

ORIGINAL

No. 12-1377

In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE No. 11-APE-10-901**

PETER F. VAN LIGTEN, M.D.

Plaintiff-Appellant

v.

EMERGENCY SERVICES, INC., et al.

Defendants-Appellees

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT
PETER VAN LIGTEN, M.D.**

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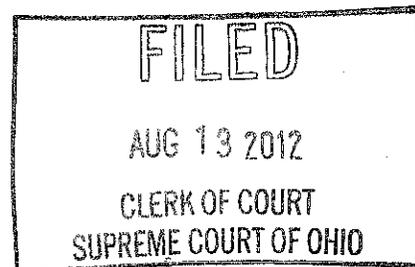


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EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

This case is of great public and general interest because the Tenth District Court of Appeals has created a loophole for Ohio's small businesses that now enables them to avoid compliance with existing contracts with their shareholders/employees. The Tenth District has effectively held that, if a small business wants to unilaterally change the terms of a buy-out or deferred compensation provision in an existing shareholder's contract, all the small business has to do is alter the nature of the stock held by the small business, even when the shareholder objects or refuses to consent to the stock alteration. The Tenth District's holding has also rendered an "entire agreement" provision in a shareholder agreement meaningless. Consequently, the Tenth District's holding is significant and has widespread implications for all small businesses and small-business shareholders throughout Ohio.

Ohio law requires compliance with the terms of a written agreement, even if the terms may be unfavorable to one of the parties. The Tenth District's decision has eliminated that long-standing rule of law. This case provides a mere example of the simple steps a small business can take pursuant to the Tenth District's holding to avoid liability under the terms written shareholder agreements.

Here, Plaintiff-Appellant, Peter F. Van Ligten, M.D. ("Dr. Van Ligten"), is a shareholder in Defendant-Appellee, Emergency Services, Inc. ("ESI"). Upon becoming a shareholder of the closely-held corporation in the mid-1990s, Dr. Van Ligten paid \$25,000 to the business and signed a number of agreements, including a Stock Purchase Agreement and a Partner Employment Agreement. He was issued 25 shares of common capital stock. Both agreements contained provisions that commonly exist in these types of contracts throughout Ohio. For example, both agreements contained "entire agreement" provisions. Both agreements also

included provisions that required ESI to compensate Dr. Van Ligten for the value of his interest in ESI if he was terminated for any reason.

In late 2004, ESI amended its corporate documents to convert the nature of stock issued by ESI. Although the stock conversion was accomplished under the pretense of a “corporate clean up” plan, its implications were far-reaching as it relates to the enforceability of Dr. Van Ligten’s agreements. The stock conversion resulted in the automatic conversion of all existing shares of common capital stock into Preferred Shares and the creation of new voting shares (i.e., New Common Shares). Shareholders could (but were not required to) exchange their Preferred Shares for the New Common Shares. Dr. Van Ligten did not agree to the amendment, but, being only one shareholder among many, was powerless to prevent it. Dr. Van Ligten elected not to exchange his Preferred Shares for the New Common Shares, because doing so would have required him to execute a new stock purchase agreement; he preferred the terms of the original Stock Purchase Agreement already in existence between the parties.

Approximately eight months after the corporate documents were amended, ESI unilaterally and without cause terminated Dr. Van Ligten’s employment. The termination constituted “triggering” events under the Stock Purchase Agreement and the Employment Agreement, obligating ESI to pay certain agreed-to compensation to Dr. Van Ligten. However, the Tenth District determined that, based on the conversion of Dr. Van Ligten’s stock from common capital shares to Preferred Shares, ESI had no obligation under either agreement to pay Dr. Van Ligten the agreed-to compensation. The Tenth District held that the stock conversion resulted in the unenforceability of both written agreements. The Tenth District’s decision is unjust and in conflict with the “entire agreement” provision in the parties’ agreements.

Ohio citizens and businesses require certainty in contracts. They need assurance from this Court that the terms of a contract will be upheld and enforced despite the unilateral actions of one party who may not be content with the implications of compliance with the terms of the contract. Without a review by this Court, a small business can now, without liability, refuse to abide by the terms of a buy-back provision in a purchase agreement with a minority shareholder simply by amending its corporate documents to convert the nature of the stock held by the company. Without review by this Court, the same corporate amendment process will relieve all liability to a small business that refuses to abide by the terms of an employment agreement that includes a provision requiring payment to a departing, minority shareholder of his earned, deferred compensation. This Court should exercise its discretion to accept this case to correct the errors of the Tenth District holding. Ohio citizens need assurances from this Court that an “entire agreement” provision means what it says; the unilateral conduct by a contracting party cannot alter the terms and purpose of a written contract, absent consent of the other contracting party.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

On October 25, 2007, Dr. Van Ligten filed his Complaint alleging five (5) separate causes of action against ESI and its President, Defendant-Appellee, Robert Griffith, M.D. (“Dr. Griffith” and collectively with ESI, “Appellees”). Two of these causes of action are at issue for purposes of Dr. Van Ligten’s Proposition of Law:

Count I: **Breach of Employment Agreement** – Dr. Van Ligten alleged that, upon his termination, the Employment Agreement required the payment of deferred compensation, which was not paid;

Count II: **Breach of Stock Purchase Agreement** – Dr. Van Ligten alleged that, upon his termination, the Stock Purchase Agreement

required ESI to purchase his shares under the formula set out under the agreement, which was not paid;

See generally Compl.¹

On July 21, 2008, in response to Appellees' motion to dismiss, the trial court filed its decision denying Appellees' arguments related to the two breach of contract claims, but granting the motion as to other pending claims.² In early 2009, after some discovery, Appellees filed their first motion for summary judgment, seeking to dismiss the remaining claims, including the two breach of contract claims. On June 7, 2009, the trial court denied summary judgment as to the breach of Employment Agreement claim (Count I), but granted summary judgment as to the breach of Stock Purchase Agreement claim (Count II) and the other remaining claim in the case. Then, on September 1, 2011, the trial court granted Appellees' second motion for summary judgment, dismissing the breach of Employment Agreement claim based on the same reasoning it employed to dismiss the breach of Stock Purchase Agreement claim.

