

IN THE SUPREME COURT OF OHIO

RICHARD SAPIENZA,	:	
	:	Case No. 2011-1252
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Delaware
	:	County Court of Appeals,
MATERIALS ENGINEERING AND	:	Fifth Appellate District
TECHNICAL SUPPORT SERVICES	:	
CORPORATION, et al.,	:	Court of Appeals
	:	Case No. 10CAE110092
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF
 JURISDICTION OF DEFENDANTS-APPELLANTS
 MATERIALS ENGINEERING AND TECHNICAL SUPPORT SERVICES
 CORPORATION AND KENNETH HEATER

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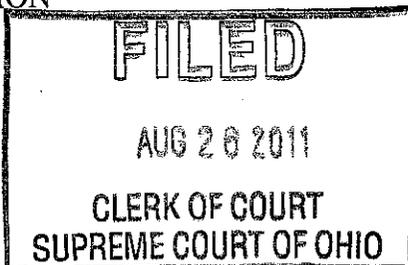


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**EXPLANATION OF WHY THIS IS A CASE
OF PUBLIC AND GREAT GENERAL INTEREST**

Defendant Materials Engineering and Technical Support Services Corporation (“METSS”), an Ohio corporation, employs at least twenty employees in Westerville and hopes to continue to do so. But the Fifth District’s split decision reversing the trial court and summarily dissolving METSS threatens to irreversibly destroy the company and its employees’ jobs.

This result has no basis in law or fact and, indeed, the legal premise underlying the Fifth District’s decision runs directly afoul of the plain language of R.C. 1701.91. That statute plainly states that: “A corporation *may* be dissolved judicially and its affairs wound up” under specific circumstances. Notwithstanding the permissive language of the statute and the express discretion granted to the trial court, the Fifth District held that, even where the evidence is uncontroverted that a shareholder was found to have committed misdeeds and then sought to manufacture a pretext for dissolution merely as a ploy to avoid the consequences of his misconduct, dissolution is mandatory simply because the wrongdoer declares a deadlock. As the dissent specifically observed, the evidence supported a finding that the “parties were not completely deadlocked and/or such deadlock was deliberately manufactured by [Plaintiff] because he was angry over the breach of fiduciary duty suit [filed by METSS] and simply trying to get even with [Defendant] Heater,” who was the other shareholder. [Slip op. ¶ 56.]

It is, of course, not the prerogative of a court to judicially rewrite a statute to reach a result inconsistent with the specific language chosen by the General Assembly. We submit this is, standing alone, a compelling reason for the Court to exercise jurisdiction. Certainly, shareholders, employees, and the public-at-large have a great interest in ensuring that a statute permitting a court to take the extraordinary act of involuntarily dissolving an active and operational corporation is applied as specifically written and not subject to multiple or

inconsistent applications. Like the proverbial bell that cannot be unrung, an operating company cannot be resurrected from the dead once dissolved.

The second compelling interest, however, is that the view espoused by the Fifth District is now “the” minority view. Every other state that has addressed this issue has reached the opposite result and has refused to permit a mischievous shareholder from perpetrating or concealing his misdeeds by dissolving the corporation. This Court has never addressed this issue and Ohio should not stand alone as the only state to condone such strategic misconduct.

STATEMENT OF THE CASE AND FACTS

A. METSS’ Organization and Operations.

METSS, incorporated in 1996, is a Westerville, Ohio based company specializing in scientific research, development and commercialization of technologies. Primarily, METSS seeks funding largely through SBIR and other Department of Defense projects, develops technologies and intellectual property and then seeks to commercialize those technologies in a practical application for everyday use. METSS’ handbook broadly defines METSS’ business as: “scientific research and scientific development; creative activities of a scientific nature; activities which directly encourage or assist scientific research, scientific development; education for and in connection with the above activities; in furtherance of the above, the reduction to practice, licensing, and other inventions, discoveries and developments.”

For most of its existence, METSS has had two 50% shareholders, Dr. Kenneth Heater and Plaintiff Dr. Richard Sapienza.¹ Plaintiff also serves as a director and also served as a full-time employee of METSS from 1994 (when METSS was an LLC prior to incorporation) through

¹ As explained below, Sapienza is the Plaintiff in the Delaware County Action but the Defendant in the Franklin County Action. Since this appeal is taken from the Delaware County Action, Sapienza is referred herein as “Plaintiff.”

his termination on February 2, 2010. During that period, Plaintiff received approximately 95% of his income through METSS. It is without dispute that, as a shareholder and director of METSS, Plaintiff has and continues to owe fiduciary duties to METSS.

But while Dr. Heater and the METSS employees were researching, developing and commercializing technologies and running the day-to-day operations of METSS (which Plaintiff had no and wanted no part of), Plaintiff was not focused on his job of moving METSS into new areas of research and development. Instead, Plaintiff used METSS' technologies to advance his personal agenda to support a number of new companies in which, without METSS' consent, Plaintiff seized opportunities that would have been advantageous for METSS.

B. Plaintiff's Outside Personal Consulting Engagements and Misappropriation of Corporate Opportunities.

Plaintiff did so in two respects. The first way Plaintiff exploited METSS was to engage in outside consulting for entities other than METSS through a d/b/a called Long Island Technological Associates ("LITA"). Unknown to METSS, Plaintiff consulted through LITA continuously from the 1990s through 2010 on matters within METSS' expertise and in clear violation of his commitment to METSS. He, of course, retained all compensation for himself.

