by him in connection with the action, suit or proceeding.”

It should be noted that the Ohio General Assembly took these three statutory provisions - - (E)(1), (E)(2) and (E)(3) - - almost word for word from subparagraphs (a), (b) and (c) of Section 145 of the Delaware General Corporation Law. (See footnote 2 of Judge O’Toole’s dissenting opinion.)

2. **The Provision For Advancement of Fees During the Course of the Litigation**

Unlike the indemnification provisions of divisions (E)(1), (E)(2) and (E)(3) that “may” come into play after an action against a director or officer has been successfully concluded, the second mechanism set forth in 1701.13(E) is **mandatory** and is **limited to directors**: it requires the corporation to pay a director’s attorneys fees during the course of the litigation “**as they are incurred**” (rather than waiting until after the director has been “successful on the merits”). That mechanism is found in division

(E)(5) of the statute - - which was separately adopted by the General Assembly in 1986

- - and reads as follows:

(5)(a) Unless at the time of a director's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which he agrees to do both of the following:

(i) Repay such amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation;

(ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding.

Unlike the indemnification provisions of (E)(1), (E)(2) and (E)(3) described above, division (E)(5) is not duplicative of any Delaware statute. Delaware does have an "advancement" statute - - namely, Section 145(e) of the Delaware Corporation Law - - but it is not mandatory. Rather, 145(e) states that attorneys fees "incurred by an officer or director of the corporation in defending" any suit or proceeding "may be paid by the corporation in advance of the final disposition."

B. The Trial Court's Application of 1701.13(E)(5) And the Court of Appeals' Reversal

Given the mandatory nature of 1701.13(E)(5), the Common Pleas Court clearly acted correctly when, in January, 2007, it ordered Trumbull Industries to pay the

attorneys fees incurred by director Sam M. Miller after he provided Trumbull with the prescribed written undertaking. After all, this derivative action, brought by two shareholders of a corporation against a director for breach of fiduciary duty, is precisely the type of action “referred to in division * * * (E)(2),” namely, “a suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that [defendant Sam M. Miller] is or was a director. . .”. Indeed, in paragraph 46 of the majority opinion the Court of Appeals expressly acknowledges that the language “by or in the right of a corporation,” as used in (E)(2), encompasses “a shareholder derivative action,” as well as actions filed against a director by the corporation itself. Accord: *MCI Telecommunications Corp. v. Wanzer*, 1990 Del. Super. LEXIS 222, and *Hydro-Dynamics v. Pope*, 146 Ariz. 586, 708 P.2d 70 (1985).

Nevertheless, only six paragraphs later (in paragraph 52), the Court of Appeals majority suddenly concluded “that **(E)(2) is inapplicable**” to this case, “as that section relates to reimbursement for a director **who seeks to procure a judgment in favor of the corporation.**” Therefore, since division **(E)(5)**, by its express terms, only applies to the types of actions that are referred to in (E)(1) or (E)(2), that meant that (E)(5) is also inapplicable to this case.

This holding makes absolutely no sense. Nothing in the language of division (E)(2), quoted above at pages 6-7, warrants the conclusion that (E)(2) allows post-trial reimbursement of attorneys fees incurred by a director only in actions brought by directors seeking “to procure a judgment **in favor of the corporation.**” Rather, (E)(2) expressly states that it applies to attorneys fees “incurred [by a director] in connection with the defense or settlement of” an action filed against him, either by the corporation itself or by other shareholders or directors, not the other way around (i.e., cases in which

the director is **the plaintiff**). The Eleventh District has therefore given divisions (E)(2) and (E)(5) an interpretation that literally stands those two statutes on their head, since that interpretation means that neither of those statutes are any longer available to a director who has been sued for breach of fiduciary duty.

Proposition of Law No. 2: The mandatory duty of advancement imposed on Ohio corporations by division (E)(5) of R.C. 1701.13 is not limited to cases in which a director is alleged to have committed acts or omissions on behalf of the corporation.

Division (E)(5) of R.C. 1701.13 begins with the following language: “Unless at the time of a **director’s act or omission** that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section. . .” Citing this language, the Court of Appeals majority stated that, in order to receive an “advancement” of attorneys fees under division (E)(5), a director must have been sued for an “act or omission” on his or her part. (Opinion, ¶ 50) The majority, however, then went on to state that “[t]he only logical interpretation of this provision” is that such an “act or omission” must have been “on behalf of the corporation” before a director can receive the benefit of either division (E)(5) or division (E)(2). (Opinion, ¶ 50). Applying this “only logical interpretation” of the statute to the instant case, the Court of Appeals majority concluded that director Sam M. Miller was not entitled to the protection of division (E)(5) because

Sam M. has not been sued as a result of any act or omission **on behalf of the corporation**. Instead, as outlined in their complaint, appellants claim Sam M. is liable for those acts done on behalf of a separate corporation, allegedly in contravention of his fiduciary duties as a director of Trumbull Industries.

(Opinion, ¶ 50). Such an allegation of “harm to the corporation as a result of a violation of his duties to the corporation * * * is inapposite to an ‘act or omission’ **on behalf** of the corporation.” (*Id.*, ¶ 53).

