

ORIGINAL

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.	:	

MOTION FOR RECONSIDERATION OF DEFENDANTS-APPELLANTS
MATERIALS ENGINEERING AND TECHNICAL SUPPORT SERVICES
CORPORATION AND KEN HEATER

Marion H. Little, Jr. (0042679) *Counsel of Record*
 Matthew S. Zeiger (0075117)
 ZEIGER, TIGGES & LITTLE LLP
 41 South High Street, Suite 3500
 Columbus, Ohio 43215
 (614) 365-9900
 Facsimile: (614) 365-7900
 Little@litohio.com
 zeigerm@litohio.com

Stephen D. Martin (0010851)
 50 North Sandusky Street
 Delaware, Ohio 43015-1926
 Phone: (740) 363-1313
 Fax: (740) 362-3288
 smartin@mmpdlaw.com

COUNSEL FOR DEFENDANT-
 APPELLANT MATERIALS ENGINEERING
 AND TECHNICAL SUPPORT SERVICES
 CORPORATION

Michael G. Long (0011079) *Counsel of Record*
 William D. Kloss, Jr. (0040854)
 Robert J. Krummen (0076996)
 Vorys, Sater, Seymour & Pease, LLP
 52 E. Gay St., P.O. Box 1008
 Columbus, Ohio 43216-1008
 (614) 464-6297
 Facsimile: (614) 719-4829
 mglong@vorys.com
 wdkloss@vorys.com
 rjkrummen@vorys.com
 COUNSEL FOR PLAINTIFF-APPELLEE
 RICHARD SAPIENZA

Tiffany C. Miller, Esq. (0072881)
 Bailey Cavalieri LLC
 One Columbus
 10 West Broad Street, 21st Floor
 Columbus, Ohio 43215
 (614) 229-3211
 Facsimile: (614) 221-0479
 tiffany.miller@baileycavalieri.com

COUNSEL FOR DEFENDANT-
 APPELLANT KENNETH HEATER

FILED
 NOV 28 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENTS OF THE CASE AND FACTS	3
ARGUMENT I NSUPPORT OF RECONSIDERATION AND PROPOSITIONS OF LAW	5
<u>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</u>	5
<u>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</u>	5
A. Reconsideration Is Appropriate Where The Attention Of The Court Is Called To Issues That May Not Have Been Considered In The First Instance	5
B. The Fifth District’s Decision Runs Afoul Of The Plain Language Of R.C. 1701.91	6
C. The Fifth District’s Decision Constitutes The Singular Exception To The Rule Adopted By Every Other Court To Consider This Issue.....	10
D. This Great Public Interest Is Magnified In A Closed Corporation Context.....	13
CONCLUSION.....	14
APPENDIX	<u>Appx. Page</u>
Opinion of the Delaware County Court of Appeals	1
Judgment Entry of the Delaware County Court of Appeals	15
November 16, 2011 Entry of The Ohio Supreme Court	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Bauer v. Bauer</u> , 54 Cal. Rptr. 2d 377 (Cal. Ct. App. 1996)	11
<u>Callier v. Callier</u> , 61 Ill.App.3d. 1011 (1978)	12
<u>Cassata v. Brewster-Allen-Wichert, Inc.</u> , 670 N.Y.S.2d 552 (N.Y. App. Div. 1998)	11, 12
<u>Crosby v. Beam</u> , 47 Ohio St. 3d 105 (1989)	1, 13
<u>Dublin Securities, Inc. v. Hurd</u> , 133 F.3d 377 (6th Cir. 1997)	2
<u>Hack v. Sand Beach Conservancy Dist.</u> , 176 Ohio App. 3d 309 (6th Dist. 2008) ...	7
<u>Heaton v. Rohl</u> , 193 Ohio App. 3d 770 (11th Dist. 2011)	1, 13
<u>In re Kemp & Beatley, Inc.</u> , 473 N.E.2d 1173 (N.Y. 1984)	11
<u>In re Radom & Neidorff, Inc.</u> , 307 N.Y. 1 (Ct. App. 1954)	12
<u>Investors REIT One v. Jacobs</u> , 46 Ohio St. 3d 176 (1989)	8-9
<u>McQuade v. Rosecrans</u> , 36 Ohio St. 442 (1881)	2
<u>Morrison v. Gugle</u> , 142 Ohio App.3d 244 (10th Dist. 2001)	1, 13
<u>Pinter v. Dahl</u> , 486 U.S. 622 (1988)	2
<u>S&P Lebos, Inc. v. Ohio Liquor Control Comm'n</u> , 163 Ohio App. 3d 827 (10th Dist. 2005)	6
<u>Smith-Schrader Co. v. Smith</u> , 136 Ill.App. 3d 571 (1985)	10
<u>State, ex rel. Darby v. Hadaway</u> , 113 Ohio St. 658 (1925)	9
<u>State, ex rel. Doe v. Smith</u> , 123 Ohio St. 3d 44 (2009)	7
<u>State v. Arnold</u> , 61 Ohio St. 3d 175 (1991)	8
<u>State v. Baker</u> , 131 Ohio App. 3d 507 (7th Dist. 1998)	8
<u>State v. Elam</u> , 68 Ohio St. 3d 585 (1994)	7