The second was that Plaintiff secured equity participation interests in the new opportunities that he should have procured for METSS. Not only were these companies within METSS' line of business, Plaintiff would initially pursue an opportunity on behalf of METSS and then later seize the opportunity for himself. Plaintiff admits he did not disclose to METSS his ownership interests in these competing companies, nor did he call a directors meeting or shareholder meeting to seek permission to accept ownership interests in these companies for work done while employed at METSS. To the contrary, Plaintiff actively concealed his involvement in these outside entities in violation of METSS' clearly defined policies and in

violation of his fiduciary duties, even as he acted as a “double agent” to negotiate relationships and agreements between METSS and these outside entities.

Of course, a result of these misdeeds was that Plaintiff squandered over a decade worth of METSS compensation by simply using his METSS paycheck to pursue his personal agenda and ignoring his responsibilities to identify and develop commercial opportunities for METSS and establishing METSS’ future growth.

C. Plaintiff Is Caught, Terminated, and Then Goes on the Offensive.

In or about June 2009, METSS consulted its corporate counsel, Schottenstein, Zox & Dunn, regarding Plaintiff’s clear act of disloyalty and the Schottenstein firm rendered an opinion concluding that Plaintiff had indeed engaged in a prohibited conflict.² Ultimately, on February 1, 2010, because of Plaintiff’s misdeeds, METSS terminated Plaintiff’s employment. METSS then filed, in Franklin County, a complaint against Plaintiff and his multiple self-dealing entities, i.e., Hospitable Solutions, LITA, Planet Walden, Persistent Energy, Strategic AgFuel Technologies, R3 Synthesis (the “Franklin County Action”). METSS’ action against Plaintiff focused on his multiple breaches of fiduciary duties, for his diversion of corporate opportunities, and to disgorge the compensation Plaintiff received from METSS during the time he was disloyal.

Following the initiation of litigation, Plaintiff, an absentee manager for literally years, attempted to shift focus off his own misdeeds by, in part, manufacturing a claim for dissolution. He did so even though he admittedly had no (and wanted no) management responsibilities. At the time Plaintiff made the claim, he admittedly had no basis for seeking dissolution; but, rather

² Following being caught self-dealing, Plaintiff requested that Dr. Heater buy out his interest. Dr. Heater, to accommodate Plaintiff’s wishes, attempted to negotiate a fair deal to buy out Plaintiff’s interest, but Plaintiff went unresponsive and thus METSS could not wait any longer and terminated Plaintiff’s employment.

merely sought dissolution as retaliation for his termination. Understanding there was no deadlock, Plaintiff resorted to calling self-serving board meetings on March 2, March 18 and May 3, 2010, all *after* he was caught self-dealing for the express purpose of trying to create a deadlock.

The Franklin County court granted summary judgment in favor of METSS on April 20, 2010, holding that authority existed for Plaintiff's termination. On August 5, 2010, METSS moved for summary judgment on Plaintiff's dissolution claim because Franklin County had no jurisdiction over a request for dissolution because METSS' principal office is located in Delaware, Ohio. Ultimately, on August 17, 2010, the Franklin County court dismissed the dissolution claim. Plaintiff then refiled the dissolution claim in Delaware County (the "Delaware Court Action"). On September 10, 2010, METSS moved for summary judgment on Plaintiff's dissolution claim in the Delaware Court Action based on Plaintiff's misconduct predating his request for dissolution. On October 26, 2010, the Delaware Court granted METSS' motion for summary judgment on Plaintiff's dissolution claim, thereby dismissing the Delaware Court Action. The Franklin County Action continued to proceed on METSS' efforts to secure relief as a result of Plaintiff's misconduct.

Plaintiff appealed this decision to the Fifth District Court of Appeals, which then in a two-one decision reversed the trial court's decision granting METSS' summary judgment. It did so even though Plaintiff had offered no admissible evidence in support of his position that a deadlock had occurred. Rather, all that was submitted were unverified transcripts of his self-serving and self-called board meetings in March and May 2010, all occurring after Plaintiff's termination and the initiation of METSS' litigation. The Fifth District erroneously found that

dissolution was mandatory, even though no hearing has yet been conducted as statutorily required, and the language in the statute is clearly discretionary.

Thus, METSS now asks this Court to accept jurisdiction to remedy this error.³

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: R.C. 1701.91 Permits A Trial Court To Deny A Motion For Dissolution When The Record Is Uncontroverted That The Movant Had Misappropriated Corporate Opportunities, Was Seeking Dissolution To Conceal His Misdeeds, and The Record Was Otherwise Lacking Any Evidence Of Deadlock In The Management Of The Corporate Affairs.

Proposition of Law No. 2: A Trial Court's Decision To Deny Dissolution Under R.C. 1701.91 Is Subject To An Abuse Of Discretion Standard On Review.

The statute at issue plainly provides:

(A) A corporation *may* be dissolved judicially and its affairs wound up:

(4) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the directors when there is an even number of directors or by the holders of shares entitling them to exercise one-half of the voting power, when it is established that the corporation has an even number of directors *who are deadlocked in the management of the corporate affairs* and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors. Under these circumstances, dissolution of the corporation *shall not* be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.

[R.C. 1701.91(A)(4) (emphasis added).]

The Fifth District's majority decision runs contrary to the well-settled tenet of statutory construction that a court must look first to the statute itself and, if the wording of the statute is unambiguous, the statute must be applied accordingly and the interpretative effort is at an end.