Dr. Van Ligten timely appealed the erroneous trial court orders to the Tenth District Court of Appeals. On June 29, 2012, the Tenth District affirmed the trial court's orders. The Tenth District's decision addresses issues related to the breach of contract claims and a breach of fiduciary duty claim. See supra footnote 2. Dr. Van Ligten's Proposition of Law, however, addresses only the breach of contract claims and the faulty reasoning employed by the Tenth District in its analysis of those claims.

¹ The Complaint also contained three separate claims for breach of fiduciary duty regarding Dr. Van Ligten's allegations of dilution of value of his shares (Count III), his termination without a legitimate business reason (Count IV), and the manner in which he was terminated (Count V).

² The trial court dismissed Count III for breach of fiduciary duty, claiming that it had to be asserted as a derivative claim. Count V was dismissed as duplicative of Count IV. Dr. Van Ligten appealed the dismissal of Count V to the Tenth District Court of Appeals. The Tenth District affirmed the trial court's ruling. Dr. Van Ligten is not appealing this aspect of the Tenth District's decision.

The Tenth District erroneously held that, despite the existence of an “entire agreement” provision, ESI’s stock conversion permitted it to unilaterally alter the terms of the Stock Purchase Agreement and Employment Agreement. In fact, the Tenth District’s holding not only ratified the alteration of the terms of these agreements, it ratified ESI’s elimination of all legal effect of those agreements. The impact of the Tenth District’s decision is significant. Indeed, under its holding, Dr. Van Ligten’s agreements with ESI were not worth the paper on which they were written.

The intent of the Stock Purchase Agreement was to provide both contracting parties with a mechanism to purchase/sell Dr. Van Ligten’s shares in ESI under an agreed-upon calculation when he departed from the company. The Tenth District’s holding allowed ESI to ignore the clear intent of the Stock Purchase Agreement. The intent of the Employment Agreement was to provide Dr. Van Ligten with compensation for services rendered based on his pro-rata ownership in ESI. The Tenth District’s holding also allowed ESI to ignore the clear intent of the Employment Agreement. The Tenth District’s decision created a financial windfall to ESI. Despite Dr. Van Ligten’s purchase of 25 shares of stock and execution of two written agreements, ESI now has no obligation to pay Dr. Van Ligten according to the terms of those agreements. This is unjust and contrary to well-established Ohio law.

II. STATEMENT OF FACTS³

Dr. Van Ligten became an employee of ESI in 1991 and a shareholder in 1996. Upon becoming a shareholder, he signed the Stock Purchase Agreement and the Employment Agreement. Dr. Van Ligten also bought 25 shares of ESI stock at \$1,000 per share (i.e., he paid

³ Many of the facts in this case are not disputed.

a total of \$25,000) through a paycheck withholding arrangement. Indeed, Dr. Van Ligten purchased a 25-share interest in the business.

At that time, ESI only had one type of stock in existence, common capital stock. For that reason, the Stock Purchase Agreement and the Employment Agreement referred to Dr. Van Ligten's stock as "common capital shares." There was no reason for the agreements to state otherwise—that was the only type of issued stock.

The Stock Purchase Agreement states that, if an ESI shareholder, "for any reason, including death or permanent disability, ceases to be employed by the Company, * * * regardless of whether or not such termination of employment is voluntary or involuntary," then ESI is obligated to purchase the terminated shareholder's ESI shares. The agreed-upon purchase price is defined as follows:

3. Purchase Price. The purchase price to be paid for the Shares to be purchased and sold pursuant to paragraph 2 above, shall be the book value of the Company (exclusive of accounts receivable) as of the close of business on the last day of the month in which the event triggering the buyout occurs, multiplied by a fraction, the numerator of which is the number of Shares being purchased and the denominator of which is the total number of shares of the Company outstanding on such date. * * *

The Stock Purchase Agreement contains an "entire agreement" provision which states:

11. Entire Agreement. This document contains the entire agreement between the parties and supersedes any prior understandings or agreements between them respecting the subject matter. No changes, alterations, modifications, additions, or qualifications to the terms of this Agreement shall be made or be binding unless made in writing and signed by each of the parties.

The Employment Agreement provides, in pertinent part:

15. TERMINATION OF EMPLOYMENT – DEFERRED COMPENSATION. Upon the termination of employment of the Employee hereunder * * *, and, if at such time the Employee is and has been an owner of any of the issued and outstanding shares of common capital stock of the Employee for six (6) years or

longer, Employee shall be entitled to deferred compensation for services rendered to Employer during his active employment * * * .

The Employment Agreement also contained an “entire agreement” provision that is almost verbatim of the corresponding clause in the Stock Purchase Agreement.

For some unexplained reason, ESI lost substantially all of its corporate records in 2004. The lost records, in part, led to a “corporate clean up” plan. Dr. Griffith sent a letter, dated December 6, 2004, to all of ESI’s shareholders, detailing the plan, which included:

- A meeting would be held on December 17, 2004, to discuss and vote on an Amended and Restated Articles of Incorporation (“Amended Articles”).
- The Amended Articles provided for conversion of all existing shares into Preferred Shares (which were non-voting shares and were redeemable at any time), and the creation of New Common Shares (which were voting shares and were redeemable when a shareholder ceased to be an employee).
- Adoption of the amendment required a 2/3 majority vote.
- At the conclusion of the meeting, if the amendment passed, shareholders who were current employees would take steps to exchange Preferred Shares for New Common Shares by signing a Subscription Agreement and a new Stock Purchase Agreement, and making a \$50 payment. Certificates for New Common Shares would be issued.
- A month later, all Preferred Shares not exchanged were redeemable for \$10.

