

IN THE SUPREME COURT OF OHIO

PETER F. VAN LIGTEN,

Plaintiff-Appellant,

v.

EMERGENCY SERVICES, INC., et al.,

Defendants-Appellees.

:
: Case No. 12-1377
:
: Appeal from the Court of Appeals
: Tenth Appellate District
: Franklin County, Ohio
: Case No. 11-APE-10-901
:
:

MEMORANDUM OF DEFENDANTS-APPELLEES
EMERGENCY SERVICES, INC., ET AL., IN RESPONSE TO
PLAINTIFF-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

Quintin F. Lindsmith (0018327)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (facsimile)
qlindsmith@bricker.com

Attorney for Defendants-Appellees

Robert B. Graziano (0051855)
Michael R. Traven (0081158)
ROETZEL & ANDRESS, LPA
PNC Plaza, Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215
(614) 463-9770
(614) 463-9792 (facsimile)
rgraziano@ralaw.com
mtraven@ralaw.com

Attorneys for Plaintiff-Appellant

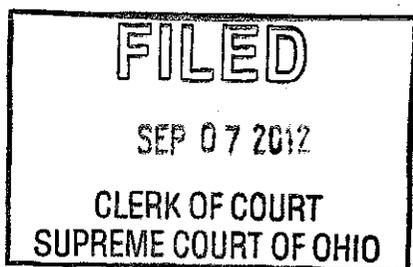


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**APPELLEES' STATEMENT AS TO WHY THIS CASE
IS NOT ONE OF GREAT PUBLIC AND GENERAL INTEREST**

This is a narrow case involving narrow facts. While Appellant complains about the creation of a new “loophole,” he identifies no violation of any statute. He describes no alteration of existing law. He does not even identify what new law was created by the Tenth District. And there was no re-writing of any agreement. Rather, Appellant wanted the courts below to essentially write in new provisions into his contracts, provisions he could have negotiated before signing them.

Appellant is a physician and a lawyer. While he was the elected corporate secretary of Appellee, Emergency Services, Inc. (“ESI”), while he was charged with the legal responsibility of protecting and preserving the corporate records of ESI, including the journal of stock ownership – he lost them. He not only lost the records of his own share ownership, but he also lost the records of all of the other twenty-four shareholders. This created uncertainty regarding share ownership. To restore certainty, all ESI shareholders – except Appellant – adopted a “corporate clean-up plan.” This plan followed a statutory process which allowed for the conversion of “Old Common Shares” into new “Preferred Shares,” which could then be redeemed for “New Common Shares.” The trial court found that the plan was in compliance with the law.

Importantly, Appellant did not appeal that finding of the trial court. So now he complains of a “loophole” created by a legal process that he did not even challenge on appeal.

Under the clean-up plan, the Old Common Shares would no longer exist or otherwise be recognized by the company. The shareholders could then immediately exchange their Preferred Shares for “New Common Shares,” provided they signed a subscription agreement and a stock purchase agreement.

The Preferred Shares were designed to be unpleasant to hold; they could only be redeemed for \$10 per share (each shareholder received twenty-five Preferred Shares), owners could only receive dividends at the rate of \$1 per Preferred Share, and in the event of liquidation, Preferred Share owners would only get paid \$10 per share. And a Preferred Share owner could not vote.

These harsh restrictions on Preferred Share ownership were designed to incentivize those owners to exchange their Preferred Shares for New Common Shares and to sign a new subscription agreement and stock purchase agreement. This would then create uniformity and certainty among all of the shareholders of ESI. This legal process validated by the trial court left the owners of Old Common Shares two options:

- (1) Exchange Preferred Shares for New Common Shares by signing a new subscription agreement and stock purchase agreement, or
- (2) Object to the entire process and pursue the recovery of the “fair cash value” of Old Common Shares by filing a claim as a dissenting shareholder pursuant to O.R.C. 1701.85.

Appellant initially undertook the latter course of pursuing a claim under the dissenting shareholder statute. But then he never filed suit within the three-month period required by the statute. And he never exchanged his Preferred Shares for New Common Shares as permitted by the amended articles of incorporation.

The result of this was that by the time Appellant left the employment of ESI nine months later in October 2005, he owned no common shares whatsoever. The Old Common Shares no longer existed and he never secured New Common Shares. In order for either the “Partner Employment Agreement” or the “Stock Purchase Agreement” to be operable, they both required that Appellant be the owner of “shares of common capital stock issued and outstanding.” For example, the “Partner Employment Agreement” (the “Employment Agreement”) expressly

provided that Appellant could only receive deferred compensation “if at such time [of termination] the Employee *is* and has been *an owner of any of the issued and outstanding shares of common capital stock* of the Employer....” (Emphasis added.) It does not simply require that the employee be the owner of “issued and outstanding shares.” It requires that the employee be the owner of “issued and outstanding shares of *common* capital stock.” (Emphasis added.)

Appellant made his own decision to forego his rights to convert his Preferred Shares to New Common Shares. If he felt he was being stripped of fair value, he could have pursued that value in a dissenting shareholder action authorized by R.C. 1701.85. He started that statutory process, then inexplicably stopped it.

