ORIGINAL

In the Supreme Court of Ohio

Dr. Richard Sapienza, *Plaintiff-Appellee,* v. Materials Engineering and Technical Support Services Corporation, et al., *Defendants-Appellants.*	:	Case No. 2011-1252 On Appeal from the Court of Appeals, Fifth Appellate District Court of Appeals Case No. 10 CAE-11-0092

MEMORANDUM IN OPPOSITION TO JURISDICTION OF PLAINTIFF-APPELLEE RICHARD SAPIENZA

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

This case involves the straightforward application of Ohio's corporate dissolution statute. This is a shareholder dispute in which one 50% shareholder and director, Defendant-Appellant Dr. Kenneth Heater, wrongfully excluded the other 50% shareholder and director, Plaintiff-Appellee Dr. Richard Sapienza, from their business, Defendant-Appellant Material Engineering and Technical Support Services ("METSS"). Dr. Heater did so to conceal the fact that assets had been improperly diverted from METSS and placed into another business owned by Dr. Heater.

Attempts to resolve the dispute through buyout negotiations failed. Thereafter, Dr. Heater fired Dr. Sapienza, and locked Dr. Sapienza out of METSS. Since then, Dr. Heater has interfered with all efforts by Dr. Sapienza to jointly manage METSS, to access its books and records, or to otherwise be involved in the conduct of its business. Dr. Heater and Dr. Sapienza cannot agree on anything concerning METSS's direction or management; indeed, the two cannot communicate except through their counsel. The bottom line is this: when it comes to METSS's corporate affairs Dr. Sapienza and Dr. Heater are intractably deadlocked.

To address this situation, Dr. Sapienza filed a complaint requesting involuntary dissolution of the company in the Delaware County Court of Common Pleas. Despite recognizing that the directors and shareholders are deadlocked, the trial court was uncomfortable dissolving METSS – a functioning business located in the court's backyard. But rather than disregarding its discomfort, the trial court incorrectly applied the dissolution statute and declined to dissolve the company. Fortunately, after reviewing the entire record, the Court of Appeals for the Fifth Appellate District agreed that the facts establish that METSS's shareholders are deadlocked and correctly ordered the trial court to dissolve the corporation.

In light of the clear and obvious deadlock, the court of appeals' decision not only was legally correct, but also was the only fair and appropriate resolution to this dispute. In fact, Ohio courts considering Ohio's dissolution statute, R.C. 1701.91, unanimously support the court of appeals' decision here. There is no dispute among Ohio courts as to the meaning of Ohio's dissolution statute – when deadlock is evident, the court must dissolve. The purpose of the dissolution statute is to protect shareholders like Dr. Sapienza from being required to participate in a business over which they have no input, say, or control. In short, there is no Ohio authority for Appellants' position that R.C. 1701.91 requires Dr. Sapienza to remain involved in a company that has been hijacked by his business partner and that continues to pursue unsubstantiated lawsuits against him.

The record in this case is long and messy. And the court of appeals properly applied the Ohio corporate dissolution statute. There is no reason for this Court to revisit the routine application of this statute. Indeed, the question of deadlock involves an extensive examination of fact, and the court of appeals' determination that corporate deadlock exists was based upon its *de novo* review of the entire factual record. This Court should not be burdened with reexamining such factual determinations. Indeed, a contrary finding would require this Court to engage in another fact-specific inquiry in this he-said/he-said dispute. Any such inquiry cannot lead to the pronouncement of law generally applicable to other cases in this State or otherwise helpful to Ohio litigants. As such, there is no great public or general interest in reviewing the specific facts of a bitter shareholder dispute and the corresponding application of the Ohio Revised Code.

