

INTRODUCTION

Appellants' Motion for Reconsideration epitomizes Appellants' litigation strategy in this case – delay and waste METSS's limited assets (half of which belong to Dr. Sapienza) in order to avoid the dissolution mandate of the court of appeals and the order of the trial court. And this Court need look no further than Appellants' Motion to reach this conclusion. No new legal authority is cited. No new factual arguments are advanced. Rather, the Motion simply regurgitates, primarily word for word, the jurisdictional brief submitted by Appellants, a brief already found lacking by this Court. Furthermore, Appellants have attempted to stymie further order on dissolution by the trial court by providing notice of their Motion to the trial judge. The result? Despite the passing of almost 6 months since dissolution was mandated, *METSS remains absolutely unchanged* – Dr. Heater still runs METSS's operations and makes every business decision, all to the total exclusion (operationally and economically) of Dr. Sapienza. Enough is enough. Justice delayed is justice denied. This Court should immediately deny Appellant's motion so that dissolution can take place as required by Ohio law.

The Fifth District Court of Appeals' decision below involved the proper and straightforward application of Ohio's dissolution statute, R.C. 1701.91. Moreover, the court of appeals' decision advances the clear purpose of that statute, which is to protect the rights of oppressed corporate shareholders who are being required to participate in a business over which they have no input or control. As this Court already concluded, the issues involved are not currently in dispute among Ohio courts. Moreover the unique procedural facts in this matter foreclose this Court from issuing a ruling that would be generally applicable to the law regarding corporate dissolution. In short, Appellants' Motion for Reconsideration should be denied for at least five reasons.

First, Appellants have offered no new arguments in support of their request. Indeed, Appellant's Motion for Reconsideration simply copies and pastes verbatim nearly the entirety of the argument section from Appellant's unsuccessful Motion in Support of Jurisdiction. While Appellants use the first five pages of their motion to take additional jabs at Dr. Sapienza, pages 6-13 have been lifted straight out of their Motion for Jurisdiction, with no appreciable modifications. This is not a request for reconsideration, it is a reargument of their claims, which is not appropriate under the Rules of this Court.

Second, Appellants' attempt to frame Dr. Sapienza as the bad actor is entirely unfounded and self serving. Again, *no court* has ever found Dr. Sapienza guilty of any misdeeds. Therefore, any allegation that Dr. Sapienza acted improperly is just that – an allegation.

Third, Appellants' reading of the dissolution statute, R.C. 1701.91, blatantly disregards the form and structure of the statute. And not surprisingly, Appellants' reading has never been adopted by a single Ohio court. As such, Appellants cannot demonstrate either that there is a conflict between the appellate courts as to how to interpret R.C. 1701.91, or that their reading of the statute is correct in light of the plain language.

Fourth, Ohio courts have rejected the unclean hands defense to dissolution under R.C. 1701.91 and Appellants have not refuted that fact.

Finally, Appellants raise a new, halfhearted argument related to Dr. Heater's and Dr. Sapienza's fiduciary duties. But this argument was not part of the appeal or their initial motion for jurisdiction. Furthermore, it is meritless. There has been no finding that Dr. Sapienza breached any fiduciary duty, so such a defense is not applicable here.

ARGUMENT

A. Appellants Have Not Presented Any Issues Ripe For Reconsideration

Appellants' Motion for Reconsideration is nothing more than a cut-and-paste of their Motion in Support of Jurisdiction, which was already denied. This Court's Rules of Practice make clear that "A motion for reconsideration shall not constitute a reargument of the case." Sup. Ct. Rule 11(B). Appellants' motion articulates no new or additional argument, case law, or policy for this Court to consider. Appellants are just rearguing the merits of jurisdiction based on identical arguments already before the Court and already denied. Indeed, Appellants' motion is symptomatic of their litigation strategy throughout – distract, delay, and waste the resources of METSS (half of which belong to Dr. Sapienza), Dr. Sapienza, and this Court. The Court should make quick work of Appellants' request so METSS can be dissolved as required by Ohio law.

B. Appellants Cannot Argue That Dr. Sapienza Engaged In Any Wrongdoing

Appellants' arguments on reconsideration hinge on the faulty assumption that Dr. Sapienza has engaged in misdeeds in his role as a 50% shareholder of METSS. But Appellants' allegations against Dr. Sapienza are nothing more than unfounded accusations. No court has ever held that Dr. Sapienza is guilty of any of the various and sundry misdeeds METSS – through its other 50% shareholder, Dr. Heater – has consistently trotted out against Dr. Sapienza. However, the Delaware County Court of Common Pleas *has* found that Dr. Heater acted improperly (ironically, to the detriment of the very company – METSS – that he argues he must protect from Dr. Sapienza). Specifically, the Delaware County Court of Common Pleas found that Dr. Heater's other company – Geo-Tech Polymers, LLC – unlawfully withheld the repayment of METSS's assets, which had been wrongfully diverted by Dr. Heater from METSS