By deliberately electing not to become an owner of New Common Shares he knowingly and deliberately gave up all of his rights as an owner of any common shares. And by doing so, he surrendered his rights under both the Partner Employment Agreement and the Stock Purchase Agreement, both of which required that he be an owner of “shares of common capital stock issued and outstanding.”

This is not a case of great public or general interest. It is only a case about a lone shareholder who had dissenting shareholder rights, but did not pursue them. It is only a case of someone who could have retained all of his rights and benefits under the Employment Agreement by converting his Preferred Shares to New Common Shares, but apparently due to his own stubbornness, chose not to. And this is not a case where a company singled out a minority shareholder for special treatment to try to strip him of his contract rights. The procedures adopted here were applicable to all twenty-five shareholders who, like Appellant, had their own

employment contracts and stock purchase agreements. In fact, the corporate clean-up occurred nine months before Appellant was terminated.

The only thing that happened here was that ESI had a sloppy corporate secretary who put all the shareholders in a terrible situation. The corporate clean-up was not an effort to strip Appellant of his contract rights. Even Appellant in his deposition did not take that position. This was a unique mess that had a logical clean-up that Appellant could have joined in and received the benefits from, but just chose not to.

STATEMENT OF THE CASE AND FACTS

Appellees do not dispute Appellant's Statement of the Case.

A. Appellant Becomes Employee And Shareholder Of ESI.

Appellant is a physician. In 1991, he became an employee and shareholder of ESI, which is a physicians group that staffs the emergency rooms of certain area hospitals. On January 1, 1996, he executed both a Stock Purchase Agreement and an Employment Agreement. The Employment Agreement permitted termination without cause as long as either party gave the other 60 days notice. Also in 1996, Appellant became a licensed attorney.

1. The Partner Employment Agreement And Stock Purchase Agreement.

The Employment Agreement contains a provision that allows for the payment to the departing employee "deferred compensation." But to be entitled to deferred compensation there is a condition precedent – the employee has to be an owner of "common capital stock" of the employer "issued and outstanding on" the date of termination of employment:

*"Upon the termination of the employment of Employee hereunder for any reason other than death or permanent disability, whether voluntarily or involuntarily, 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**..., Employee shall be entitled to receive deferred compensation for services rendered to Employer during his active employment,...." Section 15; Emphasis added.*

Similarly, the Stock Purchase Agreement created rights only for owners of “shares of common capital stock issued and outstanding.” This is set forth in the recital of the agreement that was omitted from Appellant’s brief. In that recital, the term “Shares” is a defined term:

“The Company has a total of 250 shares of common capital stock issued and outstanding (hereinafter called “Shares”). Each of the ten Stockholders is the owner and holder of 25 Shares. The Company and the said Stockholders desire to promote and protect their mutual interests by imposing certain restrictions and/or obligations on themselves.”

Paragraph 2 of the Stock Purchase Agreement provides that upon the stockholder ceasing to be employed by ESI, the stockholder “shall sell to the Company and the Company shall purchase from the Withdrawing Stockholder all of the Shares then owned by the Withdrawing Stockholder at the price and on the terms as set forth hereinafter.” (Emphasis added.)

By this language, ESI only had an obligation to purchase from departing shareholders their “shares of common capital stock issued and outstanding.” Nothing in the agreement created an obligation of ESI to purchase preferred shares. There was a logic to the company only wanting to buy back common capital stock that grants the owner voting rights, as opposed to virtually worthless Preferred Shares whereby the owner has almost no rights.

B. ESI’s Corporate Clean-Up.

In late 2004, while Appellant was the corporate secretary, substantially all of ESI’s corporate records were lost. As a result of the loss of these records and the need to conform shareholders’ stock and employment agreements, a corporate clean-up became necessary. On December 6, 2004, ESI sent a letter to shareholders, including Appellant, and certain former shareholders, informing them of the corporate clean-up plan. The letter stated in part:

“As many of you are aware, a loss of substantially all of ESI’s corporate records has created corporate governance issues for the Corporation, which we are anxious to resolve.

A number of former shareholders have assisted us by documenting the fact that their shares were surrendered to the Corporation in accordance with contracts and employment policies upon their termination of employment.

After an extensive review, ESI's Executive Committee has determined that the best method to remedy the remaining uncertainties regarding share ownership is to adopt a Corporate Clean-Up Plan... .”

The clean-up plan had the following features:

1. A meeting would be held on December 17, 2004, at which time Amended and Restated Articles of Incorporation (“Amended Articles”) would be proposed for adoption. The amendments would provide for conversion of all existing shares into Preferred Shares redeemable at any time, and creation of new common shares, redeemable when a shareholder ceases to be an employee. Adoption of the Amended Articles would require a favorable vote of two-thirds of the outstanding shares.
2. After the vote, a short recess would be taken during which the Amended Articles would be filed with the Secretary of State. The meeting would then reconvene and everyone in attendance would vote on approval of the stock restructuring.
3. At the conclusion of the meeting, the shareholders who were current employees would take the initial steps to exchange Preferred Shares for “New Common Shares” by signing a subscription agreement and making cash payment of \$50. Certificates would then be issued for New Common Shares.
4. A month later, all Preferred Shares not exchanged would be redeemed at a purchase price of \$10 a share.