The corporate meeting was held on December 17, 2004. Dr. Van Ligten objected to the proposed amendments and left the corporate meeting without voting. Nevertheless, the required majority of ESI shareholders passed the corporate plan and adopted the Amended Articles.

According to the amended corporate documents, the shareholders had until January 17, 2005, within which to tender their Preferred Shares of stock and exchange them for New Common Shares. Importantly, pursuant to the Amended Articles, the original shares of common capital stock (i.e., pre-Amended Articles ESI stock) automatically converted to Preferred Shares:

Conversion and Exchange of Previously Authorized Common Shares. Each share of common stock, no par value, of the Corporation authorized immediately prior to the effectiveness of these Amended and Restated Articles of Incorporation **shall automatically and without further act or deed be converted into and exchanged for one (1) Preferred Share of stock of the Corporation** upon the effectiveness of these Amended and Restated Articles of Incorporation.

(Emphasis added).

In other words, the exchange of shares on or before January 17, 2005, was only required if a shareholder wanted to hold New Common Shares. But, in order to do so, the shareholder was required to sign several agreements, including a new Stock Purchase Agreement. If no exchange occurred, the shareholder would simply hold Preferred Shares rather than New Common Shares. Preferred Shares were recognized, issued, and outstanding ESI shares. Dr. Van Ligten did not exchange his Preferred Shares for New Common Shares by the established deadline. Therefore, his 25 shares of pre-amendment common capital stock automatically converted to 25 Preferred Shares of ESI stock, which he still holds to date.

Dr. Van Ligten's Preferred Shares are the same as his common capital shares. They represent the same 25-share interest in the business that he purchased upon becoming an ESI shareholder. The value of his interest in ESI prior to the stock conversion was the same it was following the stock conversion. The only change was the name of the stock he held.

ESI sent a letter dated August 16, 2005, to Dr. Van Ligten terminating his employment pursuant to Section 2 of the Employment Agreement ("Termination Letter"). Dr. Van Ligten's termination constituted a "triggering" event under both the Stock Purchase Agreement and the Employment Agreement. It is undisputed that ESI failed to purchase Dr. Van Ligten's 25 Preferred Shares pursuant to the Stock Purchase Agreement. It is also undisputed that ESI has never paid Dr. Van Ligten any deferred compensation under the Employment Agreement. ESI's

failure to make these payments, as well as other misdeeds, was the basis for Dr. Van Ligten's lawsuit, which included claims for breach of the two agreements and breach of fiduciary duty.

LAW AND ARGUMENT

PROPOSITION OF LAW: – A CORPORATION BREACHES A CONTRACT CONTAINING AN “ENTIRE AGREEMENT” PROVISION WHEN IT UNILATERALLY ALTERS THE TYPE OF STOCK ISSUED BY THE CORPORATION, CLAIMS THAT THE SUBJECT CONTRACT ONLY REFERS TO THE PREVIOUSLY-ISSUED STOCK AND REFUSES TO PAY THE COMPENSATION REQUIRED UNDER THE AGREEMENT BECAUSE THE AGREEMENT DOES NOT REFER TO THE NEWLY-ISSUED STOCK.

The Tenth District's erroneous analysis can be broken down as follows:

- (1) the Stock Purchase Agreement and Employment Agreement specifically refer to “common capital stock,” the only type of stock that was issued when those agreements were executed;
- (2) at the time of the triggering event, Dr. Van Ligten did not own any “common capital stock,” but instead owned Preferred Shares, because the common capital stock automatically converted to Preferred Shares;
- (3) because the Stock Purchase Agreement and the Employment Agreement do not refer to Preferred Shares, the buy-back/deferred compensation obligations are not triggered; and
- (4) therefore, ESI did not breach either agreement by failing to pay Dr. Van Ligten upon his termination.

Decision at ¶¶ 19-24.

The Tenth District's decision is erroneous because it created an unjust loophole for close corporations to avoid liability for the terms of binding agreements. The Tenth District's decision results in the unilateral modification—indeed, the unilateral revocation—of all of the rights granted to Dr. Van Ligten in the Stock Purchase Agreement and the Employment Agreement. In other words, under the Tenth District holding, regardless of his stock purchase and actions, Dr. Van Ligten was **never** going to realize the benefits of the Agreements following ESI's Amendment to the Articles of Incorporation. Correspondingly, regardless of Dr. Van Ligten's

stock purchase and actions, Appellees were never going to have to perform under the Agreements by purchasing Dr. Van Ligten's stock and paying him deferred compensation. However, a party cannot unilaterally alter the terms of a written agreement in such a drastic manner—particularly an agreement with an “entire agreement” provision—without the consent of the other party. Dr. Van Ligten never provided such consent.

The Stock Purchase Agreement defines “Shares” as “common capital stock issued and outstanding.” The Employment Agreement likewise refers to “outstanding shares of common capital stock.” However, at the time of Dr. Van Ligten's stock purchase and execution of the Agreements, the only type of stock authorized and issued by ESI was common capital stock; hence, the referral to that type of stock in the Agreements. No Preferred Shares existed; no other types of shares existed either. There was no reason for the Agreements to make any reference to those shares, or any other class of shares. In other words, the Agreements do not differentiate between different classes of stock because only one class was in existence.

In sum, the Stock Purchase Agreement required ESI to purchase the issued and outstanding shares of stock of a terminated employee-shareholder. The Employment Agreement required deferred compensation to a departing shareholder. Dr. Van Ligten purchased and earned a 25-share interest in the business. The intent of the agreements was to protect this interest. This intent must not be frustrated by the Amended Articles, particularly when Dr. Van Ligten never consented to the Amended Articles.

The interest in ESI that Dr. Van Ligten held following the stock conversion in December 2005 was the same as it was beforehand. He still held 25 shares in the business. The only difference was the name of those shares; the conversion from common capital to Preferred Shares was automatic. The value of ESI, as a business, was not altered by the stock conversion.