³ On August 24, 2011, this Court issued an Entry granting METSS' Emergency Motion for Stay of the Court of Appeals' Judgment, staying the Fifth District's decision during the pendency of METSS' appeal to the Supreme Court.

See, e.g., State v. Elam, 68 Ohio St. 3d 585, 587 (1994) (“Where the wording of a statute is clear and unambiguous, this court’s task is to give effect to the words used.”).

Indeed, there is no ambiguity as to the consequence of this verbiage under Ohio law. “The general rule of statutory construction provides that the word ‘may’ should be construed as ‘optional, permissive, or discretionary.’” State v. Sturgeon, 138 Ohio App. 3d 882, 885 (1st Dist. 2000): This Court recently reaffirmed this rule of construction in the context of Ohio’s Public Records Act, which provides, in pertinent part, that a court “may” award attorneys’ fees to a prevailing party. State ex rel. Doe v. Smith, 123 Ohio St. 3d 44, 49 (2009). Specifically, the Court recognized that “[t]he “usage of the term ‘may’ is generally construed to render optional, permissive, or discretionary the provision in which it is embodied.” Id. at 49.⁴

As the dissent equally observed, this general rule of construction applies with particular force where, like here, “the word ‘shall’ [with its mandatory connotation] appears in close juxtaposition [to the word “may”] in other parts of the same statute.” U.S. v. Tapor-Ideal Dairy Co., 175 F. Supp. 678, 682 (N.D. Ohio 1959); see also Doe, 123 Ohio St. 3d at 50 (“In fact, when the General Assembly has intended to require an award of attorney fees in its amendment to R.C. 149.43, it has done so with specific language, *by stating in the same subsection* that the “court *shall* award reasonable attorney’s fees ...”) (emphasis added). Here, like in Doe, the applicable statute juxtaposes the word “may” with “shall” as part of the same subsection. See R.C. 1701.91(A)(4) (“[a] corporation *may* be dissolved judicially and its affairs wound up [in the stated circumstances] Under these circumstances, dissolution of the corporation *shall* not be

⁴ Accord: Hack v. Sand Beach Conservancy Dist., 176 Ohio App. 3d 309, 317 (6th Dist. 2008) (“The word ‘may’ used in [Civil Rule 41(B)(2)] ordinarily constitutes a word of permission, as opposed to a command.”).

denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit”) (emphasis added).

Of course, if the trial court were without discretion, there would have been no need for the General Assembly to have fashioned exceptions or limitations. But it did. The trial court’s exercise of its discretion is, in fact, subject to two exceptions. Section 1701.91(A)(4) precludes the trial court’s consideration of two defenses: “dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.” It is, of course, a basic tenet of statutory construction that “in enacting a statute, it is presumed that...the entire statute is intended to be effective.” R.C. 1.47(B); see also State v. Arnold, 61 Ohio St. 3d 175, 178 (1991) (it is a “cardinal rule” of statutory construction that a statute must be interpreted to give effect to every part of it). Under the majority’s construction, section 1701.91(A)(4) would be rendered a nullity, thus violating yet another basic tenet of statutory construction. State v. Baker, 131 Ohio App. 3d 507, (7th Dist. 1998) (reading a statute to render it a nullity is improper; if the General Assembly had intended such a result it would not have bothered to enact the statute in the first place).

We add that no other limitations upon the trial court’s discretion can be read into the statute under “the maxim ‘*expressio unius est exclusio alterius*.’” This doctrine “prevents [a court’s] addition of an additional statutory exclusion not expressly incorporated into this statute by the legislature.” Weaver v. Edwin Shaw Hospital, 104 Ohio St. 3d 390, 394 (2004). See also Thomas v. Freeman, 79 Ohio St. 3d 221, 224–5 (1997) (“*Expressio unius est exclusio alterius* means ‘the expression of one thing is the exclusion of the other.’ Under this maxim, ‘if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.’”); Investors REIT One v. Jacobs, 46 Ohio St. 3d 176,

181 (1989) (“The legislature’s express inclusion of a discovery rule for certain torts arising under R.C. 2305.09, including fraud and conversion, implies the exclusion of other torts arising under the statute, including negligence.”).

Thus in Weaver, for example, this Court construed a statute that tolled the statute of limitations while the “claimant is ‘within the age of minority or of unsound mind.’” Id. at 393. The defendant argued that the limitations period ran upon the appointment of a guardian because that removed the plaintiff’s unsound mind. The Court rejected this argument, however, and held that the limitations period did not commence upon the appointment of the guardian because the “only two descriptions of the term ‘disability’ are referred to in the statute—the claimant’s being ‘within the age of minority or of unsound mind’” and had “the General Assembly intended to include such a provision [triggering the limitations period upon appointment] it could have done so.” Id. at 393.

So, too, here. If the Ohio General Assembly had intended to impose other limitations on the trial court’s discretion or otherwise deny the non-movant the opportunity to advance other defenses, it certainly was within its prerogative to do so. But where, as here, it “would have been simple” for the legislature to use certain, clear language, and if the legislature chose not to, it must have “had some different meaning in mind.” State, ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, *2 (Ohio App. 10th Dist. Mar. 24, 1988). See also State, ex rel. Darby v. Hadaway, 113 Ohio St. 658, 661 (1925) (rejecting construction that could have been conveyed by “very simple and concise language”).