Here, again, the Court of Appeals has stood the statute on its head. Division (E)(5) was designed to provide directors with some interim financial relief if they are sued for a breach of fiduciary duty, and the essence of almost every breach of fiduciary claim is that the defendant director allegedly acted **contrary** to the interests of the corporation rather than **on behalf** of the corporation. Therefore, if the Court of Appeals’ interpretation remains in effect, it will prevent corporate directors from ever again requiring their corporations to pay their attorneys fees when they are sued for breach of fiduciary duty.

Proposition of Law No. 3: In order for a corporation to avoid the mandatory duty imposed by 1701.13(E)(5), the corporation must have included in its articles of incorporation or code of regulations a specific statement that the provisions of 1701.13(E)(5) do not apply to that corporation.

As noted earlier, division (E)(5) begins with the following language:

(5)(a) Unless at the time of a director’s act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by **specific reference** to this division, that the provisions of this division do not apply to the corporation * * * .

It should therefore be clear that the only way that a corporation can avoid the mandatory requirements of (E)(5) (i.e., paying the litigation expenses of its directors as they are incurred) is to “opt out” by inserting, either in its articles or in its code of regulations, an express provision that “specifically” refers to 1701.13(E)(5) and states that the provisions of that division “do not apply to the corporation.”

The Court of Appeals acknowledges that Trumbull Industries never did “opt out”. (Opinion, ¶ 57) Hence, the Court of Appeals should have held that the “advancement” obligation imposed by division (E)(5) is mandatory insofar as Trumbull Industries is concerned.² The Court of Appeals majority, however, held exactly the opposite. Citing a decision of a U.S. District Judge of the Eastern District of Virginia that such a reading of division (E)(5) is “incongruous” (*James River Management Company v. Kehoe*, 674 F.Supp.2d 745 (E.D. Va. 2009)), the majority adopted the Virginia judge’s holding that “the statute cannot be read to mandate advancement as the default rule for all employees under all circumstances.” (Opinion, ¶ 57). Rather, the view of the Virginia judge was that the “better policy” construction of division (E)(5) is that “advancement is mandated **only** when” the corporation involved has included in its articles of incorporation a provision allowing the corporation to **indemnify** a director for his legal fees after the case has been concluded (674 F.Supp.2d at 753). The Ohio corporation in the Virginia case (James River Insurance Company) had never done that.

The Virginia district judge’s interpretation is, of course, directly contrary to the plain language of (E)(5). Moreover, the Court of Appeals majority ignored the fact that if Trumbull Industries had been the corporation before the district court, the Virginia judge would have held that (E)(5) was mandatory insofar as Trumbull Industries was concerned. The reason for this is that, unlike James River Insurance Company, the

² Judge O’Toole, in her dissenting opinion, therefore had it right when she stated:

Since the Articles of Incorporation do not expressly *preclude* advancement of legal fees, Trumbull Industries must comply with the mandatory provisions of R.C. 1701.13(E)(5)(a).

(Opinion, ¶ 74)

articles of incorporation of Trumbull Industries do contain an indemnification provision for directors (and officers) who have been sued - - as the Court of Appeals itself acknowledged (see Opinion ¶¶ 54 and 55). Therefore, even under the constricted (and erroneous) interpretation given to (E)(5) by the Virginia district judge, advancement is mandated by that division insofar as directors of Trumbull Industries are concerned. Nevertheless, the Court of Appeals, quite bewilderingly, held that the advancement statute did not apply to Trumbull.

Thus, the net effect of the Court of Appeals holding is that division (E)(5) of 1701.13 no longer applies to **any** Ohio corporation, regardless of what language is (or is not) found in its articles. For if the articles do **not** provide for post-litigation indemnification (like the corporation in the *James River* case), that corporation is not subject to division (E)(5), per the Virginia judge's decision. And if the articles of incorporation **do** allow for post-litigation indemnification (like Trumbull Industries), that corporation is also not subject to division (E)(5), per the Court of Appeals holding in this case. Here, then, is another "interpretation" of (E)(5) that negates the statute entirely.

Proposition of Law No. 4: A corporation's mandatory duty under 1701.13(E)(5) to advance the legal fees of a director who has been sued for breach of fiduciary duty is not limited to directors who are alleged to have engaged in conduct protected by the business judgment rule.

One of the two judges in the majority, Judge Grendell, filed a concurring opinion in which she put forward an additional reason as to why R.C. 1701.13(E)(5) did not apply to the claims being asserted against director Sam M. Miller. According to Judge Grendell, "the plaintiffs' allegations against the director are solely for actions taken in violation of the duty of good faith and contrary to the best interests of the corporation, specifically breach of his fiduciary duties to the corporation and its shareholders, fraud

and usurpation of a business opportunity.” (Opinion, ¶ 63) “Such allegations,” continued Judge Grendell, “place the director’s conduct outside the protection of the business judgment rule, as codified in R.C. 1701.59(B),” and a director who is **alleged** to have engaged in conduct “outside the protection of the business judgment rule” is not entitled to the advancement of attorney’s fees that is provided for in 1701.13(E)(5). (*Ibid.*) In support of this conclusion, Judge Grendell cited divisions (E)(1) and (E)(2) of R.C. 1701.13, which divisions allow a corporation to **indemnify** a director for his or legal fees, **after the suit is over**, if the director is found to have “acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.” (Opinion, ¶ 62)