Finally, Appellants' principle arguments against dissolution are not supported by Ohio law. Ohio's dissolution statute does not have an unclean hands exception. And, R.C. 1701.91 expressly provides that the profitability of a corporation is not a defense to an action for

corporate dissolution. For all these reasons, this Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

This case involves an acrimonious business relationship between Dr. Richard Sapienza and Dr. Kenneth Heater, the only directors and shareholders of METSS. *Sapienza v. METSS*, 5th Dist. No. 10CAE110092, 2011-Ohio-3559, 2011 Ohio App. LEXIS 3007, at ¶ 1. Each owns 50% of the shares of METSS's stock. Prior to his termination, Dr. Sapienza was employed as a Senior Scientist. Dr. Sapienza was the principal author and idea-generator for nearly all of METSS's Small Business Innovative Research proposals, and he had primary responsibility for developing business relationships for commercialization of METSS's technologies. Id. Dr. Heater owns the remaining 50% of the shares of METSS's stock and manages its daily operations. Id.

In late 2009 and early 2010, Dr. Heater approached Dr. Sapienza regarding a potential buyout of Dr. Sapienza's ownership interest in METSS. After the exchange of a letter of intent and counter proposals, buyout negotiations failed. Thereafter, on February 2, 2010, Dr. Heater unilaterally terminated Dr. Sapienza's employment with METSS. Id. at ¶ 3. That same day, Dr. Heater caused METSS to file a lawsuit against Dr. Sapienza in the Franklin County Court of Common Pleas (the "Franklin County Action"). Id. More importantly, since Dr. Sapienza's termination, Dr. Heater has denied Dr. Sapienza access to METSS's day-to-day operations, its books and records, and the right to participate in the benefits of METSS ownership. Further, METSS, solely at Dr. Heater's direction, has expended significant company resources pursuing claims against Dr. Sapienza in numerous courts, despite Dr. Sapienza's vigorous denial of the allegations contained in those claims.

All of METSS's allegations concerning Dr. Sapienza's purported misdeeds and "unclean

hands" that form the basis for METSS's jurisdictional claim are simply that – allegations. The Franklin County Action remains pending. Thus, contrary to what METSS would have this Court believe, not a single allegation contained in Defendants-Appellants' Memorandum in Support of Jurisdiction concerning Dr. Sapienza's conduct has been found to be meritorious by any court. All are being vigorously challenged by Dr. Sapienza. In short, the essential factual underpinnings of METSS's memorandum are nothing more than shrill cries.

But the same cannot be said for Dr. Heater. That is because Dr. Heater's other company – Geo-Tech Polymers, LLC – was found by the Delaware County Court of Common Pleas to have unlawfully withheld the repayment of METSS's assets, which had been wrongfully diverted by Dr. Heater from METSS to Geo-Tech. Remarkably, in that decision, the same trial court judge involved in this case held that: "[t]he directors are deadlocked in the management of METSS's corporate affairs and the shareholders, who are the same individuals, are unable to break that deadlock." *See Sapienza v. Geo Tech Polymers LLC*, Delaware Co. Ct. of Com. Pl. Case No. 10CVH081163, Judgment Entry Granting Plaintiff Richard Sapienza's Motion for Partial Summary Judgment, filed 04/29/11, at 7. The full amount of this diversion has not been resolved by the trial court. But Dr. Heater and METSS have conceded that Geo-Tech's obligations to METSS exceed $730,000.[1]

Regardless, following the filing of the Franklin County Action, Dr. Sapienza noticed and scheduled three separate Special Shareholders Meetings in accordance with METSS's Code of Regulations. *Sapienza*, 2011-Ohio-3559 at ¶ 4. Dr. Heater did not appear at any of the meetings, which prevented a quorum and/or any business from being transacted. Id. Shortly thereafter,

[1] The full facts related to Dr. Heater's misappropriation of METSS's corporate assets is more fully explained in Dr. Sapienza's brief to the Fifth Appellate District, filed 01/03/2011, and in its Opposition to METSS's Motion for Emergency Stay, filed in this Court on 07/29/2011.

METSS's annual shareholders meeting was held, and other than re-electing themselves to the board of directors, the two were utterly deadlocked. Id. at ¶ 5. Indeed, "considering the various resolutions, the two did not agree on a single one." Id. at ¶ 5. Following the adjournment of the shareholders meeting, Dr. Heater convened the annual meeting of METSS's directors, as required by its Code of Regulations. Id. But "[b]efore any business could be discussed at the board of directors meeting, [Dr. Heater] left. The election of corporate officers never took place." Id. Dr. Sapienza attempted to reconvene a board of directors meeting following a fourth failed Shareholders Meeting to consider three pending offers to purchase METSS, but Dr. Heater walked out of the meeting, preventing any business from being conducted. Thus, for over a year and a half, Dr. Heater and Dr. Sapienza have not been able to agree on one material decision concerning METSS.