Therefore, Dr. Van Ligten's pro rata value in the business did not change. The enforceability of the two Agreements should not have been impacted by the stock conversion. Under the Tenth's District's holding, however, the stock conversion resulted in Dr. Van Ligten losing all of his rights under the two Agreements, without his consent.

Indeed, the Tenth District's holding results in a ratification of ESI's unilateral cancellation of all of the rights that existed under the Agreements. Although the Tenth District holds that the Amended Articles did not modify the Stock Purchase Agreement, see Decision ¶25, the Tenth District is incorrect. There can be no greater modification or alteration of the terms of an agreement than to eliminate all meaning and enforceability of the contract. By approving the Amended Articles, ESI attempted to strip the Stock Purchase Agreement of all legal effect. The Amended Articles had the same effect with respect to the Employment Agreement.

Prior to the Amended Articles, all of the Stock Purchase Agreements held by ESI shareholders referenced the common capital stock, as those were the only existing shares at the time. Under the Tenth District's holding, all then-existing Stock Purchase Agreements were no longer enforceable after the Amended Articles took effect as it relates to any provision referencing "Shares," including the buy-back provision. Thus, if a shareholder held the automatically-converted Preferred Shares (like Dr. Van Ligten), the buy-back provision under the Stock Purchase Agreement is unenforceable because it does not say "Preferred Shares." If a shareholder exchanged the Preferred Shares for New Common Shares (which Appellees allege Dr. Van Ligten should have done), the shareholder was required to sign a new Stock Purchase Agreement, which superseded the previous Stock Purchase Agreements and eliminated the final terms. Either way, following the Amended Articles, the previously-executed and enforceable

Stock Purchase Agreement no longer had any validity. The Tenth District held that there was nothing that Dr. Van Ligten could do to maintain the enforceability of his Stock Purchase Agreement.

ESI's corporate clean-up plan was simply a manipulation of the negotiated terms of a binding agreement. Indeed, the Amended Articles did much more than just modify the Agreements. The Amended Articles transformed the Agreements into worthless documents without Dr. Van Ligten's written consent. Ohio courts have long held that "[a] party to an existing contract may modify that contract only with the assent of the other party to the contract." Hanly v. Riverside Meth. Hosp., 78 Ohio App.3d 73, 79, 203 N.E.2d 1126 (10th Dist. 1991); see also Nagle Heating & Air Conditioning Co. v. Heskett, 66 Ohio App.3d 547, 550, 585 N.E.2d 866 (4th Dist. 1990) ("A contract cannot be unilaterally modified. In order to modify a contract, the parties to that contract must mutually consent to the modification."). There is no dispute that Dr. Van Ligten did not consent to the Amended Articles. Instead, the undisputed evidence demonstrates just the opposite—that he openly and expressly disagreed with the Amended Articles.

The clear intent of the Stock Purchase Agreement was to require ESI to purchase the stock of a terminated employee-shareholder. The clear intent of the Employment Agreement was to provide a departing employee with compensation "for services rendered to Employer during [the employee's] active employment." It is a cardinal tenet of contract construction that a court will "ascertain and give effect to the intent of the parties." Fouty v. Ohio Dep't of Youth Servs., 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, ¶ 63 (10th Dist.); Cleveland Constr., Inc. v. Kent State Univ., 10th Dist. No. 09AP-822, 2010-Ohio-2906, ¶ 29 ("When construing the terms of a contract, a court's principal objective is to determine the intent of the

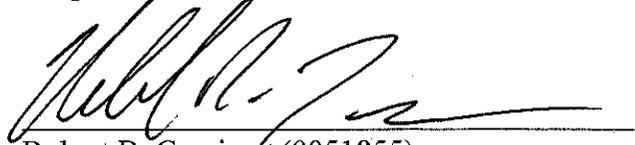
parties.”). Because of the stock conversion, and the Tenth District’s holding, the intent of those Agreements has been eviscerated. The Tenth District’s holding is erroneous and inequitable.

CONCLUSION

The impact of the Tenth District’s holding is not insignificant to Ohio’s citizens. The holding means that, if a corporation does not want to abide by the terms of existing stock purchase and employment agreements, all it must do is reissue different stock than was in existence when the agreements were executed. This creates a brand new avenue to squeeze out minority shareholders. And, by indicating that such conduct does not result in a breach of contract, the Tenth District has tacitly indicated that such a stock conversion results in no wrongdoing. This is unjust.

Therefore, this Court should accept jurisdiction to eliminate the loophole created by the Tenth District’s Decision.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing was served on August 13th, 2012 pursuant to Civ.R. 5(B)(2)(c)

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APPENDIX

- A. Decision, Tenth District Court of Appeals (June 29, 2012)

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Peter F. Van Ligten,	:	
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Plaintiff-Appellant,	:	
	:	No. 11AP-901
v.	:	(C.P.C. No. 07CVH-10-14534)
	:	
Emergency Services, Inc. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 29, 2012

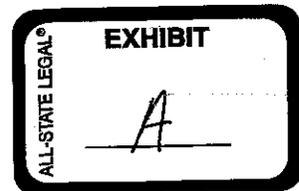
Roetzel & Andress, LPA, Robert B. Graziano, and Michael R. Traven, for appellant.

Bricker & Eckler LLP, and Quintin F. Lindsmith, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Peter F. Van Ligten ("Van Ligten"), appeals the Franklin County Court of Common Pleas' judgment in favor of defendants-appellees, Emergency Services, Inc. ("ESI") and Robert Griffith, M.D. ("Griffith") (collectively, "appellees"), on Van Ligten's claims for breach of contract and breach of fiduciary duty. For the following reasons, we affirm.