This interpretation of the statute is erroneous for several reasons. First of all, virtually every lawsuit against a director for breach of fiduciary duty alleges - - either expressly or by implication - - that the director acted in violation of his duty of good faith and contrary to the best interests of the corporation. Therefore, to hold that the advancement provisions of (E)(5) cannot be utilized by a director who is **alleged** to have engaged in conduct “outside the protection of the business judgment rule” (i.e., conduct in violation of his duty of good faith and contrary to the best interests of the corporation) is to hold that that division (E)(5) has no application to any of the usual claims for breach of fiduciary duty - - thereby rendering (E)(5) a dead letter.

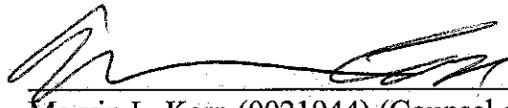
Secondly, Judge Grendell ignored the fact that the indemnification provisions of R.C. 1701.13 - - i.e., divisions (E)(1), (E)(2) and (E)(3) - - come into play only after the litigation has been concluded, the director has “succeed[ed] on the merits,” and a **factual finding** has been made by a court that the director seeking indemnification “acted in good faith,” etc. A director’s right to advancement of legal fees under division

(E)(5), on the other hand, depends solely on the **allegations** of the complaint. As stated by the U.S. Court of Appeals for the Third Circuit in *Ridder v. CityFed Financial Corp.*, 47 F.3d 85, 89 (3rd Cir. 1995), the right of corporate officers and directors “to receive the costs of defense in advance does not depend upon the merits of the claim asserted against them, and is separate and distinct from any right of indemnification they may **later** be able to establish.” In other words, the “right to advancement” is “greater than the right to indemnification.” *Homestore, Inc. v. Tateen* (Del. 2005), 888 A.2d 204, 212. Therefore, the particular conditions and limitations of the indemnification statute ((E)(2)) relied upon by Judge Grendell should have no application to the advancement statute ((E)(5)). Indeed, conflating the indemnification and advancement divisions in this manner “blurs the distinct purpose of advancement provisions” (*Morgan v. Grace*, 2003 Del. Ch. LEXIS 113 at *8), which purpose is to have the corporation “shoulder these interim costs” until after the case has been completed. *Kaung v. Cole National Corp.*, 884 A.2d 500, 509 (Del. 2005).

CONCLUSION

For all of the reasons set forth above, this case involves issues of public and great general interest. Appellant therefore requests that this Court accept jurisdiction so that these important issues can be reviewed on their merits.

Respectfully submitted,



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COURT OF APPEALS

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TRUMBULL COUNTY, OH
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IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al., : **OPINION**
Plaintiffs-Appellants, :
- vs - : **CASE NO. 2009-T-0061**
SAM M. MILLER, et al., :
Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 433.

Judgment: Reversed and remanded.

Marshall D. Buck, Comstock, Springer & Wilson, 100 Federal Plaza East, Suite 926, Youngstown, OH 44503-1811 and *Charles L. Richards*, Law Office of Charles L. Richards, Hunter's Square, 8600 East Market Street, Suite 1, Warren, OH 44484-2375 (For Plaintiffs-Appellants).

Michael N. Ungar, *Marvin L. Karp*, *Lawrence D. Pollack*, and *Brad A. Sobolewski*, Ulmer & Berne, L.L.P., 1100 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Defendant-Appellee Samuel M. Miller).

Randil J. Rudloff, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellee Daniel R. Umbs).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Murray A. Miller ("Murray"), Sam H. Miller ("Sam H."), and Trumbull Industries, Inc. ("Trumbull Industries"), appeal from the May 29, 2009 judgment entry of the Trumbull County Court of Common Pleas, finding Trumbull Industries in contempt.

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{¶2} The following facts and procedural history were taken from appellants' last appeal with this court, *Miller v. Miller*, 11th Dist. No. 2008-T-0076, 2009-Ohio-2092.

{¶3} Trumbull Industries sells plumbing supplies, including vitreous china. Two sets of cousins own Trumbull Industries' common stock: brothers Murray and Sam H. comprise one set, and brothers Sam M. and Ken Miller comprise the other set.

{¶4} On February 24, 2003, appellants, Murray and Sam H., as shareholders, directors, and/or officers of Trumbull Industries, filed a complaint for injunctive relief and damages against appellees, Samuel M. Miller ("Sam M.") and Daniel R. Umbs ("Umbs"). Sam M. is the sole trustee of the Samuel M. Miller Revocable Living Trust, which owns 25 percent of the outstanding voting shares of Trumbull Industries. Sam M. is vice president of sales and marketing for Trumbull Industries and serves as the company's plumbing products manager. Umbs is the former president of Briggs Plumbing Products, Inc. ("Briggs"), a supplier to Trumbull Industries.