On August 5, 2010, Dr. Sapienza filed his Verified Complaint against METSS and Dr. Heater, seeking dissolution of the corporation. Id. at ¶ 6. Dr. Sapienza also filed a motion for appointment of a receiver and a motion to stay the Franklin County Action. Id. On September 10, 2010, METSS filed a motion for summary judgment. Id.

On September 15, 2010, the trial court conducted a hearing originally scheduled only to discuss Sapienza's motion for appointment of receiver. But during the hearing receivership and dissolution issues were discussed. The trial court acknowledged that Ohio law is quite clear that when two equal directors and shareholders are deadlocked, dissolution is virtually a foregone conclusion. *See* Appellee's Opp'n to Mot. to Stay, filed 7/29/11 ("Appellee Opp."), at 10. But at the conclusion of the hearing, the trial court declined to rule on the receivership or dissolution issues and referred the matter to mediation. *Sapienza*, 2011-Ohio-3559 at ¶ 6. The court scheduled another hearing on November 8, 2010. *See* Appellee Opp. at 10.

The trial court never conducted the November 8, 2010 hearing because counsel for METSS hand-delivered a letter to the trial court's chambers suggesting – albeit, incorrect legally – that summary judgment could be entered against Dr. Sapienza because he did not timely respond to METSS's motion. Id. The Court granted METSS's proposed Entry verbatim (including its typographical errors), which was journalized on October 26, 2010. Id. at 11.

Dr. Sapienza filed a Motion to Vacate, which was briefed by the parties. Id. The trial court never ruled on the Motion to Vacate, and Dr. Sapienza timely appealed to the Court of Appeals for the Fifth District. Id.

On appeal, after examining the entire undisputed factual record, the court of appeals held:

> **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.

Sapienza, 2011-Ohio-3559 at ¶ 28 (emphasis added). Thus, the court of appeals ordered the trial court to dissolve METSS under R.C. 1701.91. Id. at ¶ 29.

Following the court of appeals' mandate, the trial court dissolved METSS on July 21, 2010. *See* Appellee Opp. at 12. Since the trial court entered its dissolution order, any action pursued on METSS behalf must be made by METSS's board of directors. *See* R.C. 1701.88 (all power of the corporation is consolidated with the board of directors of the corporation following dissolution, including the power to continue litigation). Because agreement had already been shown to be impossible, Dr. Sapienza moved for an order appointing a receiver.

One day later, Dr. Heater, without approval of the METSS board of directors, filed on METSS's behalf a Notice of Appeal in the Ohio Supreme Court and a Motion for Emergency Stay. On July 26, 2011, Dr. Heater, again without approval of the METSS board of directors, filed a motion with the trial court to vacate its order dissolving METSS pending appeal to the

Ohio Supreme Court. On July 28, 2011, the trial court entered an order staying further litigation pending the appeal to the Ohio Supreme Court. But the trial court did *not* vacate its July 21, 2011 Entry ordering the dissolution of METSS.

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST

A. The Case Law Is Well Settled And Unanimous Regarding Involuntary Dissolution.

This case is not of public or great general interest because the appellate court's opinion merely reaffirmed well-established Ohio law: when corporate shareholders are deadlocked, corporate dissolution under R.C. 1701.91 is appropriate. The appellate court's application of this principle is uncontroversial. This is best demonstrated by the fact that Appellants fail to identify any uncertainty, confusion, and/or conflict among Ohio's appellate courts regarding these well-settled rules. Nor are Appellants able to identify any tension among this Court's decisions concerning the statute. In short, Appellants simply seek an additional forum to re-argue the facts, something that cuts squarely against review by this Court.

