

IN THE SUPREME COURT OF OHIO

MURRAY A. MILLER, et al.	:	CASE NO: 2011-0024
	:	On Appeal from the
Appellees	:	Trumbull County Court
	:	of Appeals, Eleventh
v.	:	District
	:	
SAM M. MILLER, et al.	:	Court of Appeals
	:	Case No. 2009-T-0061
Appellants	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION  
 OF APPELLEES MURRAY A. MILLER, SAM H. MILLER AND  
 TRUMBULL INDUSTRIES, INC.

Marshall D. Buck (0009115), Counsel of Record  
 Megan M. Graff (0082836)  
 COMSTOCK, SPRINGER & WILSON CO., L.P.A.  
 100 Federal Plaza E., Ste. 926  
 Youngstown, Ohio 44503  
 (330) 746-5643  
 (330) 746-4925 (fax)  
 E-mail: [mdb@csandw.com](mailto:mdb@csandw.com)  
[mmg@csandw.com](mailto:mmg@csandw.com)  
 and

Charles L. Richards (0022128)  
 8600 E. Market Street, Suite 1  
 Warren, Ohio 44484  
 (330) 373-1000  
 (330) 394-5291 (fax)  
 E-Mail: [clr@neo.rr.com](mailto:clr@neo.rr.com)

ATTORNEYS FOR APPELLEES  
 MURRAY A. MILLER, SAM H. MILLER AND  
 TRUMBULL INDUSTRIES, INC.

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 SUPREME COURT OF OHIO

Marvin L. Karp (0021944), Counsel of Record  
Michael N. Ungar (0016989)  
Lawrence D. Pollack (0042477)  
Brad A. Sobolewski (0072835)  
ULMER & BERNE LLP  
Skylight Office Tower  
1660 West 2nd Street, Suite 1100  
Cleveland, Ohio 44113  
(216) 583-7000  
(216) 583-7001 (fax)  
E-mail: [mkarp@ulmer.com](mailto:mkarp@ulmer.com)  
[mungar@ulmer.com](mailto:mungar@ulmer.com)  
[lpollack@ulmer.com](mailto:lpollack@ulmer.com)  
[bsololewski@ulmer.com](mailto:bsololewski@ulmer.com)

ATTORNEYS FOR APPELLANT SAM M. MILLER

Chad A. Readler (0068394)  
JONES DAY  
325 John H. McConnell Boulevard, Ste. 600  
Columbus, Ohio 43215  
(614) 469-3939  
(614) 461-4198 (fax)  
E-mail: [careadler@jonesday.com](mailto:careadler@jonesday.com)

Lyle G. Ganske (0031493)  
Jeanne M. Rickert (0007703)  
Louis A. Chaiten (0072169)  
(Counsel of Record)  
Amanda R. Parker (0086072)  
JONES DAY  
901 Lakeside Avenue  
Cleveland, Ohio 44114-1190  
(216) 586-3939  
(216) 579-0212 (fax)  
E-mail: [lganske@jonesday.com](mailto:lganske@jonesday.com)  
[jmrickert@jonesday.com](mailto:jmrickert@jonesday.com)  
[lachaiten@jonesday.com](mailto:lachaiten@jonesday.com)  
[arparker@jonesday.com](mailto:arparker@jonesday.com)

Eugene P. Whetzel (0013216)  
Ohio State Bar Association  
1700 Lake Shore Drive  
Columbus, Ohio 43204  
(614) 487-2050  
(614) 485-3191 (fax)  
E-mail: [gwhetzel@ohiobar.org](mailto:gwhetzel@ohiobar.org)

ATTORNEYS FOR AMICUS CURIAE  
OHIO STATE BAR ASSOCIATION

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## THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The Eleventh District ruling is correct and this case is not of public or great general interest. Instead, this case involves a unique set of facts applied by the court of appeals to a clear and unambiguous statute. The Eleventh District clarified the inherent requirements of R.C. 1701.13(E)(5)(a) within the parameters of the Miller family and their family-owned business. There is no issue of public or great general interest in this case for three reasons.

First, accepting jurisdiction in this case would not provide resolution for other cases because this unique fact pattern will not arise in other cases involving directors' requests for advancement of attorney fees. "Unique" is the operative word. Despite Sam M. Miller's ominous predictions for Ohio corporate law, the Eleventh District Court of Appeals' decision adversely impacts only one person: Sam M. Miller, who has repeatedly stolen from Trumbull Industries. Ohio corporate law is not intended to damage corporations at the expense of directors who have violated the corporate trust and stolen from the very entity to which fidelity is owed.