{¶5} According to the complaint, Jacuzzi, Inc. ("Jacuzzi") entered into a contract with Briggs in 2002, in which Briggs would supply plumbing products to Jacuzzi. Umbs negotiated the Jacuzzi contract on behalf of Briggs. Sometime later in 2002, Umbs negotiated a contract to sell plumbing products to Jacuzzi on terms more favorable than those in the contract between Briggs and Jacuzzi.

{¶6} Sam M. became involved with Umbs in his efforts to sell plumbing products to Jacuzzi, which came to be known as "Private Brand." It was alleged that Sam M.'s involvement was not disclosed to appellants until December 4, 2002. Apparently, Sam M. informed appellants and shareholders of Trumbull Industries, by memorandum, of a "business opportunity" involving the operation of a business that

would market private brand plumbing and related products for sale to manufacturers and possibly other wholesalers, including Jacuzzi. The memorandum indicated that Private Brand “would source products from imported and domestic suppliers and re-brand these products under various brand names.” Sam M. called this business opportunity the “Brand Company project.” Appellants immediately objected and demanded that Sam M. cease and desist his involvement. However, appellants allege in their complaint that Sam M. did not comply but, rather, has been actively involved with Umbs in the Brand Company project.

{¶7} On February 10, 2003, Briggs filed a lawsuit against Umbs in the United States District Court for the District of South Carolina. At that time, appellants allege they discovered that Umbs had purportedly been acting on behalf of Trumbull Industries in his dealings with Jacuzzi.

{¶8} On April 28, 2003, appellees filed an answer to the complaint. Appellants later filed numerous amended complaints.

{¶9} On June 17, 2003, Sam M. filed a motion to compel appellants to repay and reimburse to Trumbull Industries all attorney fees and expenses.

{¶10} On March 1, 2004, appellants filed a motion for default judgment and/or sanctions. Appellees filed a response on March 19, 2004. The trial court denied appellants’ motion for default judgment on April 15, 2004.

{¶11} Appellants filed a motion for sanctions on April 19, 2004. Appellants filed another motion, entitled “Motion for Sanctions (Default Judgment),” on November 5, 2004. On December 6, 2004, appellees filed a memorandum in opposition to appellants’ motion for sanctions.

{¶12} Appellees filed a motion for summary judgment on September 7, 2005. On October 3, 2005, appellants filed a memorandum in opposition. Appellees filed a reply on October 18, 2005.

{¶13} A hearing was held on appellants' "Motion for Sanctions (Default Judgment)" on December 19, 2005.

{¶14} Pursuant to his decision, the magistrate determined appellants' motion to be well-taken in part. The magistrate indicated that appellees shall reimburse appellants for their reasonable and necessary attorney fees and expenses. Also, the magistrate determined that Umbs is entitled to summary judgment in his favor as a matter of law on the claims made by appellants for usurpation of a business opportunity and breach of fiduciary duty. As to all other claims, the magistrate indicated that appellees' motion for summary judgment should be denied.

{¶15} On December 15, 2006, appellees filed a motion for declaratory judgment on the issue of legal fees. Also on that date, appellants filed a motion for declaratory judgment on the issue of appellees' right to indemnification of attorney fees.

{¶16} Pursuant to its January 22, 2007 judgment entry, the trial court determined that Sam M. is entitled to have his attorney fees reimbursed from time to time by Trumbull Industries. The trial court further ordered that appellants are entitled to have their attorney fees funded by Trumbull Industries, subject to the risk of reimbursement to Trumbull Industries under the law.

{¶17} On February 6, 2007, Sam M. filed a motion for reconsideration and request for clarification of the trial court's January 22, 2007 judgment entry, which was denied by the trial court on May 18, 2007. It was from that judgment that Sam M. filed a

notice of appeal with this court, case No. 2007-T-0065, to which appellants filed a cross-appeal. On September 28, 2007, this court dismissed the appeal and cross-appeal due to lack of a final, appealable order. *Miller v. Miller*, 11th Dist. No. 2007-T-0065, 2007-Ohio-5212.

{¶18} On February 12, 2008, appellants filed a motion for reconsideration and request for clarification with respect to the trial court's January 22, 2007 judgment entry regarding the right to indemnification of attorney fees and its May 18, 2007 judgment entry. On April 18, 2008, Sam M. filed an opposition to appellants' motion for reconsideration, as well as a motion for the trial court to clarify its January 22, 2007 judgment entry.

{¶19} Pursuant to its June 30, 2008 judgment entry, the trial court ordered Trumbull Industries to pay Sam M.'s attorney fees and costs incurred from March 25, 2008. It indicated that all of Sam M.'s attorney fees incurred before March 25, 2008, shall be paid in accordance with the January 22, 2007 order.

{¶20} On July 17, 2008, appellants' counsel sent the trial court a letter, indicating Trumbull Industries' refusal to abide by the court's June 30, 2008 order to pay the invoices from Ulmer and Berne, L.L.P.

{¶21} On July 24, 2008, Sam M. filed a motion for the trial court to reconsider or clarify its January 22, 2007 order as it applies to the \$240,000 that he was required to reimburse to Trumbull Industries and to Ulmer and Berne through March 24, 2008.