B. The Fact Specific Nature Of This Bitter Business Dispute Renders This Case A Poor Vehicle For The Court To Address R.C. 1701.91.

If any of the legal issues here do warrant review – they do not – this case is a poor vehicle to review those issues. This case involves an acrimonious business relationship between Dr. Heater, Dr. Sapienza and several corporate entities that spans at least four lawsuits, with allegations of bad faith by both parties. The purported factual issues upon which Appellants seek this Court's review simply are not of general public interest. Moreover, to the extent that some issues herein may be recurring and could someday warrant review, like the unclean hands defense to involuntary dissolution, this case is a particularly bad vehicle for review. That is because none of the allegations raised by Appellants have any foundation – they have not been proven below – or in any court – and are simply baseless allegations. Appellants should not be

able to waste this Court's valuable time and resources with unfounded factual accusations.

ARGUMENT

Appellee's Counter-Proposition of Law No. 1: *A court properly applies R.C. 1701.91 when a company's shareholders and directors are unquestionably deadlocked in the management of the company and it orders corporate dissolution, and Ohio has no "unclean hands" defense to dissolution.*

Appellee's Counter-Proposition of Law No. 2: *A trial court's decision granting summary judgment is subject to de novo review by the court of appeals.*

The court of appeals properly applied Ohio's dissolution statute, R.C. 1701.91, which states: "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." R.C. 1701.91(A)(4).[2] Here, after reviewing the entire underlying and undisputed record, the court of appeals found that METSS's two co-equal shareholders and directors are hopelessly deadlocked in the management of corporate affairs, including the issues of the continued operation of the company. *Sapienza*, 2011-Ohio-3559, at ¶ 28. METSS's directors have been unable to conduct any company business (other than the election of Dr. Heater and Dr. Sapienza as directors), for nearly a year and a half. Moreover, there is no hope of METSS's shareholders – Dr. Sapienza and Dr. Heater – breaking the deadlock as each director owns 50% of the company's shares. There can be no question that dissolution is necessary and appropriate under such circumstances. R.C. 1701.91(A)(4); *Lautenschleger v. Monarch Mgmt., Inc.*, 5th Dist. No. 2003AP120090, 2004-Ohio-4670, 2004 Ohio App. LEXIS 4249, *appeal denied* 104 Ohio St.3d 1462, *reconsideration denied* 105 Ohio St.3d 1473. Thus, Appellants are simply

[2] As a threshold matter, neither Dr. Heater nor METSS (acting solely through Dr. Heater) is permitted to take any further unilateral action on behalf of METSS now that there is a judicial order dissolving the corporation. The Ohio Revised Code specifically consolidates all power of the corporation following dissolution, including the power to continue litigation, with the board of directors of the corporation. R.C. 1701.88. This issue is more fully briefed in Plaintiff-Appellee's Memorandum in Opposition to Motion for Emergency Stay, filed July 29, 2011.

asking this Court to reconsider a factual dispute, something this Court has not been, and should not be, inclined to do.

A. METSS Misconstrues Ohio's Dissolution Statute And Flatly Ignores The Controlling Language Contained Therein.

METSS argues that the term "may" in the statute means that a trial court has the discretion to deny dissolution even when the elements of the statute are satisfied. (METSS Br. at 6-8) Certainly, R.C. 1701.91(A) states that, "A corporation may be dissolved judicially and its affairs wound up" when five different, enumerated scenarios are established by the evidence. But contrary to METSS's claim, that is not the end of the inquiry. The statute is equally clear as to what happens when one of the five scenarios exists:

> (C) Upon the filing of a complaint for judicial dissolution, the court with which it is filed shall have power to issue injunctions, to appoint a receiver with such authority and duties as the court from time to time may direct, to take such other proceedings as may be necessary to protect the property or the rights of the complainants or of the persons interested, and to carry on the business of the corporation until a full hearing can be had. . . .
>
> (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 . . . upon the evidence . . . <u>shall</u> be made dissolving the corporation or dismissing the complaint**." . . .