Two sets of cousins own the Trumbull Industries' common stock: brothers Murray A. Miller and Sam H. Miller comprise one set, and brothers Sam M. Miller and Ken Miller comprise the other set. Sam M. Miller is one of the owners and directors of Trumbull Industries. Sam M. formed his own company, called Private Brand, and stole a business opportunity from Trumbull Industries. He did so on

behalf of, and to benefit his new corporation. As a result, Trumbull Industries and Sam M.'s cousins, Murray A. Miller and Sam H. Miller, sued Sam M. for fraud, usurpation of a business opportunity and breach of fiduciary duty.

The Eleventh District found Sam M. does not meet the statutory requirements necessary for the corporation to advance his legal fees. Specifically, the court found Sam M. never acted on behalf of Trumbull Industries during his alleged breaches of fiduciary duties. Rather, Sam M. was acting on behalf of Private Brand when he committed the wrongful acts that formed the basis of the complaint. Further, Sam M. Miller cannot "cooperate" with Trumbull Industries in this litigation. Therefore, Trumbull Industries was not required to advance defense fees under the requirements of the statute.

Sam M. relies upon this unique set of circumstances to make the dire prediction that the Eleventh District's decision will "in most cases, prevent directors of Ohio corporations from ever again invoking the protection of the statute when sued for breach of fiduciary duty." The reality is that those directors whose acts or omissions relate to the same corporation from which they seek advancement, will continue to achieve statutory advancement based on the Eleventh District's analysis. The Eleventh District's decision strengthens the impact of the statute and its application to those directors who comply with its requirements and have a valid right to advancement. Sam M. is not one of those directors and the court of appeals' decision only impacts his claim to advancement.

Second, the issue of advancement of attorney fees is adequately managed by the clear and unambiguous statutory provisions of R.C. 1701.13. The court of appeals methodically considered the language of the statute while applying it to this unusual request for advancement. R.C. 1701.13 allows a corporation to indemnify a party who is sued “by reason of the fact that he is or was a director, officer, employee, or agent of the corporation . . . .” R.C. 1701.13(E)(1). The statute requires a corporation to advance attorney fees if the director meets two conditions: (1) the director must agree to repay any advanced expenses if a court finds by clear and convincing evidence that the director intended to injure the corporation or acted recklessly; and (2) the director must reasonably agree to cooperate with the corporation concerning the suit.

This Court need not accept jurisdiction over this case to announce to the bench, bar, and citizens of Ohio the requirements for advancement of attorney fees to a director because the court of appeals holding was clear and correct. A reasonable interpretation of R.C. 1701.13, coupled with an understanding of the legislature’s intent in revising the statute, shows that the statute only mandates advancement of attorney fees in certain circumstances, and only when the statutory requirements are met. The court of appeals opinion does not create conditions on a director’s right to advancement which are not clearly set forth in R.C. 1701.13. The court of appeals analyzed the statute and correctly concluded that in light of Sam M.’s acts and omissions, he did not meet the requirements of the statute and was

not entitled to advancement. This Court should not accept jurisdiction over a case in which the court of appeals clearly and correctly applied a straightforward statute.

Third, Sam M. Miller improperly asks this Court to accept jurisdiction to engage in error correction. His request for jurisdiction amounts to nothing more than a request for reconsideration of what he believes is an erroneous decision. The court of appeals rejected Sam M.'s request for advancement because Sam M. was not sued because of acts or omissions done on behalf of Trumbull Industries, but because of acts or omissions done on behalf of Private Brand Corp., from which he received 90% of the revenues. The court of appeals also found that the suit against Sam M. did not fall within the actions contemplated by R.C. 1701.13(E)(1) or (2). While Sam M. disagrees with the way the court of appeals applied the statute, challenging the court of appeals' application of settled principles to the facts of a specific case is not a proper basis for requesting Supreme Court jurisdiction.

The court of appeals found that suits contemplated by R.C. 1701.13(E)(1) or (2) are those that arise when "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." *Miller*, ¶51. Sam M. did not act in a manner in the best interest of Trumbull Industries; he acted contrary to the best interest of Trumbull Industries. Sam M.'s actions rendered R.C. 1701.13(E)(5)(a) inapplicable and Trumbull Industries was not required to advance attorney fees.

In accord with the Eleventh District's ruling, this is not a matter of great public interest in the State of Ohio. The *Miller* court found the lawsuit centered around Sam M.'s actions that caused harm to Trumbull Industries, not actions that Sam M. performed in cooperation with Trumbull Industries.