The Fifth District has impermissibly ignored these well-settled rules of construction and has instead interpreted as mandatory a remedy the General Assembly made within the discretion of the trial court and thus only subject to an abuse of discretion standard on appeal. In doing so,

the Fifth District permits those, like Plaintiff here, to avoid the consequences of their misdeeds by simply dissolving the corporation after they are caught. This result is not only contrary to Ohio statutory construction but is also contrary to every state which has addressed this same fact pattern. As one hornbook summarized it:

Courts occasionally limit a shareholder's right to seek dissolution for oppression under the "unclean hands" doctrine. The New York Court of Appeals has stated that "the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing involuntary dissolution, give rise to the complained act of oppression, should be given no quarter in the statutory protection."

[2 O'Neal and Thompson, Close Corporations and LLCs: Law and Practice, § 9:27 at 9-196 (emphasis added).]

An identical case to the instant litigation has already been decided in Smith-Shrader Co. v. Smith, 136 Ill.App. 3d 571 (1985). The court denied dissolution of a company that had been requested by a 50% shareholder who had enticed the corporation's customers to do business with him in a new competing corporation. There, like here, when the corporation brought breach of fiduciary duty and tortious interference claims against the dissident 50% shareholder, he counterclaimed for involuntarily dissolution. The court denied dissolution and ordered forfeiture of all of his salary after the time he began negotiating with the corporation's customers, imposed a constructive trust on all profit, and enjoined the shareholder and his new corporation from doing business with former customers of the corporation for five years, and awarding attorneys' fees and punitive damages to the other shareholder. The court did this, reasoning:

We conclude that defendants' failure to demonstrate legitimate shareholder deadlock coupled with the manifest unfairness of allowing Smith, who breached his fiduciary duty to [the corporation], to force dissolution of what is remaining of [the corporation], compels us to affirm the trial court's determination as to [denying] dissolution.

[Id. at 582.]

Moreover, the New York decision referenced by O'Neal, In re Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984), appropriately notes that it would be “contrary to this remedial purpose to permit [the dissolution statute’s] use by minority shareholders as merely a coercive tool Therefore, the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection” Id. at 1180 (emphasis added).

Thus, in Cassata v. Brewster-Allen-Wichert, Inc., 670 N.Y.S.2d 552, 553 (N.Y. App. Div. 1998), the court reversed an order dissolving a company because issues of fact remained regarding the bad faith of the shareholder seeking dissolution:

We conclude, however, that it was error to grant Cassata's motion without a hearing as there are issues of fact with respect to the majority shareholders' defense of bad faith. A minority shareholder “whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression” is not entitled to redress under the statute The shareholders of a close corporation owe each other a duty to act in good faith The parties' affidavits present disputed issues of fact with respect to the claim by the majority shareholders that Cassata's actions were undertaken with a view toward forcing a judicial dissolution of BAW in order to aid the competing insurance agency in which he had a financial interest

(Emphasis added.)

The same result was reached in Bauer v. Bauer, 54 Cal. Rptr. 2d 377 (Cal. Ct. App. 1996), where the minority shareholder of a corporation was fired after he set up a competing corporation. After his termination, the shareholder sought statutory judicial dissolution which the court declined to grant because “[i]t would be tantamount to sanctioning abuse to permit minority shareholders acting in bad faith to use [the dissolution statute] as a coercive tool to force an involuntary dissolution.” Id. at 384 (emphasis added).

See also Callier v. Callier, 61 Ill.App.3d. 1011, 1015 (1978) (denying judicial dissolution, reasoning “should we sanction what appears to be a flagrant breach of Leo’s fiduciary duty as a

director of All Steel, we would be permitting him to siphon off the going-concern of All Steel, leaving the 50% shareholder who was opposed to dissolution with only half of whatever assets are in control of the receiver. This, we think, would be manifestly unfair”); In re Radom & Neidorff, Inc., 307 N.Y. 1, 7 (Ct. App. 1954) (refusing to dissolve the company despite a feud between two shareholders as there is no absolute right to dissolution, especially where the corporation is flourishing and there is no impasse regarding corporate policies).

These cases reach the only fair result, a result consistent with R.C. 1701.91. That is, a loyal shareholder can feel safe prosecuting the misdeeds of a 50% shareholder without the fear that the disloyal shareholder can dissolve the company to hide his misdeeds and in the process destroy the lives of those employed. To allow such use of the dissolution statute is not good for the company, its employees, or the loyal shareholder—it only benefits the dissident shareholder. Courts from around the country have observed the public interest involved with the potential involuntary dissolution of companies. For instance, In re Radom, *supra*, likewise considered the injury to the public in denying the requested dissolution, finding: “the prime inquiry is, always, as to necessity for dissolution, that is, whether judicially-imposed death will be beneficial to the stockholders or members and not injurious to the public.” *Id.* at 7. The public impact here is of even greater import as METSS is a Department of Defense contractor and dissolving METSS would likely result in the mid-stream termination of METSS’ governmental contracts creating enormous waste of taxpayer funds already expended on the research and development that may never be completed.

That is exactly what Plaintiff is trying to do. In his last act of selfishness, Plaintiff is willing to sacrifice METSS, the jobs and well being of its employees all because Plaintiff wants to hide his misdeeds. Plaintiff’s plan has worked as now the Franklin County Action has been

stayed pending resolution of this appeal even though the trial on Plaintiff's misdeeds was to occur on August 2, 2011. The public has a great interest in ensuring that self-dealing shareholders, like Plaintiff, are not afforded the opportunity to do so and R.C. 1701.91 is applied as written so that trial courts have the discretion to prevent such misconduct.

Proposition of Law No. 3: An Operational Deadlock Does Not Exist Under R.C. 1701.91 When All Shareholders Are In Agreement That The Company Should Be Sold.