R.C. 1701.91 (emphasis added.) Thus, once a complaint is filed under one of the five scenarios and the requisite evidence is presented, a court must ("shall") do one of two things: (1) order dissolution; or (2) dismiss the claim. There is no middle ground. Appellants' disagreement with the court of appeals' decision to do the former, does not make for an issue worthy of review by this Court.

B. METSS Ignores Well-Settled Ohio Law.

Not only is the language of R.C. 1701.91 clear, so is the case law. For two decades Ohio courts have <u>unanimously</u> supported the decision of the court of appeals here – that dissolution is

required under these circumstances. *See, e.g.*, *Frank Lerner & Assocs., Inc. v. Vassy* (10th Dist. 1991), 74 Ohio App.3d 537, 546 ("[W]e note that the trial court must determine whether the foregoing requirements for judicial dissolution have been met; and, if so, the trial court must proceed with winding up [the company] pursuant to R.C. 1701.91(D)."); *Nozik v. Mentor Lagoons* (1994), 11th Dist. No. 93-L-057s, 1994 Ohio App. LEXIS 1957 (holding that the trial court did not err in denying Appellants' motion to dismiss or in ordering the dissolution of the corporation when the evidence established that the directors and shareholders were deadlocked over the operation and management of corporate affairs); *Callicoat v. Callicoat* (10th Dist. Ct. of Com. Pl. 1995), 73 Ohio Misc. 2d 38, 41 ("The two principals of the corporation are at odds over the operation and management and very existence of the corporation. From the plain and unambiguous evidence dissolution of Callicoat Inc. is required by law."); *Plance v. Metal Dynamics*, 9th Dist. No. 03CA0004, 2003-Ohio-4902, 2003 Ohio App. LEXIS 4424 (holding that the trial court did not err in ordering dismissal of a corporation where "it is clear that the most basic deadlock of all in the management of corporate affairs, namely whether the corporate entity should continue to exist, occurred between these two directors. One wants the corporation dissolved; the other, as evidenced by his inaction, wants the corporation to continue."); *Herbert v. Porter*, 3d Dist. No. 13-03-53, 2004-Ohio-01851, 2004 Ohio App. LEXIS 1622 (holding that the trial court properly dissolved the corporation where the shareholders were deadlocked in voting power). METSS has not cited to any Ohio case holding to the contrary. There is simply no issue for this Court to clarify because Ohio courts are unanimous in their application of R.C. 1701.91.

C. There Is No "Unclean Hands" Defense To Dissolution In Ohio.

Here, as in the court of appeals, METSS and Dr. Heater have attempted to bolster their argument against dissolution by alleging that Dr. Sapienza violated his fiduciary duties.

Appellants' are wrong for at least two reasons. First, Appellants have *never* proven, in *any* court, that Dr. Sapienza *ever* breached his fiduciary duty to METSS.[3] Second, Appellants do not point to a single Ohio case that applies the unclean hands defense to a special proceeding under the Ohio dissolution statute. This is because there are none.

To the contrary, Ohio law is clear that an equitable doctrine of unclean hands does not apply to the dissolution under R.C. 1701.91. *Lautenschleger*, 2004-Ohio-4670, at ¶ 19 (agreeing with appellant that the trial court erred by considering evidence and equity, specifically allegations of unclean hands, which is not permitted under Ohio law.) The *Lautenschleger* decision is not alone: "[a]s we have previously stated, the dissolution of a corporation is purely statutory, and those statutes entirely define the rights of the parties. The trial court's equity jurisdiction was not invoked, and the equitable doctrine of 'unclean hands' did not apply in this case." *Chomczynski v. Cinna Scientific, Inc.*, 1st Dist. No. C-010170, 2002-Ohio-4605, 2002 Ohio App. LEXIS 4735, at ¶ 19 (*citing Civil Service Personnel Assoc. v. Akron* (1976), 48 Ohio St.2d 25, 27 ("Where a right is statutory it should not be extended beyond the scope of the statute, however inequitable the result may seem.")).