{¶22} A hearing was held on July 24, 2008.

{¶23} Pursuant to its July 24, 2008 judgment entry, the trial court found Trumbull Industries in contempt of its January 22, 2007 judgment. The trial court allowed

Trumbull Industries to purge itself of contempt by paying all amounts due for the legal bills incurred on behalf of Sam M. in the amount of \$138,972.51 by 3:00 p.m. on July 24, 2008. In the event that Trumbull Industries failed to purge itself of contempt by the specified date and time, the trial court indicated that it would impose a sanction against Trumbull Industries in the amount of \$5.00 per business day commencing July 25, 2008. It is from that judgment that appellants filed a second appeal, case No. 2008-T-0076.

{¶24} On May 4, 2009, this court dismissed the appeal. *Miller v. Miller*, 11th Dist. No. 2008-T-0076, 2009-Ohio-2092. The majority opinion specifically indicated that “[t]he contempt entry in the instant matter, however, does not rise to one of finality. Pursuant to the record before us, again, there has been no finding by the trial court that the contemnor has failed to purge itself and an actual imposition of a penalty or sanction.” *Id.* at ¶32. Thus, this court determined that the July 24, 2008 judgment was not final and appealable. *Id.* at ¶33.

{¶25} On May 11, 2009, Trumbull Industries filed a motion to impose sanctions.

{¶26} Pursuant to its May 29, 2009 judgment entry, the trial court sustained the motion to impose sanctions and found that Trumbull Industries had not purged itself of contempt. The trial court imposed sanctions for contempt upon Trumbull Industries in the amount of \$5.00 per business day. The matter was stayed by the trial court pending appellate review of the contempt citation. It is from the May 29, 2009 order of contempt that appellants filed the present appeal, asserting the following assignment of error for our review:

{¶27} “The trial court abused its discretion when it ruled that Trumbull Industries must indemnify Sam M. Miller for his attorney fees.”

{¶28} Appellants present two issues: (1) Sam M. violated his corporate duties and did not act in the best interest of Trumbull Industries, as well as the trial court failed to address R.C. 1701.13; and (2) Trumbull Industries’ Articles of Incorporation do not envision reimbursement of a director’s attorney fees while a litigation is pending.

{¶29} Initially, we note that appellants are appealing from the May 29, 2009 order of contempt. “*** [I]n a contempt proceeding, a reviewing court must uphold the trial court’s decision absent a showing that the court abused its discretion. *Winebrenner v. Winebrenner* (Dec. 6, 1996), 11th Dist. No. 96-L-033, 1996 Ohio App. LEXIS 5511, at 7, citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶30} Although appellants are appealing from the order of contempt, their main focus is on the January 22, 2007 order, directing Trumbull Industries to pay Sam M.’s attorney fees during the pendency of the litigation. In ordering such payment, the trial court applied R.C. 1701.13(E)(5)(a). Thus, we must determine whether the trial court’s application of the foregoing statute was erroneous as a matter of law.

{¶31} “In Ohio, as in every other state, the long-established principle is that directors of a corporation have an obligation to the corporation which is in the nature of that of a fiduciary. A director’s obligation to the corporation includes two separate duties: loyalty and care. *** The formation of these duties is codified in R.C.

1701.59(B)[.]” *Stepak v. Schey* (1990), 51 Ohio St.3d 8, 11-12 (Holmes, J., concurring).
(Internal citations and footnotes omitted.)

{¶32} A standard of care is provided under R.C. 1701.59(B), which provides, in pertinent part:

{¶33} “A director shall perform the director’s duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. ***.”

{¶34} “In evaluating a director’s compliance with the duty of care, Ohio courts follow the ‘business judgment rule,’ and will not usually inquire into the wisdom of actions taken by the director in the absence of fraud, bad faith or abuse of discretion.” *Stepak*, supra, at 12-13 (Holmes, J., concurring).

{¶35} According to the 1986 Committee comment, “[t]he addition to division (B) [of R.C. 1701.59] conforms it to division (E) of Sec. 1701.13, which, among other things, provides for director indemnification.”

{¶36} With respect to appellants’ first issue, R.C. 1701.13(E) provides, in part:

{¶37} “(1) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee,

member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, if he had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

{¶38} "(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in

or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any of the following:

{¶39} "(a) Any claim, issue, or matter as to which such person is adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless, and only to the extent that, the court of common pleas or the court in which such action or suit was brought determines, upon application, that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper;

{¶40} "(b) Any action or suit in which the only liability asserted against a director is pursuant to section 1701.95 of the Revised Code.

{¶41} "(3) To the extent that a director, trustee, officer, employee, member, manager, or agent has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the action, suit, or proceeding.

{¶42} "****

{¶43} "(5)(a) Unless at the time of a director's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division

(E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which he agrees to do both of the following:

{¶44} "(i) Repay such amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation;

{¶45} "(ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding."