to Geo-Tech. 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

C. METSS's Interpretation Of R.C. 1701.91 Is Incorrect And Unsupported

As Dr. Sapienza explained in his Opposition to Jurisdiction, METSS misconstrued – and in its Motion for Reconsideration again identically misconstrues – the plain language of R.C. 1701.91. Appellants argue that the inclusion of the phrase “may” in the introductory clause of the dissolution statute permeates the entire statute, making the entire statute discretionary, which simply is not correct. (See Appellants' Br. at 6-8; Mot. for Reconsid. at 6-7.) Appellants are correct that the text of R.C. 1701.91(A) uses the word “may” and states, “A corporation may be dissolved judicially and its affairs wound up” when five different, enumerated scenarios are established by the evidence. However, Appellants are incorrect when they claim that the word “may” in the introductory phrase of the statute trumps the plain language of the rest of the statute. The statute is structured such that it provides a list of five scenarios in which dissolution “may” be appropriate. However, once any one of those scenarios is satisfied, Sections C and D definitively lay out the next steps:

(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 . . . shall be made dissolving the corporation or dismissing the complaint.** . . .

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.

R.C. 1701.91 (emphasis added.) In other words, once a party files a complaint setting forth one of the five scenarios set forth in Section A(1)-(5), the court must (“shall”) do one of two things: (1) order dissolution; or (2) dismiss the claim.

Appellants do not – and cannot – point to any Ohio court that interprets R.C. 1701.91 in the manner it suggests is appropriate. And Appellants cannot refute the fact that the Third, Fifth, Ninth, Tenth, and Eleventh Ohio Appellate District Courts have all interpreted R.C. 1701.91 in the manner that Dr. Sapienza proposes. (*See* Opp’n to Jurisd. at 9-10.)

D. There Is No “Unclean Hands” Defense To Dissolution In Ohio

Appellants’ argument that dissolution is improper when one shareholder has unclean hands is especially unavailing for two reasons. First, Ohio law does not support this conclusion. And second, *the only shareholder who has unclean hands is Dr. Heater, not Dr. Sapienza.*

As to the latter, the only shareholder adjudicated as behaving improperly is Dr. Heater. The trial court held that he diverted over \$730,000 from METSS to his own company, Geo-Tech. And as to the former, even if a court had found that Dr. Sapienza had acted with unclean hands – which has not happened – Ohio law does not support Appellants’ argument. As made clear in Dr. Sapienza’s jurisdictional briefing, Ohio law is clear that an equitable doctrine of unclean hands does not apply to the dissolution under R.C. 1701.91. *Lautenschleger v. Monarch Mgmt., Inc.*, 5th Dist. No. 2003AP120090, 2004-Ohio-4670, 2004 Ohio App. LEXIS 4249, at ¶ 19, *appeal denied* 104 Ohio St.3d 1462, *reconsideration denied* 105 Ohio St.3d 1473 (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); *Chomczynski v. Cinna Scientific, Inc.*, 1st Dist. No. C-010170, 2002-Ohio-4605, 2002 Ohio App. LEXIS 4735, at ¶ 19 (holding that “the equitable doctrine of ‘unclean hands’ did not apply” when considering R.C. 1701.91.)

Because there is simply no Ohio law that supports its position, Appellants instead rely on inapposite extra-judicial cases. But whether an Illinois case, for example, declined to dissolve a corporation under an entirely different statute and an entirely different set of facts, does not change the fact that *Ohio* law – the only applicable law here – does not recognize an unclean hands exception to the dissolution statute. No matter how many times Appellants throw the pitch they still miss the plate. And this Court already reached that conclusion when it denied jurisdiction.

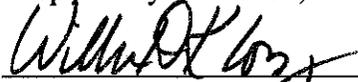
E. Appellants' Fiduciary Duty Argument Is Irrelevant

Appellants attempt to raise for the first time an argument that a heightened fiduciary duty should be applied in this case, but this is not an issue properly raised on reconsideration because it was not raised on appeal or in their Motion for Jurisdiction. Regardless, and as Dr. Sapienza has repeatedly explained, no court has ever found that Dr. Sapienza breached any fiduciary duty. To the contrary, the only shareholder who has been adjudicated as acting improperly is Dr. Heater when he allowed his other company, Geo-Tech, to withhold METSS's assets. Therefore, even if Appellants' new fiduciary duty argument applied, it would apply to Dr. Heater's actions, not those of Dr. Sapienza.

CONCLUSION

This Court already declined to exercise jurisdiction over the issues raised. And Appellants have offered no additional reasons why jurisdiction is appropriate. 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. Dr. Sapienza has been forced to wait long enough for his proper legal remedy. This Court should immediately deny Appellants' Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Opposition to Motion for Reconsideration of Plaintiff-Appellee Richard Sapienza* was served by U.S. mail, with sufficient postage, this 7th day of December, 2011, on the following:

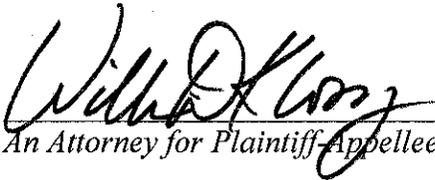
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