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I. BACKGROUND

{¶ 2} From 1991 to October 2005, Van Ligten, a physician specializing in emergency medicine, was employed by ESI, a physicians group that staffs emergency rooms at certain central Ohio hospitals. In January 1996, Van Ligten became an ESI shareholder and executed both a Stock Purchase Agreement ("purchase agreement") and a Partner Employment Agreement ("employment agreement"). At that time, Van Ligten purchased 25 shares of ESI's common capital stock for \$1,000 per share through a paycheck-withholding arrangement.

{¶ 3} After ESI lost substantially all of its corporate records in 2004, Griffith sent a letter to all ESI shareholders and certain former shareholders, informing them of a corporate clean-up plan. The letter stated that a special shareholders meeting would be held on December 17, 2004, for a vote on a proposal to adopt Amended and Restated Articles of Incorporation ("amended articles"). According to Griffith's letter, the amended articles would provide for conversion of all existing ESI shares into preferred shares, which would be non-voting shares, redeemable at any time. The amended articles would also create New Common Shares ("new common shares"), which were voting shares, redeemable when a shareholder ceased to be an employee. Adoption of the amended articles required a two-thirds majority vote. The letter stated that, if the amendment passed, current ESI employees would take steps to exchange their preferred shares for new common shares by signing a subscription agreement and making a \$50 payment. Certificates would then be issued for new common shares. A month later, all preferred shares not exchanged would be redeemed for \$10 per share.

{¶ 4} Van Ligten attended the December 17, 2004 meeting, but he objected to the proposed amendments and left the meeting without voting. At the meeting, the required majority approved and adopted the amended articles, and ESI effectuated a stock conversion plan. As a result, each share of ESI common stock authorized immediately prior to the effectiveness of the amended articles automatically converted to a share of preferred stock. Shareholders had until January 17, 2005, to exchange their preferred shares for new common shares. Van Ligten admits that his 25 shares

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automatically converted to preferred shares and that he did not exchange them for new common shares.

{¶ 5} On December 27, 2004, Van Ligten sent a demand letter to ESI, claiming relief as a dissenting shareholder pursuant to R.C. 1701.85. Van Ligten estimated the value of his shares at \$500,000. As authorized by R.C. 1701.85(A)(9), ESI responded by requesting that Van Ligten return his stock certificates by January 15, 2005, for ESI's endorsement that Van Ligten had made a demand for the cash value of the shares. Van Ligten did not comply with ESI's request. On January 27, 2005, ESI sent Van Ligten a letter contesting Van Ligten's valuation of his shares and indicating that it was exercising its option to terminate his dissenting shareholder's rights as a result of his failure to submit his stock certificates. See R.C. 1701.85(A)(9) ("A dissenting shareholder's failure to deliver the certificates terminates the dissenting shareholder's rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to the dissenting shareholder within twenty days after the lapse of the fifteen-day period [for delivery of the certificates]."). Van Ligten did not file a dissenting shareholder's complaint within three months after service of his demand, contrary to R.C. 1701.85(B).

{¶ 6} On August 16, 2005, ESI notified Van Ligten that his employment would terminate on October 15, 2005, in accordance with section 2 of the employment agreement, which required 60 days advance notice of termination. Van Ligten contends that his termination constituted a triggering event that required ESI to purchase his shares, pursuant to the purchase agreement, and to pay him deferred compensation pursuant to the employment agreement.

{¶ 7} Van Ligten filed this action on October 25, 2007, alleging five causes of action against appellees, as well as unnamed shareholders and officers of ESI. Van Ligten alleged claims for breach of the employment agreement and breach of the purchase agreement, as well as three claims for breach of fiduciary duty. Van Ligten's claims for breach of fiduciary duty alleged dilution of the value of ESI shares as a result of the amended articles, lack of a legitimate business reason for his termination, and a breach by the manner in which appellees terminated his employment. An amended

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complaint asserted the same causes of action, but clarified that Van Ligten was directing his breach of fiduciary duty claims only against the individual defendants.

{¶ 8} On July 21, 2008, the trial court dismissed counts three and five of Van Ligten's complaint pursuant to Civ.R. 12(B)(6). The trial court stated that count three, which alleged dilution of share values, failed to state a claim for breach of fiduciary duty because it included no allegation that the individual defendants used their control to benefit themselves at Van Ligten's expense. The court further found that count five, which alleged that appellees breached their fiduciary duty by the manner in which they terminated Van Ligten's employment, was simply a restatement of count four, which alleged a breach of fiduciary duty based on termination of Van Ligten's employment without a legitimate business reason. Van Ligten does not appeal the dismissal of count three.

{¶ 9} On June 17, 2009, the trial court entered summary judgment in favor of appellees on Van Ligten's claim for breach of the purchase agreement and Van Ligten's remaining fiduciary duty claim. The trial court determined, however, that Van Ligten's claim for breach of the employment agreement was not appropriate for summary judgment. On September 1, 2011, after further briefing, the trial court granted summary judgment in favor of appellees on Van Ligten's final pending claim for breach of the employment agreement. The court held that the same reasoning that entitled appellees to summary judgment on Van Ligten's claim for breach of the purchase agreement also entitled them to summary judgment on Van Ligten's claim for breach of the employment agreement.

II. ASSIGNMENTS OF ERROR

{¶ 10} Van Ligten asserts the following assignments of error for this court's review:

[I.] The Trial Court Erred by Dismissing Count II of the Amended Complaint for Breach of the [purchase agreement].

[II.] The Trial Court Erred by Dismissing Count I of the Amended Complaint for Breach of the Employment Agreement.

[III.] The Trial Court Erred by Dismissing Count V of the Amended Complaint Because it Was Not Duplicative of Count IV of the Amended Complaint.