A separate error by the Fifth District was its refusal to recognize that no deadlock existed concerning METSS' operations, which is the focus under R.C. 1701.91. The dissent found this excerpt from Plaintiff's testimony insightful:

Q. And you're seeking to dissolve METSS even though you've made 95% of your entire income over your time at METSS through METSS?

A. Yes.

Q. And you're willing to dissolve the Company and put all those families out of work?

A. Yes.

Q. Why?

A. I told you, I have three reasons. The first one is I'm not involved in the management or the operations of the Company. Two, my partner's actually sued me to say that I don't work and don't do things for the Company. And, three, my partner is a crook.⁵ So those are very, very good reasons. Three wonderful reasons right there to dissolve the company, because I don't need it. Sapienza Deposition p.103.

[Slip op. ¶¶ 50-5.]

⁵ Still after repeated unsuccessful attempts by Plaintiff to have a receiver appointed in the Franklin and Delaware Actions, Plaintiff has produced no evidence whatsoever to prove that Dr. Heater has engaged in any wrongdoing. In fact, all Plaintiff continues to rely upon is a METSS receivable from Geo-Tech, a company in which both Plaintiff and Dr. Heater used to have ownership interests, which Plaintiff himself ratified. As the Fifth District dissent noted with respect to the dissolution claim, these after the fact allegations by Plaintiff are nothing more than retaliation.

The dissent then relied upon Plaintiff's own admission in finding that the trial court did not abuse its discretion in denying dissolution:

By his own admission, Appellant was not involved in the day-to-day management or operations of the business, and, therefore, his deadlock with Heater on some issues did not extend to how the Company was managed. As there was some evidence that the parties were not completely deadlocked and/or such deadlock was deliberately manufactured by Appellant because he was angry over the breach of fiduciary duty suit and simply trying to get even with Heater, I would find that the court did not abuse its discretion in denying dissolution.

[Id. ¶ 56.]

In short, no deadlock related to the "management of the corporate affairs" occurred to support dissolution. Just the opposite was true. Both Plaintiff and Defendant Heater have agreed METSS could be sold: "The evidence demonstrates that the parties were both willing to sell the Company." [Id. ¶ 49.] Thus, there was no evidence to support a finding of an operational deadlock within the meaning of section 1701.91.

Proposition of Law No. 4: Under R.C. 1701.91, Dissolution May Be Ordered Only After Hearing and Upon Admissible Evidence.

The Fifth District not only reversed the trial court's entry of summary judgment in favor of METSS but then summarily ordered dissolution. It did so even though R.C. 1701.91(D) prescribes that hearing is required: "After a hearing had upon such notice as the court may direct be given to all parties to the proceeding...a final order based on either upon the evidence...shall be made dissolving the corporation or dismissing the Complaint." (Emphasis added.)

Here, it is undisputed that no hearing was held. Nor was there any evidence in the record. Rather, Plaintiff only submitted transcripts, which were not notarized or certified, claiming to recount the proceedings from the board meetings he unilaterally noticed and held without quorum. These documents are of no evidentiary value and are no different than merely writing something down on a piece of paper. See Hill v. Village of West Lafayette, 1996 WL 487943, at

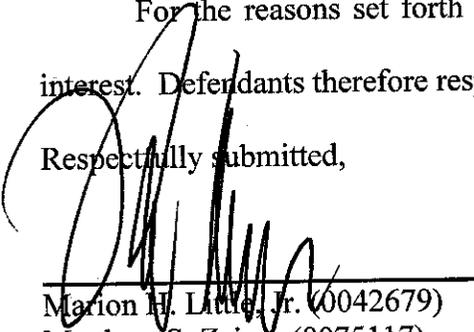
*3 (Ohio App. 5th Dist. May 24, 1996) (holding that a “deposition transcript and those deposition exhibits which were not properly notarized were not properly before the trial court and are not part of our review on appeal.”). And where a party has presented no evidence, the law of Ohio is clear that an appeal of the trial court’s decision could not be challenged. See, e.g., Gordon v. Gordon, 2009 WL 106653, at *3 (Ohio App. 5th Dist. Jan. 9, 2009) (“[I]t is well established that where a party fails to...present evidence...the absent party may not then raise issues on appeal concerning the weight of the evidence...”). “Having failed to present any evidence ... in the trial court [Plaintiff] has waived the right to contest the ... issue on appeal.” Clay v. Clay, 1995 WL 434404, at *1 (Ohio App. 9th Dist. July 19, 1995).

In short, dissolution cannot be premised upon a wink and nod. Admissible evidence is required. Here there was none and thus the Fifth District compounded its statutory construction error by ignoring Plaintiff’s failure to offer evidence in the first place.

CONCLUSION

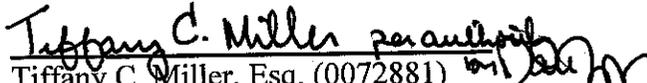
For the reasons set forth above, this case involves matters of public and great general interest. Defendants therefore respectfully request that this Court accept jurisdiction in this case.

Respectfully submitted,



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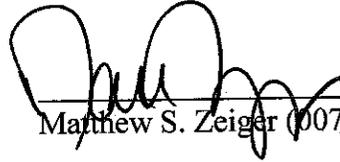
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via U.S.

Mail, this 20th day of August, 2011, on all counsel of record.

A handwritten signature in black ink, appearing to read 'Matthew S. Zeiger', is written over a horizontal line.