Not surprisingly, METSS relies solely on cases outside of Ohio. METSS's melodramatic argument – that the appellate court's decision makes it permissible for a shareholder to "avoid the consequences of their misdeeds by simply dissolving the corporation after they are caught" – is simply wrong. (Appellants' Mem. in Supp. of Jurisd. at 10.) A shareholder cannot just dissolve a corporation on a whim to avoid wrongdoing; shareholder deadlock must be established. Indeed, if accepted, Appellants' position creates more risk than it purportedly resolves – any valid attempt to dissolve a corporation could be thwarted by simply *alleging*

[3] To be clear, the only allegations of wrongdoing that have been proven are against Dr. Heater, in his unlawful diversion of assets from METSS to Geo-Tech.

"breach of fiduciary duty." This would erode the essential purpose of the dissolution statute.

More importantly, the cases upon which Appellants rely to support this argument involve distinct corporate dissolution statutes from other states with both (1) different language, and (2) involving the right of minority shareholders (less than 50% shareholders) – not a 50% shareholder as at issue here.[4] Surely Appellants cannot substitute the language of New York's or California's corporate dissolution statutes for that in Ohio's corporate dissolution statute. Had the General Assembly intended to create an "unclean hands" exception to Ohio's corporate dissolution proceedings, it would have done so.

D. Dissolution Of A 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.

Appellants ignore the plain text of R.C. 1701.91 and instead attempt to invoke the sympathy of the Court.[5] METSS and Dr. Heater go to great lengths to inform the Court that

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[4] *Shrader Co. v. Smith* (1985), 136 Ill. App. 3d 571 (after making a factual finding that one shareholder breached his fiduciary duties, the court declined to order dissolution because no actual deadlock was shown, which is not the circumstance before this court); *In re Kemp & Beatley, Inc.* (N.Y. 1984), 473 N.E.2d 1173 (explaining that under New York law, the court must consider both whether "liquidation of the corporation is the only feasible means" to protect the complaining shareholder's expectation of a fair return on his or her investment and whether dissolution "is reasonably necessary" to protect "the rights or interests of any substantial number of shareholders," two considerations not present in Ohio's statute); *Cassata v. Brewster-Allen-Wichert, Inc.* (N.Y. App. Div. 1998), 670 N.Y.S.2d 552 (holding that summary judgment was improper because Court failed to consider bad faith/unclean hands defense, a defense that does not apply under Ohio law); *Callier v. Callier* (1978), 61 Ill. App. 3d 1011 (holding that dissolution was not "reasonably necessary" to protect minority shareholders' rights when evidence presented supported allegation that minority shareholders acted in bad faith, a defense not applicable in Ohio); *In re Radon & Neidorff, Inc.* (1954), 307 N.Y. 1 (dismissal of a petition for dissolution was upheld by the Court of Appeals because the allegations of the petition established that dissolution would not be beneficial to the stockholders since the corporation's business was flourishing, a defense to dissolution that is not permitted under Ohio law).

[5] Though irrelevant, the court of appeals' decision ordering dissolution does not necessitate the end for METSS's employees or the cessation of its contracts. A receiver can determine the appropriate future for METSS's business. Indeed, a receiver is tasked with resolving such issues with an eye toward preserving the company's assets. While it is impossible to predict the result of a dissolution, it is not fair to presume the worst.

METSS is a successful business entity, with 20 employees, and multiple active contracts.[6] Dr. Sapienza does not dispute these facts. But they are irrelevant. Indeed, the General Assembly could not have been clearer: "[D]issolution 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).

E. The Appellate Court Properly Reviewed The Entire Record In Reversing The Decision Of The Trial Court.

In reviewing the trial court's decision, the court of appeals properly examined the entire trial court record. And it determined that corporate deadlock existed and that the dissolution of METSS was appropriate under R.C. 1701.91. While Appellants argue that the court of appeals should have applied an abuse of discretion standard, they provide no case law in support.