III. DISCUSSION

{¶ 11} The issues under Van Ligten's first and second assignments of error, which arise out of the trial court's entry of summary judgment on his breach of contract claims, are interrelated, and we discuss those assignments together. We review a summary judgment de novo by independently reviewing the judgment, without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). We apply the same standard as the trial court and must affirm the judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 12} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 13} The first and second causes of action in the amended complaint allege breaches of contract. "The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff." *Flaim v. Med. College of Ohio*, 10th Dist. No.

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04AP-1131, 2005-Ohio-1515, ¶ 12. There is no dispute that Van Ligten and ESI validly entered into both the purchase agreement and the employment agreement. A copy of the employment agreement is attached to Van Ligten's complaint, as is a copy of a Stock Purchase Agreement "believed to be identical" to the purchase agreement that Van Ligten executed. (Complaint, ¶ 16.) For purposes of summary judgment, appellees and the trial court assumed that Van Ligten executed an identical purchase agreement. Van Ligten contends that the trial court erred in interpreting the purchase agreement and the employment agreement to find no breach by ESI.

{¶ 14} The construction of a written contract is a matter of law, which we review de novo. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶ 9. The goal of contract construction is to effectuate the parties' intent, which is presumed to reside in the language the parties employed in the contract. *Id.* Where contractual language is unambiguous, we must apply that language as written, without resort to methods of construction or interpretation, and we may not, in effect, create a new contract by finding an intent not expressed by the clear language. *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906, ¶ 29; *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶ 12. Where a contract is susceptible of two constructions, we must employ the construction that makes the agreement fair and reasonable and gives the agreement meaning and purpose. *GLIC Real Estate Holdings, LLC v. Bicentennial Plaza Ltd.*, 10th Dist. No. 11AP-474, 2012-Ohio-2269, ¶ 10.

{¶ 15} Central to the first and second assignments of error is the specific language utilized in the purchase agreement and the employment agreement. We first look to the purchase agreement, which states that "[ESI] has a total of 250 shares of common capital stock issued and outstanding (hereinafter called "Shares") [and each stockholder] is the owner and holder of 25 Shares." The purchase agreement contains the following relevant provisions:

2. Termination of Employment of Stockholder. If any Stockholder, for any reason, * * * ceases to be employed by the Company or any of its subsidiaries, pursuant to a written Employment Agreement, * * * then that Stockholder * * * shall sell to the Company and the Company shall purchase from the Withdrawing Stockholder all the Shares then

owned by the Withdrawing Stockholder at the price and on the terms as set forth hereinafter.

3. Purchase Price. The purchase price to be paid for the Shares to be purchased and sold pursuant to paragraph 2 above, shall be the book value of the Company (exclusive of accounts receivable) as of the close of business on the last day of the month in which the event triggering the buyout occurs, multiplied by a fraction, the numerator of which is the number of Shares being purchased and the denominator of which is the total number of shares of the Company outstanding on such date.

* * *

11. Entire Agreement. This document contains the entire agreement between the parties and supersedes any prior understandings or agreements between them respecting the subject matter. No changes, alterations, modifications, additions, or qualifications to the terms of this Agreement shall be made or be binding unless made in writing and signed by each of the parties.

{¶ 16} The employment agreement provides, in pertinent part, as follows:

15. TERMINATION OF EMPLOYMENT – DEFERRED COMPENSATION. Upon the termination of the employment of the Employee hereunder * * *, and, if at such time the Employee is and has been an owner of any of the issued and outstanding shares of common capital stock of the Employer for six (6) years or longer, Employee shall be entitled to receive deferred compensation for services rendered to Employer during his active employment * * *.

The employment agreement also contains an "Entire Argument" clause that is nearly identical to the corresponding clause in the purchase agreement.

{¶ 17} The trial court concluded that ESI was not contractually required to purchase Van Ligten's shares under the terms of the purchase agreement. The court found that ESI no longer recognizes the shares Van Ligten owns because Van Ligten did not exchange his preferred shares for new common shares after the amended articles took effect. The trial court relied on the purchase agreement's definition of "Shares" as outstanding shares of common capital stock and found that ESI "did not have *any* shares of common capital stock outstanding, as those shares ceased to exist prior to

[Van Ligten's] termination." (Emphasis sic.) The court held that "[t]o enforce a stock purchase agreement that was superseded by subsequent amended articles * * *, which the dissenting shareholder was aware of, [absent] evidence of fraud, is against public policy." Van Ligten argues that the trial court erred in its interpretation of the purchase agreement and specifically maintains that the trial court erred by holding that he no longer held any recognized shares of ESI stock and that the amended articles superseded the purchase agreement.

{¶ 18} We agree that the trial court erred to the extent it broadly held that Van Ligten no longer held shares recognized by ESI. It is undisputed that, when the amended articles took effect, Van Ligten's original shares automatically converted to preferred shares, which Van Ligten continued to own when he was terminated. ESI recognizes preferred shares, as set forth in the amended articles. Any error with respect to the trial court's statement that Van Ligten owned no recognized shares, however, is inconsequential because the purchase agreement does not require ESI to purchase preferred shares. Similarly, whether the trial court erred by stating that the amended articles superseded the purchase agreement is inconsequential because, even assuming the continuing validity of the purchase agreement, Van Ligten is not entitled to the recovery he seeks. Although we disagree with some of the trial court's reasoning, we must nevertheless affirm an entry of summary judgment if any grounds support it. *See Corna/Kokosing Constr. Co. v. South-Western City School Dist. Bd. of Edn.*, 10th Dist. No. 02AP-624, 2002-Ohio-7028, ¶ 10.

{¶ 19} Van Ligten held 25 preferred shares of ESI stock when he was terminated. We disagree with Van Ligten's assertion that the preferred shares differ from common shares in name only. Unlike either ESI's original common shares or new common shares, preferred shares afford no voting power. Also, unlike the original common shares, preferred shares are redeemable at any time upon the payment of \$10 plus accumulated dividends, if any, per share. The amended articles also reveal the myriad differences between preferred shares and new common shares. For example, preferred shares have a par value of \$10 per share and may receive cumulative dividends of no more than \$1 per share per year. In contrast, new common shares have no par value and no limitation on cumulative dividends. Upon liquidation, preferred shares are paid

out at \$10 per share plus accumulated dividends, if any, whereas holders of new common shares share all remaining corporate assets and funds. Finally, unlike preferred shares, new common shares are redeemable only after a shareholder ceases to be employed full-time by ESI or with the shareholder's consent.