Matthew S. Zeiger (0075117)

900-001:210719

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD SAPIENZA
Plaintiff-Appellant

-vs-

MATERIAL ENGINEERING AND
TECHNICAL SUPPORT SERVICES
CORPORATION, ET AL.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 10CAE110092

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 10CVH081164

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

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Court of Appeals
Delaware Co., Ohio
I hereby certify the within be a true
copy of the original on file in this office.
Jan Antonopoulos, Clerk of Courts
By *JAN ANTONOPOLOS* Deputy

JAN ANTONOPOLOS
CLERK

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COURT OF APPEALS
DELAWARE COUNTY, OHIO

APPX-000001

Farmer, P.J.

{¶1} Materials Engineering and Technical Support Services Corporation (hereinafter "METSS") is an Ohio corporation with its principal office in Delaware County, Ohio. Appellant, Richard Sapienza, and appellee, Richard Heater, are the only directors and shareholders of METSS, each owning a 50% share of the corporation. Appellant resides in New York, developing technologies which the company would then market commercially. Appellee resides in Delaware County and manages the day-to-day operations of METSS.

{¶2} Appellee received information that appellant was diverting opportunities from METSS by consulting with companies other than METSS, including several corporations in which appellant held an ownership interest. Meanwhile, METSS was the sole member of Geo-Tech Polymers, LLC, a limited liability company. A disagreement arose between appellant and appellee over Geo-Tech which led to appellant divesting his interest in Geo-Tech. Following his divestment, appellant believed there were financial irregularities between Geo-Tech and METSS, with appellee diverting METSS assets to the insolvent Geo-Tech.

{¶3} On February 2, 2010, METSS filed an action against appellant in the Court of Common Pleas of Franklin County, Ohio, alleging breach of fiduciary duties, including misappropriation of corporate opportunities. On the same day, appellee fired appellant from his employment at METSS. Appellant filed a counterclaim seeking the dissolution of the corporation. On August 17, 2010, the Franklin County court dismissed the dissolution claim from the action.

{¶4} Following the filing of the Franklin County action, appellant scheduled three special shareholders meetings of METSS – the first on March 2, 2010; the second on March 18, 2010; and the third on April 14, 2010. Appellee did not appear, thereby preventing a quorum and any business from being transacted.

{¶5} An annual shareholders meeting was held on May 3, 2010 wherein appellant and appellee re-elected themselves to the board of directors. Upon considering various resolutions, the two did not agree on a single one. Appellant voted for a resolution dissolving the corporation while appellee voted against the resolution. Appellee removed the resolutions dealing with the election of corporate officers from the shareholders meeting agenda because the resolutions were to be heard during the board of directors meeting which was to be held immediately following the shareholders meeting. Before any business could be discussed at the board of directors meeting, appellee left. The election of corporate officers never took place.

{¶6} On August 5, 2010, appellant filed the instant action against appellee and METSS seeking dissolution of the corporation. He also filed a motion for appointment of a receiver and a motion to stay the Franklin County action. On September 10, 2010, appellees filed a motion for summary judgment. A non-evidentiary hearing was held on September 15, 2010. The trial court denied appellant's motion to stay the Franklin County action, and directed the matter to mediation. The remaining issues were scheduled to be heard on November 8, 2010.

{¶7} On October 25, 2010, appellant filed a cross-motion for summary judgment. By judgment entry filed October 26, 2010, the trial court granted appellees' motion for summary judgment and dismissed the complaint for dissolution.

{¶8} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO JUDICIALLY DISSOLVE THE CORPORATION PURSUANT TO R.C. 1701.91(A)(4) IN THE FACE OF UNDISPUTED EVIDENCE THAT THE PARTIES ARE DEADLOCKED REGARDING THE CONTINUED EXISTENCE OF THE CORPORATION."

II

{¶10} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONSIDERING EVIDENCE NOT RELEVANT TO THE SPECIAL STATUTORY PROCEEDING OF A JUDICIAL DISSOLUTION PURSUANT TO R.C. 1701.91(A)(4)."

III

{¶11} "IF THERE IS ANY DISPUTE AS TO THE EXISTENCE OF DEADLOCK, THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE MATERIAL ENGINEERING AND TECHNICAL SUPPORT SERVICES CORPORATION ('APPELLEE' OR 'METSS')."

IV

{¶12} "THE TRIAL COURT ERRED BY AWARDING SUMMARY JUDGMENT TO METSS BASED ON A DEFENSE THAT REQUIRES THE ADJUDICATION OF GENUINE ISSUES OF MATERIAL FACT – SPECIFICALLY QUESTIONS OF MATERIAL FACT OVER WHICH THE TRIAL COURT HAD NO JURISDICTION TO DECIDE BECAUSE THOSE ISSUES ARE BEFORE THE FRANKLIN COUNTY COURT OF COMMON PLEAS, OHIO, IN CASE NO. 10 CVH-02-1636."

V

{¶13} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE METSS BASED SOLELY ON THE FACT THAT PLAINTIFF-APPELLANT DR. RICHARD SAPIENZA ('APPELLANT' OR 'SAPIENZA') FAILED TO RESPOND TO METSS'S SUMMARY JUDGMENT MOTION WITHIN 14 DAYS."

I, III

{¶14} We address these assignments of error together as they both challenge the trial court's granting of summary judgment to appellees and failure to judicially dissolve the corporation.