**Argument in opposition to Propositions of Law No. 1 and 2:** R.C. 1701.13 contains clear conditions that must be met before a director is entitled to advancement. A director that does not commit an act or omission on behalf of the corporation of which he is a director does not meet the statutory requirements for advancement.

The Eleventh District Court of Appeals correctly synthesized the indemnification and advancement sections of R.C. 1701.13 and found that Sam M. Miller was not statutorily entitled to advancement of his legal fees. Sam M. Miller openly stole a business opportunity and funds in excess of \$270,191 from Trumbull Industries. Sam M. snuck into the corporate vault of Trumbull Industries, stole eleven corporate checks, without notifying the corporate comptroller, or any officer of the company, and began writing checks payable to law firms he was using to defend multiple Private Brand Corp. entities, himself, and his partner, Daniel Umbs. Pursuant to Sam M.'s instructions, the two law firms then wrote checks payable to Private Brand Corp. to "reimburse legal fees" and he also had one firm write a check for more than \$36,000 payable to Sam M. Miller for "reimbursement of legal fees", for which he had already been paid by Private Brand Corp. Setting aside the issue of whether a corporation has a duty to advance defense fees for a director, Trumbull Industries certainly did not have a duty to advance defense fees

for Daniel Umbs (who was never employed by Trumbull Industries) or Private Brand Corp., and the various other entities formed by Sam M. to prevent his fellow Trumbull Industries shareholders from learning of his deceit. Sam M., after being caught with his fingers in the proverbial cookie jar, now argues to this Court that paying his defense fees is a matter of great public interest. That notion is simply absurd.

The Eleventh District Court of Appeals held that the trial court erred in applying R.C. 1701.13(E)(5)(a) when it ordered Trumbull Industries to pay Sam M.'s attorney fees. The statute has two threshold requirements: (1) the director is sued as a result of an act or omission; and (2) the litigation must be the type described in R.C. 1701.13(E)(1) or (2). The "act or omission" must be an act or omission *on behalf of the corporation of which he is a director*. The Court found Sam M. did not act or omit on behalf of Trumbull Industries, but rather acted on behalf of Private Brand.

The Eleventh District analyzed the various subsections of R.C. 1701.13(E) and the criteria for advancement of a director's defense fees. The majority opinion correctly interpreted key language in R.C. 1701.13(E)(5)(a). In discussing the "act or omission" language of that section, the court of appeals concluded a director seeking advancement must have been sued as a result of an act or omission committed on behalf of the corporation from which he seeks advancement. *Miller*, ¶50.

The court of appeals reviewed the allegations of the complaint, which revealed that Sam M. was alleged to have committed wrongful acts on behalf of his own, new corporation, not on behalf of Trumbull Industries. Sam M. usurped a corporate business opportunity from Trumbull Industries. Therefore, his acts or omissions were committed on behalf of the new company, Private Brand, not Trumbull Industries.

It is fundamental that a director's right to advancement of legal fees under division (E)(5) depends on the allegations of the complaint. *Ridder v. Cityfed Financial Corp.* (3rd Cir. 1995), 47 F.3d 85, 89. Since Trumbull Industries sued Sam M. for acts or omissions committed on behalf of Sam M.'s new corporation, the court of appeals correctly found that section (E)(5) does not confer upon him any advancement rights.

For over twenty years, courts, corporations and corporate directors have relied on R.C. 1701.13 to analyze the right to indemnification and advancement when directors are sued "by reason of the fact" that they are a director, officer, employee or agent of the corporation. The court of appeals did not engage in the parade of horrors Sam M. so passionately describes. Instead, the court found that the clear language of the statute did not apply to Sam M.'s self-serving, self-promoting conduct, performed on behalf of another corporation to the direct detriment of the corporation he damaged: the very same corporation he asked to fund his defense. There are no "grey issues" with respect to this statute. No novel

issues of law will be resolved here. Sam M. merely disagrees with the Eleventh District's treatment of a clear and unambiguous piece of legislation.

While Sam M. and amicus curiae Ohio State Bar Association argue at length regarding the impact of the Eleventh District's decision, the truth is that the facts of this case nullify any impact of the decision on Ohio corporate law. Trumbull Industries is a family-owned business. The four directors are cousins who share stock ownership in the company. Sam M. deceived his fellow owners, stole a business opportunity from Trumbull Industries, stole money from Trumbull Industries to pay legal fees for Private Brand and Daniel Umbs. He did so on behalf of and for the benefit of Private Brand, in which he had a 90% ownership interest, as opposed to his 25% interest in Trumbull Industries.