{¶46} R.C. 1701.13(E)(1), (2), and (3) permit the corporation to indemnify a director after the litigation against the director, or threatened litigation, has been concluded and the director has been successful on the merits.¹ R.C. 1701.13(E)(1) applies to an action filed against a director or officer by a third party who is outside of the corporation (i.e., an action for negligence or other torts). R.C. 1701.13(E)(2) applies to an action "by or in the right of the corporation" (i.e., a shareholder derivative action). As such, the language in R.C. 1701.13(E)(1), (2), and (3) is permissive.

{¶47} The language in R.C. 1701.13(E)(5)(a) is mandatory. That section provides that the payment of attorney fees incurred by a director "shall be paid by the corporation as they are incurred."

1. The comparable Delaware provision is contained in subparagraph (e) of 8 Del. C. Section 145. Ohio courts have looked to Delaware cases construing the provisions of 8 Del. C. Section 145 when asked to interpret and apply the comparable provisions of R.C. 1701.13(E). See *MD Acquisition, L.L.C. v. Myers*, 173 Ohio App.3d 247, 2007-Ohio-3521, at ¶7.

{¶48} Appellees cite to numerous cases from Delaware to assist this court in its interpretation of R.C. 1701.13(E). “Although the Ohio and Delaware statutes are similar, both structurally and respecting the verbiage used, the statutes are not identical. *** [T]he key difference between the two statutes is that the Ohio statute’s advancement provision states that, for a suit referenced in division 1701.13(E)(1) or (E)(2) (respecting indemnification), expenses ‘shall be paid *** as they are incurred, in advance of the final disposition of the action’ unless the corporation specifically states that it does not wish to confer advancement rights. ***. The Delaware advancement provision (8 Del. Code 145(e)), by comparison, does not mention the prior indemnification provisions (id. 145(a)-(b)) within the same statute, and states that fees and expenses ‘may be paid *** in advance of the final disposition of such action.’ ***.” (Emphasis sic.) *James River Mgmt. Co. v. Kehoe* (E.D.Va.2009), 674 F.Supp.2d 745, 753. Notably, “(n)o Delaware corporation is required to provide for advancement of expenses.” Id. at 754. (Citation omitted.)

{¶49} Although R.C. 1701.13(E)(5)(a) is mandatory in its application, it is not applicable under the factual scenario as alleged in appellants’ complaint. R.C. 1701.13(E)(5)(a) is limited to payment of legal expenses as incurred by a director who is the subject of a suit. In this case, there are two threshold requirements to invoke this statute for the benefit of the director named in the suit. First, the director must have been sued as a result of an “act or omission.” R.C. 1701.13(E)(5)(a). Second, the litigation must be “an action, suit, or proceeding referred to in division [R.C. 1701.13] (E)(1) or (2).” Id.

{¶50} As acknowledged by appellees' counsel at oral argument, "act or omission" does not mean any "act or omission" by the director. The only logical interpretation of this provision is that it be an "act or omission" of a director on behalf of the corporation. In this case, Sam. M. has not been sued as a result of any "act or omission" on behalf of the corporation. Instead, as outlined in their complaint, appellants claim Sam M. is liable for those acts done on behalf of a separate corporation, allegedly in contravention of his fiduciary duties as a director of Trumbull Industries.

{¶51} Additionally, division (E)(5) of R.C. 1701.13 refers to the indemnification division in (E)(1) and (2). Therefore, the litigation must be "an action, suit, or proceeding referred to in division (E)(1) or (2)." R.C. 1701.13. Both (E)(1) and (2) are applicable only if the director "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the corporation[.]"

{¶52} Based on the facts as alleged in the instant case, it is evident that (E)(2) is inapplicable, as that section relates to reimbursement for a director who seeks to procure a judgment in favor of the corporation.

{¶53} Similarly, (E)(1) is inapplicable to this case, as that section applies to cases "other than an action by or in the right of the corporation[.]" Based on the allegations in the complaint, this case is clearly contemplated by the exclusionary language contained in R.C. 1701.13(E)(1). Any other interpretation has the potential to result in a significant injustice to the corporation and any of the remaining shareholders. The complaint alleges harm to the corporation as a result of a violation of his duties to the corporation. This is inapposite to an "act or omission" *on behalf of* the corporation.

{¶54} We further note that the trial court's January 22, 2007 judgment entry failed to include any reference to Trumbull Industries' Articles of Incorporation. Trumbull Industries' Articles of Incorporation do not provide for advancement of a director's attorney fees; however, they do provide for indemnification. Article Six states, in pertinent part:

{¶55} "Any person who at any time shall serve, or shall have served, as director, officer or employee of the corporation, or of any other business or firm at the request of the Board of Directors or management of this corporation *** shall be saved harmless and indemnified by this corporation of all costs and expenses, including but not limited to counsel fees, amounts paid in settlement, judgments and interest on judgment and court costs, reasonably incurred in *connection* with the defense of any claim, action, suit or proceeding *** *in which he or they may be involved by virtue of such position with or by direction of this corporation[.]*" (Emphasis added.)

{¶56} Indemnification is not available under Trumbull Industries' Articles of Incorporation, inter alia, "where there is final adjudication that such person has been guilty of gross neglect or willful misconduct in the performance of duty" or where "such person shall be required to disgorge any amounts realized to [Trumbull Industries] or any other business or firm, or any contracts, transactions, offers or acts of this corporation shall be rescinded, nullified or otherwise voided."