Appellee's Counter-Proposition of Law No. 3: *An operational deadlock exists under R.C. 1701.91 when the parties cannot agree on any operational or management decision of the company, including the issue of its continued existence. The party hoping to avoid dissolution may not defeat dissolution simply by nominally agreeing the company should be sold, while taking affirmative steps against the same.*

Appellants argue that the Appellate Court erred in holding that deadlock existed despite the fact that Dr. Heater and Dr. Sapienza both seem to agree that METSS should be sold. But the Ohio dissolution statute has no "sale exception." The issue is whether the parties are deadlocked concerning decisions necessary to conduct the company's business. Furthermore, even if there is agreement concerning the concept of a corporate sale, there is no indication that these parties could agree on any essential sale terms – that is because they cannot. Indeed, the fact that both

[6] *See, e.g.* Appellants' Mem. in Supp. of Jurisd. at 1 (noting that METSS "employs at least twenty employees in Westerville and hopes to continue to do so"); 12 ("The public impact here is of even greater import as METSS is a Department of Defense contractor . . .); 12 ("In his last act of selfishness, Plaintiff is willing to sacrifice METSS, the jobs and well being of its employees . . .); 13 (quoting deposition testimony asking Dr. Sapienza "you're willing to dissolve the Company and put all those families out of work").

individuals agreed that they could not co-manage METSS, hence their desire to sell, actually supports the court of appeals' finding of deadlock.

Here, the parties disagree on every aspect of METSS's corporate governance. And Appellants point to nary a single fact to the contrary. That is why the court of appeals held that "[t]here is no doubt that the parties are in complete deadlock . . . the governance of the corporation is at a standstill." Id. at ¶ 28.

Appellee's Counter-Proposition of Law No. 4: *A hearing was held as required by R.C. 1701.91, and the court examined admissible evidence in holding that dissolution is proper.*

Finally, Appellants argue that the court of appeals' opinion must be overturned because a hearing was not held on the dissolution issue. This argument is wrong. On September 15, 2010, the trial court conducted a hearing originally scheduled only to discuss Sapienza's motion for appointment of receiver. And, during that hearing, the receivership and dissolution issues were addressed. The trial court agreed that Ohio law is very clear that when two equal directors and shareholders are deadlocked, dissolution is virtually a foregone conclusion. But the trial court expressed displeasure in dissolving a successful business.

At the conclusion of the hearing, the trial court declined to rule on the receivership or dissolution issues and referred the matter to mediation. *Sapienza*, 2011-Ohio-3559, at ¶ 6. The court informed the parties that the receivership and dissolution issues were subject to further hearing on November 8, 2010. Id. But the trial court never conducted its November 8, 2010 oral hearing because METSS circumvented that hearing by hand-delivering a letter to the trial court's chambers suggesting – incorrectly – that summary judgment could be entered against Dr. Sapienza because he failed to timely respond to METSS's motion. The trial court adopted METSS's proposed order and granted METSS's motion for summary judgment. It is disingenuous for METSS to now claim that no hearing occurred. A hearing *was* held, and

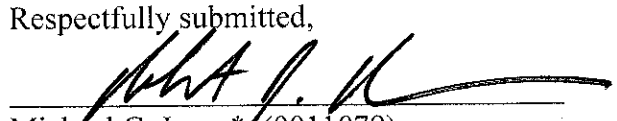
METSS is the party who engaged in legal maneuvering to assure that the second hearing would not occur. Thus, even if the first hearing was somehow short of what is contemplated by the statute (which it was not), under the doctrine of invited error, a party cannot take advantage of an error that he himself has invited or induced the trial court to make. *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 521.

Regardless, the trial court had before it hundreds of pages of evidence, as did the appellate court, to allow it to find that dissolution is required. The transcripts that METSS now complains of (for the first time) were meetings at which Dr. Heater himself was present. Dr. Heater has never suggested that these transcripts are incomplete or inaccurate, nor has he otherwise objected to their use. And it is now too late. Simply put, METSS's proposition of law number four is a desperate attempt to manufacture an issue for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should decline to accept jurisdiction over the appeal. The court of appeals properly applied Ohio's corporate dissolution law, the application of which is not an issue of great general or public interest, as Appellants contend.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Opposition to Jurisdiction of Plaintiff-Appellee Richard Sapienza* was served by U.S. mail, with sufficient postage, this 26th day of September, 2011, on the following:

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