{¶ 20} Under the purchase agreement, ESI was required to purchase a terminated employee's "Shares," which the purchase agreement defined as "shares of common capital stock issued and outstanding." ESI originally issued Van Ligten 25 shares of common capital stock, but those shares automatically converted to preferred shares after adoption of the amended articles. Van Ligten has not argued that anything in the parties' contracts or the law precluded ESI's ability to convert shares of common capital stock into preferred shares. The trial court found that "ESI took the proper and legal steps in amending its Articles of Incorporation and converting existing shares of stock," and Van Ligten does not assign as error the trial court's determination that the conversion was proper and valid.

{¶ 21} Van Ligten urges this court to overlook the purchase agreement's definition of "Shares" as including only common capital stock and to hold that the term also encompasses preferred shares that resulted from the conversion of ESI's original common capital stock. He contends that, because ESI had only a single class of stock when he executed the purchase agreement, there was no reason for the agreement to distinguish between classes of stock and that it, thus, requires ESI to purchase any issued and outstanding stock held by a terminated employee. Additionally, he argues that the parties' intent when they executed the purchase agreement was that a departing shareholder would receive a pro rata share of the company's value, which could only be maintained if "Shares" refers to all ESI stock, regardless of classification. In contrast, appellees argue that the plain language of the purchase agreement unambiguously requires ESI to purchase only common capital stock and not preferred shares.

{¶ 22} When interpreting a contract, a court must give meaning to every word and may not overlook the existence of certain words. *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. No. 04AP-305, 2005-Ohio-2557, ¶ 34, citing *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50 (1988). A court "must give meaning to every paragraph,

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clause, phrase and word, omitting nothing as meaningless, or surplusage." *Affiliated FM Ins. Co. v. Owens-Corning Fiberglas Corp.*, 16 F.3d 684, 686 (6th Cir.1994). We may, therefore, not overlook the purchase agreement's unambiguous language that ESI's purchase obligation related specifically to common capital stock.

{¶ 23} The purchase agreement provided that, upon termination of Van Ligten's employment, ESI was required to purchase his common capital stock, but, as a result of the amended articles, the stock restructuring, and his own inaction, Van Ligten owned no common capital stock at the time of his termination. Rather, he owned 25 preferred shares. Because neither the purchase agreement nor the amended articles creates an obligation for ESI to purchase preferred shares, the trial court appropriately concluded that ESI was not required to purchase Van Ligten's shares upon the termination of his employment.

{¶ 24} Application of the purchase agreement's unambiguous definition of "Shares" also affects Van Ligten's rights in another way. The purchase agreement's formula for calculating the price of a terminated employee's shares is the product of ESI's book value and a fraction, the numerator of which is "the number of Shares being purchased." As Van Ligten owned no common capital stock at the time of his termination, the numerator of the fraction designated in the purchase agreement is zero. Therefore, application of the formula could produce no value other than zero.¹

{¶ 25} Neither the amended articles nor the stock conversion modified the terms of the purchase agreement. Both prior to the amended articles and after the amended articles, ESI was obligated to purchase common capital stock held by a withdrawing shareholder. While Van Ligten contends that the amended articles had a detrimental effect on the value of his ownership interest, as a shareholder, he had a statutory remedy available. To avoid the ramifications of the amended articles and stock conversion, Van Ligten could have filed an action as a dissenting shareholder. Van Ligten initiated the dissenting shareholder process when he filed a demand on ESI for the cash value of his

¹ The trial court found that the denominator of the multiplier fraction ("the total number of shares of the Company outstanding") was zero, based on its finding that ESI had no shares of common capital stock outstanding. While we disagree with the trial court's reasoning, we agree that application of the formula can only produce a value of zero.

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shares. He did not, however, follow through with the statutory requirements, and his rights as a dissenting shareholder terminated in accordance with R.C. 1701.85. We do not suggest that the dissenting shareholder statutes provide an exclusive remedy, but, here, Van Ligten has not established a breach of contract.

{¶ 26} For these reasons, we conclude that the trial court did not err by determining that appellees were entitled to summary judgment on Van Ligten's claim for breach of the purchase agreement. Accordingly, we overrule Van Ligten's first assignment of error.

{¶ 27} The same reasoning that requires us to overrule Van Ligten's first assignment of error likewise compels us to overrule Van Ligten's second assignment of error. The employment agreement stated that, upon the termination of employment, "if at such time the Employee is and has been an owner of any of the issued and outstanding shares of common capital stock of the Employer for six (6) years or longer, Employee shall be entitled to receive deferred compensation."² As stated above, Van Ligten did not own common capital stock at the time of his termination. Like the obligation to purchase an employee's stock under the purchase agreement, ESI's obligation to pay deferred compensation arises only if an employee, at the time of his or her termination, owns shares of ESI common capital stock. Because Van Ligten did not, the trial court appropriately entered summary judgment in favor of appellees on Van Ligten's claim for breach of the employment agreement. Accordingly, we overrule Van Ligten's second assignment of error.

{¶ 28} By his third assignment of error, Van Ligten argues that the trial court erred by dismissing count five of his amended complaint pursuant to Civ.R. 12(B)(6). The trial court stated that "Count Five is merely a recitation of the allegation set forth in Count Four. As such, it cannot form a separate basis for relief." We review a trial court's dismissal for failure to state a claim upon which relief can be granted *de novo*. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

² The parties agree that the employment agreement's formula for determining the amount of deferred compensation owed is incomplete as the result of a drafting error.