<u>State v. Sturgeon</u> , 138 Ohio App. 3d 882 (1st Dist. 2000)	7
<u>Thomas v. Freeman</u> , 79 Ohio St. 3d 221 (1997)	8
<u>U.S. v. Tapor-Ideal Dairy Co.</u> , 175 F. Supp. 678 (N.D. Ohio 1959)	7
<u>Weaver v. Edwin Shaw Hospital</u> , 104 Ohio St. 3d 390 (2004)	8

Unreported Cases

<u>State, ex rel. Pickrel v. Industrial Commission</u> , 1988 WL 35809 (Ohio App. 10 th Dist. Mar. 24, 1988)	9
---	---

Other Authorities

R.C. 1701.91	6
S.Ct. Prac. R. 11.2(B)(1)	6
2 O’Neal & Thompson, Close Corporations and LLCs: Law and Practice, § 9:27...	10
5 O. Jur. § 417.....	5

INTRODUCTION

Pursuant to Rule 11.2, Defendants Materials Engineering and Technical Support Services Corporation (“METSS”) and Kenneth Heater move the Court to reconsider its order of November 16, 2011 Entry declining to accept jurisdiction of the Fifth District’s split decision reversing the trial court and summarily dissolving METSS.¹ A decision which, if left intact, not only has the potential to irreversibly destroy METSS and its employees’ jobs, but also creates a public policy that encourages and rewards shareholder misconduct. Such a policy runs directly afoul of the numerous decisions issued by this Court and Ohio appellate courts imposing enhanced fiduciary duties upon shareholders in a close-corporation context. Indeed, decisions such as Crosby v. Beam, 47 Ohio St. 3d 105 (1989), applying the heightened fiduciary duty in the close corporation context are rendered a nullity.²

At bottom, the import of the Fifth District’s decision is that where a close corporation has two 50% - 50% shareholders, the wrongdoer shareholder can freely ignore the heightened fiduciary duties owed to the company and the other shareholder without fear of repercussion given the wrongdoer holds the nuclear threat of dissolution. By simply ignoring the plain language of R.C. 1701.91 and the decisions of every other court in the nation that has addressed this issue, the Fifth District has held the trial court lacks any discretion whatsoever under the dissolution statute, and thus a pretext deadlock created by a wrongdoer necessarily compels, as a

¹ A copy of the Fifth District’s Opinion is attached as Appx-1 and this Court’s November 16, 2011 Entry is attached as Appx-16.