{¶15} At the outset, we note that while couched in the context of a Civ.R. 56 summary judgment proceeding, this is not the type of case that would go forward with a full trial. It is the practice of Ohio courts to decide the issue of corporate dissolution by means of an evidentiary hearing rather than a full trial. *Callicoa v. Callicoa* (1994), 73 Ohio Misc.2d 38, citing *Hunt v. Kegerreis* (November 8, 1979), Monroe App. No. 523; *Sergakis v. White* (October 2, 1984), Jefferson App. No. 83-J-13. Because each party filed motions for summary judgment, it appears they tacitly agreed to allow the trial court to decide the issue based on the undisputed facts.

{¶16} R.C. 1701.91 governs judicial dissolution and provides the following in pertinent part:

{¶17} "(A) A corporation may be dissolved judicially and its affairs wound up:

{¶18} "(4) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the

directors when there is an even number of directors or by the holders of shares entitling them to exercise one-half of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors. Under these circumstances, dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.

{¶19} "(D) After a hearing had upon such notice as the court may direct to be given to all parties to the proceeding and to any other parties in interest designated by the court, a final order based either upon the evidence, or upon the report of the special master commissioner if one has been appointed, shall be made dissolving the corporation or dismissing the complaint.****"

{¶20} Because R.C. 1701.91(A)(4) involves an analysis of the facts presented by the complaining shareholders and directors, our standard of review is essentially a sufficiency of the evidence standard.

{¶21} Appellant argues the uncontroverted facts establish a deadlock exists between the parties, each owning a 50% interest in the corporation. In support of this proposition, appellant cites to the May 3, 2010 annual shareholders meeting. At this meeting, various resolutions were considered wherein the parties did not agree, including a resolution for a forensic audit of METSS and the appointment of a receiver

for METSS. May 3, 2010 Shareholders Meeting T. at 7-8. Another resolution was presented to dissolve the corporation with appellant voting for and appellee voting against. Id. at 8. Resolutions relative to other litigation, to the removal of appellant as an employee, and to make a monetary distribution to the shareholders for fiscal year 2009 were split for and against. Id. at 8-11.

{¶22} The shareholders meeting was adjourned and appellee immediately called a board of directors meeting and refused to entertain any issues and adjourned the meeting. Id. at 12-13.

{¶23} Appellant attempted to call a shareholders meeting on September 1, 2010, but appellee refused to participate. September 1, 2010 Shareholders Meeting T. at 6. A board of directors meeting was held immediately thereafter wherein appellee, as chair, left. Id. Appellant read into the record the reasons for the meeting, including three offers to purchase the corporation. Id. at 7-8. One resolution called for the filing of criminal charges against appellee for the misappropriation of funds from METSS to Geo-Tech. Id. at 12-13.

{¶24} Previously, three other special shareholders meetings were called by appellant and appellee failed to participate resulting in the lack of a quorum (March 2 and 18, 2010, and April 14, 2010).

{¶25} It is uncontested that appellant and appellee are each 50% shareholders of the corporation. Appellee runs and manages the day-to-day activity of the corporation. Appellant alleges financial misconduct by appellee in his ownership of GeoTech and his failure to fulfill the obligations to METSS as memorialized in a Memorandum of Understanding dated November 1, 2005, including the repayment of

loans, the payment of accounts receivable, and the payment of rent by GeoTech to METSS. Appellee alleges appellant has violated his duty to the corporation by engaging in outside activities. As a result, appellee as CEO terminated appellant's employment at METSS and appellant was sued by his own corporation.

{¶26} During appellee's deposition, he testified that he saw no basis and had no desire to dissolve the corporation while acknowledging that appellant sought dissolution. Heater depo. at 146-147. Appellee argues the day-to-day activity of the corporation is on-going and despite the lack of cooperation in the shareholders meetings, dissolution is not warranted. See, Appellees' Motion for Summary Judgment filed September 10, 2010.

{¶27} It is clear from the record that the issues of dissolution and sale of the corporation to another have been stonewalled by appellee in his failure to attend the three special shareholders meetings and his vote against dissolution at the May 3, 2010 annual shareholders meeting. In fact, during the operational arm of the corporation, the board of directors meeting which appellee called, appellee immediately adjourned and left.

{¶28} There is no doubt that the parties are in complete deadlock. One party wishes to end the corporation while the other wishes to continue on. Although the day-to-day activities are still happening, the governance of the corporation is at a standstill.

{¶29} Upon review, we find sufficient evidence in the record of an actual deadlock of the corporation. We find judicial dissolution to be mandated by the clear language of R.C. 1701.91.

{¶30} Assignments of Error I and III are granted.

II, IV, V

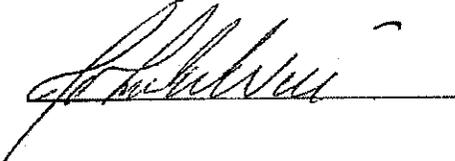
{¶31} Based upon our decision in the previous assignments, these assignments of error are moot.

{¶32} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. concurs.

Edwards, J. dissents.

JUDGES

SGF/db 629

EDWARDS, J., DISSENTING OPINION

{¶33} I respectfully dissent from the majority opinion.

{¶34} R.C. 1701.91 provides in pertinent part:

{¶35} "(A) A corporation may be dissolved judicially and its affairs wound up:

{¶36} "(4) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the directors when there is an even number of directors or by the holders of shares entitling them to exercise one-half of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors. Under these circumstances, dissolution of the corporation shall not be denied on the ground that the corporation is solvent or on the ground that the business of the corporation has been or could be conducted at a profit.