If the goal of the 1986 amendments was to encourage outside directors to serve on corporate boards and act in a corporation's best interests without fear of personal financial exposure from lawsuits based on their good faith decisions, then the facts of this case could not be further removed from that goal. The decision in this case will not affect other directors who genuinely act pursuant to the statute designed to protect them. This decision impacts only one errant individual who acted in his own self-interest with intent to harm another corporation: the very corporation he asks to fund his legal expenses.

Based on the foregoing, the Eleventh District correctly found Sam M. Miller failed to satisfy Ohio's statutory scheme for advancement of his defense fees in this

matter. This Court should not accept jurisdiction.

**Argument in opposition to Proposition of Law No. 3:** When a corporation's articles of incorporation are silent on the issue of advancement, a director is only entitled to advancement upon the requisite showing that he meets the requirements of R.C. 1701.13

Appellants rely on the dissenting opinion of Justice O'Toole who correctly recognized that Trumbull Industries' Articles of Incorporation do not expressly preclude advancement of legal fees. *Miller v. Miller*, Trumbull App. No. 2009-T-1106, ¶74. "Ohio law does not require corporations to provide indemnification or advancement; it just gives them the power to do so." *Westbrook v. Swiatek*, Delaware App. No. 2009 CAE 05 0048, 2010 Ohio 2868, ¶25. While the majority did engage in an in-depth analysis of the opt-out provision of R.C. 1701.13(E)(5)(a), this had absolutely nothing to do with the Eleventh District's ultimate decision. The majority did not decide the case on the fact that Trumbull Industries' Articles of Incorporation did not "opt out" of advancement.

Instead, having found that Trumbull Industries' Articles of Incorporation were silent on advancement, the Eleventh District focused on the other requirements of R.C. 1701.13(E)(5)(a) and rightfully found Sam M. did not meet the requirements to have his fees advanced by Trumbull Industries. Appellants try to convince this Court that the advancement obligation imposed by division (E)(5) is mandatory because Trumbull Industries did not include opt-out language in its articles. But this disingenuous thinking overlooks the clear language of the statute

and its requirements that the director must have committed an act or omission, must be entitled to indemnification under (E)(1) or (2) and must make an undertaking containing requisite promises. Since Trumbull Industries' Articles do not mandate advancement, the Eleventh District properly applied the statute and decided Sam M. did not meet its requirements.

**Argument in opposition to Proposition of Law No. 4: A director's compliance or noncompliance with the business judgment rule does not negate a court's role in determining whether the director meets the requirements contained in R.C. 1701.13 with respect to advancement**

The concurring opinion in the *Miller* opinion includes a discussion of the business judgment rule, which, while misplaced, has no effect on the majority's decision and provides no basis upon which this Court should accept jurisdiction. In her concurring opinion, Judge Grendell seems to advance the position that unless the allegations of the complaint put the director's conduct within the protection of the business judgment rule, the director is not entitled to advancement. Appellees concede that this position would find little support in Ohio case law.

But Judge Grendell correctly recognizes the importance of a director's submission of an undertaking in which he agrees to cooperate with the corporation concerning the action which forms the basis of his request for advancement.

R.C. 1701.13(E)(5)(a) mandates that in order to qualify for advancement, the director must agree "... to do both of the following:

- (i) repay such amount if it is proved by clear and convincing evidence ...;

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

Appellant and the Amicus acknowledge in their memorandums that the language cited above is contained in the statute, yet they completely ignore, and fail to even address the obligation of the director requesting advancement to “cooperate with the corporation concerning the action, suit, or proceeding.” “In construing a statute, a court’s paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished.” *State Ex Rel Zonders, et al. vs. Delaware County Board of Elections, et al.* (1994), 69 Ohio St.3d 5, 8; citing *State v. S.R. (1992)*, 63 Ohio St.3d 590, 594-595. “Words used in a statute must be taken in their usual, normal or customary meaning.” R.C. 1.42; *Indep. Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314; *State Ex Rel Zonders, et. al. vs. Delaware County Board of Elections, et al.* (1994), 69 Ohio St.3d 5, 8. The word “cooperate” means, “To act or work with another or others: act together; to associate with another or others for mutual benefit.” *Webster’s New Collegiate Dictionary* (1981) 247. Cooperation is further defined as, “An association of individuals who join together for a common benefit; a unity of action to a common end or result, not merely joint or simultaneous action.” *Black’s Law Dictionary*, 8<sup>th</sup> Edition (2004) 359. The Ohio Legislature, in amending R.C. 1701.13 requires a unity of interest between the director and the corporation in order for the corporation to be obligated