² It would also render a nullity the multitude of appellate court decisions applying the heightened fiduciary duty standard to 50%-50% shareholders of a close corporation. See Morrison v. Gugle, 142 Ohio App. 3d 244, 255 (10th Dist. 2001) (“impos[ing] the heightened fiduciary duty in cases where the actors are equal shareholders”); Heaton v. Rohl, 193 Ohio App. 3d 770, 782 (11th Dist. 2011) (applying a “heightened fiduciary duty” to shareholders of a close corporation.)

matter of law, dissolution, thus facilitating the wrongdoer's efforts to conceal his misconduct. Under this rule of law, the innocent shareholders in Ohio are left with a Hobson's choice: to continue to permit the wrongdoer to pilfer the company or to confront the wrongdoer and subject the company, as well as the innocent shareholder's life's work, to the wrongdoer's unilateral choice to dissolve the company to hide his misdeeds. This is not the rule of law anywhere but first in the Fifth District and now in the State of Ohio.

Ironically, where a party has proceeded improperly or engaged in misconduct, the law often leaves the parties as it finds them. However, until now, this legal proposition, without exception, only negatively impacted the wrongdoer in an effort to deter illegality. See Pinter v. Dahl, 486 U.S. 622, 634 (1988) ("denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality"); McQuade v. Rosecrans, 36 Ohio St. 442, 448 (1881) (indicating that courts "always, and uniformly, den[y]" aid under the maxim "in pari delicto potior est conditio defendentis, not because the defendant's rights are superior to the plaintiff's, but coming into court with unclean hands, [the court] refuses to exercise its powers in his behalf."); Dublin Securities, Inc. v. Hurd, 133 F.3d 377, 380 (6th Cir. 1997) (applying "the equitable principle that '[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'").

Here, for the first time just the opposite occurred: the Court left the parties where they stood based upon the misconduct of the wrongdoer and to the disadvantage of the innocent party. In essence the Court is enabling the illegality instead of deterring it. METSS requests the Court to reconsider its denial of jurisdiction since the Fifth District's decision is both counter to the plain language of R.C. 1701.91 and uniform decisions of this Court and the other courts of Ohio

imposing substantial duties on shareholders. It has never been the rule, nor should it, that an innocent party should be forced to make such a Hobson's choice.

STATEMENT OF THE CASE AND FACTS

The facts are undisputed and are set forth at length in METSS' Motion in Support of Jurisdiction. METSS hereby incorporates by reference the Statement of the Case and Facts section from that Motion. For purposes of this Motion for Reconsideration, the following facts highlight METSS, the wrongdoer's repeated misdeeds, and the impact upon METSS, its employees and their families should the Court not reconsider its denial of jurisdiction:

- METSS, a scientific research and development company was incorporated in 1996 and has been based in Westerville, Ohio ever since.
- METSS' remarkable success has been based upon seeking and receiving funding to work on SBIR and Department of Defense projects, developing technologies and intellectual property and then commercializing those technologies into everyday uses.
- For most of its existence, Dr. Kenneth Heater and Dr. Richard Sapienza ("Plaintiff") have owned METSS 50%-50%. Plaintiff also serves as a director and served as a *full-time* employee of METSS from 1994 through his termination on February 2, 2010. Plaintiff was charged with moving METSS into new areas while Heater ran the day-to-day operations. During that period, Plaintiff admits receiving approximately 95% of his income through METSS; which in and of itself was a surprise to Heater, as Heater was under the impression Sapienza, as a full time employee of METSS, was deriving 100% of his income from METSS.
- Instead of working for METSS, Plaintiff admits that he used METSS' technologies and resources to advance his personal agenda by engaging for upward of *fifteen years* in

outside consulting for entities other than METSS through a d/b/a called Long Island Technological Associates (“LITA”). Plaintiff also admits that he secured equity participation interests in the new opportunities which Plaintiff would initially pursue on behalf of METSS before seizing the opportunity for himself, without ever disclosing the opportunity or his subsequent interest to METSS.