{¶57} Appellees argue that in the absence of an advancement provision in the articles of incorporation, as contemplated by R.C. 1701.13(E)(5)(a), the advancement of fees is mandatory. This argument has been considered and rejected by the Eastern District of Virginia in *Kehoe*, supra. The court stated, "[a]lthough division (E)(5) could be

read as granting corporations the *authority* to opt out of advancement, it would be incongruous to require corporations to 'opt in' to indemnification, the underlying remedy that advancement is meant to enhance, but 'opt out' of the corollary advancement remedy." (Emphasis sic.) Id. at 753. "A corporation may choose to advance expenses even when it provides no underlying right of indemnification ***. But, all in all, the statute cannot be read to mandate advancement as the default rule for all employees under all circumstances." Id. at 754.

{¶58} Further, as we previously noted, the alleged actions at issue were not taken in Sam M.'s capacity as a director of Trumbull Industries.

{¶59} Based on the foregoing, the trial court improperly ordered Trumbull Industries to pay the attorney fees of Sam M.

{¶60} For the foregoing reasons, appellants' sole assignment of error is well-taken. The judgment of the Trumbull County Court of Common Pleas is hereby reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J., concurs with Concurring Opinion,
COLLEEN M. O'TOOLE, J., dissents with Dissenting Opinion.

DIANE V. GRENDALL, J., concurs with a Concurring Opinion.

{¶61} I concur fully in the judgment and disposition of this case as set forth in the majority opinion. I write separately, however, to emphasize that the inapplicability of

R.C. 1701.13(E)(5) in the present circumstances rests on that statute's incorporation of the "business judgment rule."

{¶62} Under R.C. 1701.13(E)(5), a director shall be reimbursed for expenses, including attorney fees, when he is the subject of a "an action, suit, or proceeding referred to in division (E)(1) or (2) of this section." Divisions (E)(1) and (2) provide for indemnification by the corporation where the director is the subject of an action, suit, or proceeding, "if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." A director's obligations to the corporation are set forth in R.C. 1701.59(B): "A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances."

{¶63} In the present case, the plaintiffs' allegations against the director are solely for actions taken in violation of the duty of good faith and contrary to the best interests of the corporation, specifically breach of his fiduciary duties to the corporation and its shareholders, fraud, and usurpation of a business opportunity. These allegations place the director's conduct outside the protection of the business judgment rule, as codified at R.C. 1701.59(B), and, therefore, beyond the application of R.C. 1701.13(E)(5). *Gries Sports Ents., Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 20 (the protections of the business judgment rule "can only be claimed by disinterested directors whose conduct otherwise meets the tests of business

judgment”; “this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally”).

{¶64} There are further conditions on which the application of R.C. 1701.13(E)(5) depend which cannot be satisfied in the present case. In order to have the corporation pay a director’s expenses during the pendency of a suit, the director must execute an undertaking in which he agrees, among other things, to “[r]easonably cooperate with the corporation concerning the action, suit, or proceeding.” R.C. 1701.13(E)(5)(a)(ii). Given the circumstances of the present case, it is evident that it is impossible for the director to reasonably cooperate with the corporation concerning the action inasmuch as the corporation’s and the director’s interests are opposed. Cf. *Westbrook v. Swiatek*, 5th Dist. No. 2009 CAE 05 0048, 2010-Ohio-2868, at ¶24 (“a corporation may be reluctant to advance funds to an officer who is perceived by the corporation as being unfaithful, or fear the funds will never be paid back”).

{¶65} The director/appellees claim that, at the time the undertaking was executed, Trumbull Industries was a not a party to the action. This argument is unavailing in that Trumbull Industries is currently a party to the action and was a party at the time the trial court held it in contempt for failing to pay the director’s fees. This argument is also disingenuous in that it ignores the reality that the corporation is comprised of four persons: the plaintiffs, and the director and his brother, thus forestalling action in the name of the corporation. Under the statute, however, the focus

is not on whether the action is pursued in the name of the corporation, but, rather, whether the director's conduct falls within the parameters of the business judgment rule.

{¶66} In the present case, the allegations are based solely on conduct outside these parameters. Accordingly, R.C. 1701.13(E)(5) does not apply and the director is not entitled to have his expenses paid during the pendency of this action.

COLLEEN M. O'TOOLE, J., dissents with Dissenting Opinion.

{¶67} I respectfully dissent.

{¶68} With respect to appellants' first issue, R.C. 1701.13(E)(1), (2), and (3) permits the corporation to indemnify a director after the litigation against the director, or threatened litigation, has been concluded and the director has been successful on the merits. As such, the language in R.C. 1701.13(E)(1), (2), and (3) is permissive.² The language in R.C. 1701.13(E)(5)(a), however, is mandatory. Again, that section provides that the payment of attorney fees incurred by a director "shall be paid by the corporation as they are incurred.

***³ Thus, pursuant to the mandatory language contained in R.C. 1701.13(E)(5)(a), I believe the trial court properly followed the law by ordering Trumbull Industries to pay the attorney fees of Sam M.