to advance attorney fees to a director. This is a unique distinction between the Ohio and Delaware statutes, or any other state statute requiring advancement of litigation expenses for a director. A corporation that brings suit against a director for theft of corporate property simply does not have the ability to cooperate with its errant director. The Rules of Civil Procedure and the Rules of Professional Conduct prevent the parties and their counsel from engaging in the type of collaboration contemplated in R.C. 1701.13(E)(5)(a)(2) to develop a united approach or strategy for the matter being litigated. The Ohio Legislature clearly intended that before a corporation would be burdened with advancement of litigation expenses, there must be a unity of interest between the corporation and the director seeking advancement. Sam M. and Trumbull Industries will never be, and cannot be aligned in “a unity of action to a common end or result.” *Black’s Law Dictionary*, Id.

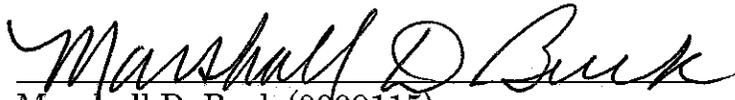
Judge Grendell also noted correctly that Sam M. could not reasonably cooperate with Trumbull Industries because that corporation’s interests and those of Sam M. are completely opposed. Thus, a director who submits an undertaking containing a promise to cooperate, but who in reality cannot cooperate, may be entitled to indemnification but not advancement. Even if the concurring opinion misses the mark on the business judgment rule, the opinion offers no reason for this Court to accept jurisdiction.

## CONCLUSION

Judges and lawyers recognize bad facts make bad law. Sam M. Miller's theft and deception of his fellow shareholders at Trumbull Industries are not the type of facts that would clarify Ohio corporation law. Contrary to the position of the Amicus, Ohio's economy will suffer a far more severe competitive disadvantage if Ohio corporations are burdened with the cost of defending directors who have stolen from the corporation. The Eleventh District Court of Appeals did not end corporate law as we know it when it denied Sam M. Miller's request for advancement of legal expenses. The court simply applied a clear and unambiguous statute to a unique set of facts and rendered an unremarkable decision that does not lend new facets to Ohio jurisprudence. Sam M. Miller set out on a self-serving course of conduct, intending to defraud Trumbull Industries to the benefit his new company. The court of appeals found that these facts simply did not support a request for advancement under the statute. This is not a matter of public or great general interest, but rather a narrow issue of one man's deceit of the company he was supposed to serve. The court of appeals merely found what was inherent in the statute from its inception: it was not designed to protect thieves. Thus, this Court

should decline to accept jurisdiction.

Respectfully submitted,



Marshall D. Buck (0009115)

Megan M. Graff (0083826)

COMSTOCK, SPRINGER & WILSON CO., LPA

100 Federal Plaza E., Ste. 926

Youngstown, Ohio 44503

(330) 746-5643

(330) 746-4925 (fax)

[mdb@csandw.com](mailto:mdb@csandw.com)

[mmg@csandw.com](mailto:mmg@csandw.com)

and

Charles L. Richards (0022128)

8600 E. Market Street, Suite 1

Warren, Ohio 44484

(330) 373-1000

(330) 394-5291 (fax)

[clr@neo.rr.com](mailto:clr@neo.rr.com)

ATTORNEYS FOR APPELLEES

## CERTIFICATION

A copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellees Murray A. Miller, Sam H. Miller and Trumbull Industries, Inc., was sent by regular U.S. Mail this 4<sup>th</sup> day of February, 2011, to:

Marvin L. Karp, Esq.  
Michael N. Ungar, Esq.  
Lawrence D. Pollack, Esq.  
Brad A. Sobolewski, Esq.  
Ulmer & Berne LLP  
Skylight Office Tower  
1660 West 2<sup>nd</sup> Street, Suite 1100  
Cleveland, Ohio 44113  
Attorneys for Appellant Sam M. Miller

Chad A. Readler, Esq.  
Jones Day  
325 John H. McConnell Blvd., Ste. 600  
Columbus, Ohio 43215

Lyle G. Ganske, Esq.  
Jeanne M. Rickert, Esq.  
Louis A. Chaiten, Esq.  
Amanda R. Parker, Esq.  
Jones Day  
901 Lakeside Avenue  
Cleveland, Ohio 44114

Eugene P. Whetzel, Esq.  
Ohio State Bar Association  
1700 Lake Shore Drive  
Columbus, Ohio 43204

Attorneys for Amicus Curiae  
Ohio State Bar Association



Marshall D. Buck  
Attorney of record for Appellees  
Murray Miller, Sam H. Miller and Trumbull  
Industries