- Of course, one result of these misdeeds was that Plaintiff squandered more than a decade worth of METSS compensation by simply using his METSS paycheck to pursue personal business opportunities within METSS’ line of business.
- In or about June 2009, Plaintiff was caught self-dealing and METSS’ corporate counsel rendered an opinion concluding that Plaintiff had indeed engaged in a prohibited conflict. After efforts to resolve this misconduct failed, METSS terminated Plaintiff’s employment on February 1, 2010.
- 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, seeking 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 the appearance of a deadlock.

- METSS obtained summary judgment on its ability to terminate Plaintiff's employment. Additionally, *fifteen months ago*, in August 2010, METSS moved for summary judgment on its claims in Franklin County; however, now a year later, Plaintiff still has yet to file a response and has attempted at every turn to delay matters.
- On October 26, 2010, after Plaintiff refiled his dissolution case that had been dismissed in Franklin County, the Delaware Court granted METSS' motion for summary judgment on Plaintiff's dissolution claim, thereby dismissing Plaintiff's dissolution claim. The Franklin County Action continued to proceed on METSS' efforts to secure relief as a result of Plaintiff's misconduct. Plaintiff then appealed the dissolution 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. The Fifth District held that the trial court lacked discretion under R.C. 1701.91 and the review on appeal was de novo, as opposed to an abuse of discretion. METSS appealed to this Court which denied jurisdiction over the appeal on November 16, 2011.

ARGUMENT IN SUPPORT OF RECONSIDERATION AND 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.

- A. Reconsideration Is Appropriate Where The Attention Of The Court Is Called To Issues That May Not Have Been Considered In The First Instance.**

As a threshold matter, it is hornbook law that the “Ohio Supreme Court...may entertain an application for reconsideration...upon any ground that the court might consider to be in furtherance of justice.” 5 O. Jur. § 417. Supreme Court reconsideration is particularly appropriate where, as here, the reconsideration focuses upon “[t]he Supreme Court’s refusal to grant jurisdiction to hear a discretionary appeal.” S.Ct. Prac. R. 11.2(B)(1).

The test for determining whether reconsideration is appropriate is “whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for consideration that either was not considered or was not fully considered when it should have been” S&P Lebos, Inc. v. Ohio Liquor Control Comm’n, 163 Ohio App. 3d 827, 829 (10th Dist. 2005) (granting the motion for reconsideration).

Here, while the Court did not issue a substantive decision in electing to deny jurisdiction over the appeal, from the denial it is clear that the impact of the Fifth District’s decision was not fully considered by the Court and thus this Motion is appropriate.

B. The Fifth District’s Decision Runs Afoul Of The Plain Language Of R.C. 1701.91.

R.C. 1701.91, 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).]³

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. 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 only 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,

³ As discussed, Plaintiff attempt to manufacture a basis of deadlock was merely a pretext. Even after Plaintiff’s termination, Plaintiff and the innocent shareholder, Ken Heater, have successfully elected directors for the past two years. As such, there was no evidentiary basis for dissolving METSS.

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.”).

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 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, 511 (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.

C. The Fifth District’s Decision Constitutes The Singular Exception To The Rule Adopted By Every Other Court To Consider This Issue.

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 undertake 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 (Ill. App. Ct. 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 (N.Y. 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 innocent shareholder—it only benefits the wrongdoer 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, disrupting payments to innocent subcontractors and 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.

D. This Great Public Interest Is Magnified in a Close Corporation Context.

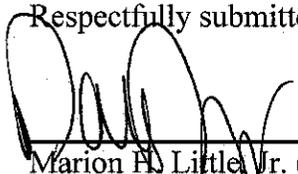
This is especially true in a close corporation context. Ohio courts have uniformly “imposed the heightened fiduciary duty in cases where the actors are equal shareholders.” *Morrison*, 142 Ohio App. 3d at 255 (10th Dist. 2001); *Crosby v. Beam*, 47 Ohio St. 3d at 109 (1989) (applying the heightened fiduciary duty standard to close corporations explaining the “duty is similar to the duty that partners owe one another in a partnership...”); *Heaton v. Rohl*, 193 Ohio App. 3d at 782 (11th Dist. 2011) (applying a “heightened fiduciary duty” to shareholders of a close corporation.) The Fifth District’s decision undercuts this enhanced fiduciary duty inasmuch as it allows a wrongdoing shareholder absolute protection to shield the

shareholder's wrongdoing from scrutiny by simply dissolving the company when the wrongdoing comes to light. That simply is not the law of any other state and cannot be the law of Ohio.