2. R.C. 1701.13(E)(1) applies to an action filed against a director or officer by a third party who is outside of the corporation (i.e., an action for negligence or other torts). R.C. 1701.13(E)(2) applies to a shareholder derivative action or an action by the corporation itself against the director or officer (i.e., an action for breach of fiduciary duty). The language in R.C. 1701.13(E)(1), (2), and (3) is nearly identical to those provisions of the Delaware statute dealing with indemnification of officers, directors, employees, and agents, 8 Del. C. Section 145 (a), (b), and (c).

3. The comparable Delaware provision is contained in subparagraph (e) of 8 Del. C. Section 145. However, the major distinctions between the Delaware and Ohio provisions are that Delaware's advancement provision is permissive and extends to officers and directors, whereas Ohio's advancement provision is mandatory and is limited to directors. Nevertheless, Ohio courts have looked to Delaware cases construing the provisions of 8 Del. C. Section 145 when asked to interpret and apply the comparable provisions of R.C. 1701.13(E). See *MD Acquisition, L.L.C. v. Myers*, supra, at ¶7.

{¶69} Appellants assert that in light of the claims of fraud and breach of fiduciary duty made against Sam M., he cannot satisfy the requirements of the business judgment rule.

{¶70} R.C. 1701.59(D), the “business judgment rule,” provides in part: “[a] director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director’s action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation.”

{¶71} Both R.C. 1701.59(D) and R.C. 1701.13(E)(5)(a), the subparagraph at issue in the instant case, deal with the financial obligations that can be imposed on a director who loses a breach of fiduciary duty lawsuit. Again, pursuant to R.C. 1701.13(E)(5)(a), when a suit is filed against a director engaged in fraud or breach of a fiduciary duty (i.e., referred to in division (E)(1) and (2)), the corporation is required to make advance payments of the director’s attorney fees. A director cannot claim the protection of the business judgment rule and obtain from the corporation indemnification of his attorney fees under R.C. 1701.13(E)(2) if a *judgment* of breach of fiduciary duty is entered against him. However, a *claim* of a breach of fiduciary duty against a director does not have the same consequences under either R.C. 1701.59(D) or R.C. 1701.13(E)(5)(a). Thus, the *claims* of a breach of fiduciary duty and other misconduct made against Sam M. were sufficient to trigger Trumbull Industries’ duty to advance his attorney fees.

{¶72} In addition, I believe appellants’ reliance on *Endres Floral Co. v. Endres* (Feb. 9, 1995), 5th Dist. No. 93AP100071, 1995 Ohio App. LEXIS 1388, is misplaced since the

appellant in that case sought indemnification under R.C. 1701.13(E)(2), and it did not involve the advancement provision of R.C. 1701.13(E)(5)(a), which is at issue in the case sub judice.

{¶73} I believe appellants' first issue is without merit.

{¶74} With regard to their second issue, I note that the trial court's January 22, 2007 order was properly authorized by the mandatory provisions of R.C. 1701.13(E)(5)(a) and does not mention Trumbull Industries' Articles of Incorporation. Since the Articles of Incorporation do not expressly *preclude* advancement of legal fees, Trumbull Industries must comply with the mandatory provisions of R.C. 1701.13(E)(5)(a).

{¶75} I believe appellants' second issue is without merit.

{¶76} For the foregoing reasons, as I would affirm the judgment of the trial court, I respectfully dissent.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MURRAY A. MILLER, et al.,
Plaintiffs-Appellants,

- vs -

SAM M. MILLER, et al.,
Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2009-T-0061

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion. Costs to be taxed against appellees.



JUDGE TIMOTHY P. CANNON

DIANE V. GRENDALL, J., concurs with Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

FILED
COURT OF APPEALS

NOV 22 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS

TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al.)	CASE NO. 2003-CV-433
)	
Plaintiffs)	JUDGE THOMAS P. CURRAN
)	
vs.)	JUDGMENT ENTRY
)	
SAMUEL M. MILLER, et al.)	
)	
)	
Defendants)	
)	
)	

This cause is before on the Court upon motion of plaintiff, Trumbull Industries, Inc., to impose sanctions for its failure to pay defendant Sam M. Miller's attorney's fees. On January 22, 2007, this Court ordered Trumbull Industries to pay defendant Miller's attorney's fees from time to time. On July 24, 2008, this Court found Trumbull Industries in contempt of the January 22, 2007 order by failure to pay Sam M. Miller's attorney's fees. This Court gave Trumbull Industries an opportunity to purge itself of contempt. Trumbull Industries has not purged itself of contempt. On May 1, 2009, the Eleventh District Court of Appeals ruled that this Court had not yet imposed the contempt sanction upon Trumbull Industries. Trumbull Industries's Motion to Impose Sanction for Contempt is therefore well-taken and sustained.

It is ORDERED, ADJUDGED and DECREED this Court imposes sanctions for contempt upon Trumbull Industries, Inc. in the amount of \$5.00 per business day. There is no just reason for delay

pursuant to Civ. R. 54(B) and this order is final and appealable.

May 29, 2009
Date

Tom P. Curran
Judge Thomas P. Curran

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