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{¶ 29} A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may review only the complaint, must presume all factual allegations in the complaint are true, must draw all reasonable inferences in favor of the non-moving party, and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988).

{¶ 30} Counts four and five of Van Ligten's amended complaint allege, as follows:

COUNT FOUR, BREACH OF FIDUCIARY DUTY

31. The preceding paragraphs are incorporated herein.
32. The Individual Defendants' [sic] breached their fiduciary duty to Plaintiff by terminating his employment without a legitimate business reason.
33. For the Individual Defendants' termination of Plaintiff's employment in breach of their fiduciary duty, Plaintiff is entitled to damages in an amount to be established at trial, but not less than \$25,000.

COUNT FIVE, BREACH OF FIDUCIARY DUTY

34. The preceding paragraphs are incorporated herein.
35. The Individual Defendants breached their fiduciary duty to Plaintiff by the manner in which they exercised their power to terminate Plaintiff.
36. For the Individual Defendants' breach of their fiduciary duties to Plaintiff, Plaintiff is entitled to damages in an amount to be established at trial, but not less than \$25,000.

{¶ 31} Van Ligten relies on *Cruz v. S. Dayton Urological Assoc., Inc.*, 121 Ohio App.3d 655 (2d Dist.1997), in support of his third assignment of error. Cruz, a physician terminated from a professional corporation, alleged, among other claims, multiple breaches of fiduciary duty. Cruz claimed that the other shareholders breached their

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fiduciary duty by terminating his employment without a legitimate business reason, by the manner in which they terminated his employment, and by reallocating overhead expenses to his financial detriment. As in this case, Cruz's employment agreement stated that either party could terminate employment unilaterally and without specification of cause, with a specified period of notice. Reviewing the trial court's entry of summary judgment, the Second District Court of Appeals held that Cruz waived his right to argue a breach of fiduciary duty based on the lack of a legitimate business reason for his termination by agreeing that the corporation could terminate him without cause. With respect to Cruz's claim that the other shareholders breached a fiduciary duty by the manner in which they terminated him, however, the Second District stated, at 663, as follows:

[Cruz] does not claim that the defendants owed him some different form of process, but that they owed him a duty to be fair and forthright in their dealings leading to his termination. He argues that they breached that duty by acts of duplicity. That claim, which is akin to fraud, is independent of whether the defendants were required to have good cause in order to terminate him.

Based on the *Cruz* court's finding of an independent claim for breach of fiduciary duty based on the manner in which Cruz was terminated, Van Ligten maintains that the trial court erred by dismissing his claim for breach of fiduciary duty regarding the manner of his termination. We disagree.

{¶ 32} First, the appeal in *Cruz* stemmed from the trial court's entry of summary judgment against Cruz. Thus, neither the trial court nor the appellate court was confined to the four corners of the complaint. Instead, they were able to examine the parties' arguments in light of the evidentiary record. Here, because the trial court dismissed count five under Civ.R. 12(B)(6), it focused solely on the sufficiency of Van Ligten's amended complaint and limited its review to the allegations contained in it.

{¶ 33} Appellees argue that, regardless of whether count five is duplicative of count four, Van Ligten's conclusory allegation that the individual defendants breached their fiduciary duties "by the manner in which they exercised their power to terminate" his employment is insufficient to state a claim upon which relief can be granted. We

agree. Van Ligten does not allege what was wrong with the manner of his termination, nor does he allege any improper act by any defendant. Other than Van Ligten's allegation that appellees lacked a legitimate business reason for terminating his employment, the only factual allegation concerning Van Ligten's termination is that "[o]n August 16, 2005, ESI delivered to [Van Ligten] a 'Termination Notice,' under Section 2 of the Employment Agreement, notifying [Van Ligten] that his employment was being terminated, effective 60 days from the date of delivery of the Termination Notice." Thus, the only allegation in the amended complaint to support a claim that appellees breached their fiduciary duty to Van Ligten in the manner in which they terminated his employment is Van Ligten's allegation, in count four, that appellees terminated him without a legitimate business reason. As a result, we discern no error in the trial court's conclusion that count five did not set forth an additional claim or separate basis for relief.

{¶ 34} Van Ligten correctly argues that a claim for breach of fiduciary duty is subject to Ohio's notice pleading requirements and not to a heightened standard of pleading. *See Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-943, ¶ 13, 15. Notice pleading requires that a claim concisely set forth only those operative facts sufficient to give a defendant fair notice of the nature of the action. *Wildi v. Hondros College*, 10th Dist. No. 09AP-346, 2009-Ohio-5205, ¶ 12. Count five of Van Ligten's amended complaint, however, fails to satisfy even that minimum standard. In *Brooks*, at ¶ 15, we held that the plaintiffs' allegation that their real estate agent shared confidential information with another purchaser, without permission, "minimally, but sufficiently" pled a failure to observe a fiduciary duty defined by statute. In contrast, Van Ligten pleads no facts sufficient to give appellees fair notice of the nature of his claim. Unsupported conclusions in a complaint are not sufficient to withstand a motion to dismiss. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490 (1994). We do not suggest that a plaintiff may never set forth an independent claim for breach of fiduciary duty based on the manner of his or her termination, as recognized in *Cruz*, because we need not reach that question. Rather, we hold only that, even if Van Ligten were entitled to set forth a separate claim based on the manner of his termination, count five of his

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amended complaint does not sufficiently allege such a claim. For these reasons, we overrule Van Ligten's third assignment of error.

IV. CONCLUSION

{¶ 35} Having overruled each of Van Ligten's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
2012 JUN 29 PM 3:21
CLERK OF COURTS

Peter F. Van Ligten,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-901
	:	(C.P.C. No. 07CVH-10-14534)
	:	
Emergency Services, Inc. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 29, 2012, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, J., BROWN, P.J., and SADLER, J.

By *Judith L. French*
Judge Judith L. French