CONCLUSION

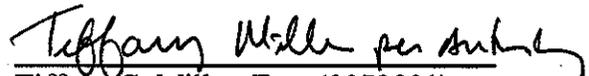
For the reasons set forth above, there is no question that this case involves matters of public and great general interest. Defendants therefore respectfully request that this Court reconsider its November 16, 2011 entry and accept jurisdiction in this case.

Respectfully submitted,



Marion F. Little Jr. (0042679)
Matthew S. Zeiger (0075117)
ZEIGER, TIGGES & LITTLE LLP
41 S. High Street, Suite 3500
Columbus, Ohio 43215
Telephone: (614) 365-9900
Facsimile: (614) 365-7900
little@litoio.com

Attorneys for Defendant-Appellant
Materials Engineering and Technical
Support Services Corporation

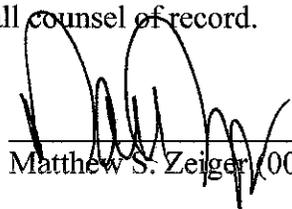


Tiffany C. Miller, Esq. (0072881)
Bailey Cavaleri LLC
One Columbus
10 West Broad Street, 21st Floor
Columbus, Ohio 43215
Telephone: (614) 229-3211
Facsimile: (614) 221-0479
tiffany.miller@baileycavaleri.com

Attorney for Defendant-Appellant
Kenneth Heater

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via U.S. Mail, this 28th day of November, 2011, on all counsel of record.



Matthew S. Zeiger (0075117)

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

MICHAEL G. LONG
WILLIAM D. KLOSS, JR.
ROBERT J. KRUMMEN
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

For Defendants-Appellees

MARION H. LITTLE, JR.
MATTHEW S. ZEIGER
41 South High Street
Suite 3500
Columbus, OH 43215

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: *[Signature]* Deputy

ROBERT G. APPEALS
DEPARTMENT
CITY, OHIO
2011 JUL 15 AM 11:36
JAN ANTONOPOLOS
CLERK

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. Kegerrels* (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

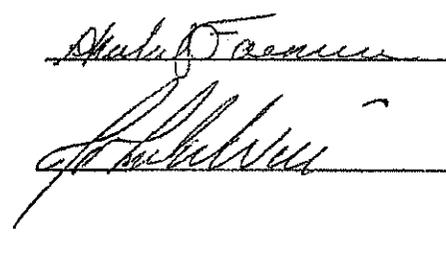
{¶31} Based upon our decision in the previous assignments, these assignments of error are moot.

{¶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.

The image shows two handwritten signatures in cursive script, each written over a horizontal line. The first signature is for the presiding judge, and the second is for a concurring judge. The lines are positioned to the right of the text above.

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 *Dorian 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. 287, 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?

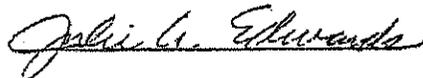
{¶53} "A. Yes.

{¶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

The Supreme Court of Ohio

FILED

NOV 16 2011

CLERK OF COURT
SUPREME COURT OF OHIO

Richard Sapienza

Case No. 2011-1252

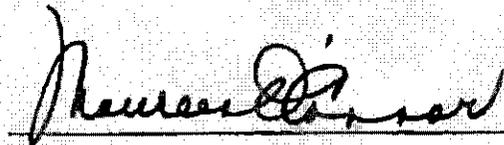
v.

ENTRY

Material Engineering and Technical Support
Services Corporation, et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Delaware County Court of Appeals; No. 10CAE110092)



Maureen O'Connor
Chief Justice