{¶37} "(D) After a hearing had upon such notice as the court may direct to be given to all parties to the proceeding and to any other parties in interest designated by the court, a final order based either upon the evidence, or upon the report of the special master commissioner if one has been appointed, shall be made dissolving the corporation or dismissing the complaint. . . ."

{¶38} I would find that based on the language of this statute, the court has discretion to grant or deny dissolution even where there is evidence of deadlock.

{¶39} The Ohio Supreme Court has discussed the issue of statutory use of the words "may" and "shall" in *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 107-108, 271 N.E.2d 834, 837-838:

{¶40} "The character of a statute, as mandatory or permissive, is commonly determined by the manner in which particular terms used therein are construed.

{¶41} "In determining whether a statute is mandatory or permissive, it is often necessary, as in this case, to trace its use of the terms 'may' and 'shall.'

{¶42} "The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary (*Dennison v. Dennison* (1956), 165 Ohio St. 146, 134 N.E.2d 574), at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation (*State ex rel. John Tague Post v. Klinger* (1926), 114 Ohio St. 212, 151 N.E. 47).

{¶43} "The word 'shall' is usually interpreted to make the provision in which it is contained mandatory (*Dennison v. Dennison*, supra), especially if frequently repeated (*Cleveland Ry. Co. v. Brescia* (1919), 100 Ohio St. 267, 126 N.E. 51).

{¶44} "Ordinarily, the words 'shall' and 'may,' when used in statutes, are not used interchangeably or synonymously. *State ex rel. Wendling Bros. Co. v. Board of Edn.* (1933), 127 Ohio St. 336, 188 N.E. 566.

{¶45} "However, in order to serve the basic aim of construction of a statute-to arrive at and give effect of the intent of the General Assembly-it is sometimes necessary to give to the words 'may' and 'shall' as used in a statute, meanings different from those given them in ordinary usage (*State v. Budd* (1901), 65 Ohio St. 1; 60 N.E. 988; *State*

ex rel. Myers v. Board of Edn. (1917), 95 Ohio St. 367, 116 N.E. 516), and one may be construed to have the meaning of the other (*State v. Budd*, supra; *State ex rel. Myers v. Board of Edn.*, supra; *Gallman v. Board of County Commrs.* (1953), 159 Ohio St. 253, 112 N.E.2d 38).

{¶46} "But when this construction is necessary, the intention of the General Assembly that they shall be so construed must clearly appear (*General Electric Co. v. International Union* (1952), 93 Ohio App. 139, 108 N.E.2d 211), from a general view of the statute under consideration (*State v. Budd*, supra; *State ex rel. Myers v. Board of Edn.*, supra), as where the manifest sense and intent of the statute require the one to be substituted for the other (*State ex rel. Mitman v. Greene County* (1916), 94 Ohio St. 296, 113 N.E. 831; *State ex rel. Methodist Children's Home v. Board of Edn.* (1922), 105 Ohio St. 438, 138 N.E. 865).

{¶47} "As Judge Stewart of this court said in *Dennison v. Dennison*, supra: 'Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion.'"

{¶48} In the instant statute, I do not find that the General Assembly clearly intended that "may" be interpreted as "shall." In subsection (D), the legislature used the word "shall" to direct the trial court to issue a final order either dissolving the corporation or dismissing the complaint. By the use of both "may" and "shall" in the same statute, it would appear the General Assembly intended the words to be given their ordinary meaning.

{¶49} I would therefore find that our standard of review is whether the court abused its discretion in denying judicial dissolution. Appellant's verified complaint demonstrates that the parties were deadlocked on the issue of dissolution of the corporation and also had failed to elect directors after Heater walked out of a meeting. However, there was evidence that the parties were not hopelessly deadlocked. The evidence demonstrates that the parties were both willing to sell the company. Appellant had no involvement in the day-to-day management of the business, and the company continued to operate in the usual manner in spite of the obvious animosity between appellant and Heater. The meetings which appellant claims demonstrate deadlock were called by appellant after he had been sued by METSS for breach of fiduciary duty and the court could have determined that he was deliberately attempting to create deadlock for the purpose of dissolving the corporation. In his deposition testimony, appellant cited three reasons for wanting to dissolve the corporation, none of which was an inability to operate the company due to deadlock:

{¶50} "Q. And you're seeking to dissolve METSS even though you've made 95 percent of your entire income over your time at METSS through METSS?

{¶51} "A. Yes.

{¶52} "Q. And you're willing to dissolve the company and put all those families out of work?

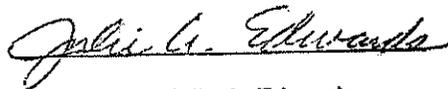
{¶53} "A. Yes.

{¶54} "Q. Why?

{¶55} "A. I told you, I have three reasons. The first one is I'm not involved in the management or the operations of the company. Two, my partner's actually sued me to

say that I don't work and don't do things for the company. And, three, my partner is a crook. So those are all very, very good reasons. Three wonderful reasons right there to dissolve the company, because I don't need it." Sapienza Deposition, p. 103.

{¶56} By his own admission, appellant was not involved in the day-to-day management or operations of the business, and, therefore, his deadlock with Heater on some issues did not extend to how the company was managed. As there was some evidence that the parties were not completely deadlocked and/or such deadlock was deliberately manufactured by appellant because he was angry over the breach of fiduciary duty suit and simply trying to get even with Heater, I would find that the court did not abuse its discretion in denying dissolution.



Judge Julie A. Edwards