In order for each shareholder to remain an owner of common shares, they were required to participate in the stock exchange plan. Once the adoption of this new plan took place, the old ESI shares (the “Old Common Shares”) would no longer be recognized.

C. Appellant Refuses To Participate.

Appellant attended the December 17, 2004 meeting of shareholders, voiced his objections, and then left halfway through the meeting. After Appellant left, the shareholders approved the stock restructuring plan. With this new plan in place, Appellant had until January 17, 2005 to exchange his Preferred Shares for New Common Shares.

Appellant *never* attempted to exchange his shares. Rather, on December 27, 2004, ten days after approval of the stock exchange plan, Appellant sent ESI a letter “claiming relief as a dissenting shareholder.” His letter tracked the language of R.C. 1701.85, which is the statute for a dissenting shareholder’s demand for the fair cash value of shares. In conformance with R.C. 1701.85, ESI sent Appellant a letter on January 6, 2005 requesting that Appellant return his stock certificates in which he claimed relief. In conformance with R.C. 1701.85, Appellant was given until January 15, 2005 to tender his certificates or risk terminating his rights as a dissenting shareholder. Appellant *never* tendered his stock certificates.

As of January 15, 2005, Appellant’s rights as a dissenting shareholder terminated. As such, Appellant did not have *any* recognized common stock in ESI after January 15, 2005, only twenty-five Preferred Shares. On January 27, 2005, ESI sent Appellant a letter indicating that Appellant’s dissenting shareholder rights were terminated. ESI expressed its disagreement with Appellant’s valuation of the fair market value of his shares.

Once ESI disputed the fair market value of Appellant’s stock, Appellant, under the dissenter’s statute (R.C. 1701.85), had three months to file a complaint in Franklin County Court of Common Pleas. Appellant did not file such a complaint within three months thereby extinguishing Appellant’s dissenter’s rights. R.C. 1701.85(D)(1).

D. The Trial Court Found The 2004 Restructuring To Be Legal And Appropriate.

The Trial Court found:

“The evidence before the Court establishes that ESI took the proper and legal steps in amending its Articles of Incorporation and converting existing shares of stock, which the Appellant claimed he owned, into New Common Shares. Under the Amended Articles of Incorporation, ESI issued New Common Shares and set forth a procedure for shareholders to exchange existing shares for New Common Shares. *The existing shares then ceased to be recognized.*” (Emphasis added.)

The Court went on to find:

“The Appellant does not dispute that ESI properly notified him of the process. The Appellant does not dispute that he failed to follow the procedures set forth under the Articles of Incorporation to exchange his stock.”

Appellant did not assign error to the trial court’s finding that the steps taken by ESI were “legal and proper.” And he agrees with the finding that he never exchanged his shares.

E. Appellant Is Terminated.

On August 16, 2005, ESI sent Appellant a termination notice. Appellant did not take issue with the termination notice and on October 15, 2005, Appellant ceased employment with ESI. But as a result of the restructuring that occurred in 2004 and as a result of Plaintiff’s failure to follow procedures to secure New Common Shares, he owned no “outstanding shares of common capital stock of the Employer” at the time of his termination because the Old Common Shares “ceased to be recognized.”¹

ARGUMENT

Response To Proposition of Law: – There Is No Breach Of Contracts Where, As A Result Of Lawful Actions Of A Company And As A Result Of Decisions Made By A Shareholder, Conditions Precedent In Such Contracts Can No Longer Be Met.

There are poorly written contracts and there are well-written contracts. Well-written contracts anticipate most areas of possible dispute; the parties negotiate terms designed to address possible areas of dispute. On the spectrum between poorly written contracts and well-written contracts, the agreements at issue fall somewhere in between. They address many potential areas of dispute, but not all. But it is not for the courts to remedy such deficiencies by writing in new provisions. Contracts that do not address every scenario present risks borne by the parties to the contracts.

¹ Decision and Entry of June 17, 2009, p. 4.

Both contracts at issue contain express conditions precedent whereby Appellant was not eligible to receive any payments under either contract unless at the time of his separation he was the holder of “existing and outstanding shares of common capital stock.” Ohio law at the time was no different than it is today. Chapter 1701 of the Ohio Revised Code grants corporations the right to create different classes of shares with “a distinguishing designation.” R.C. 1701.06(B). Appellant is deemed to have known the law – especially as a lawyer – which allowed corporations to issue different classes of stock and which also created statutory procedures for the conversion of one class to another.

Yet, Dr. Van Ligten did not seek to negotiate terms in his contracts that would have limited ESI’s rights to convert shares from one class to another. Rather, he accepted the conditions precedent in both contracts which provided that he could receive no payment under either contract unless he met the condition that he was a current owner of “issued and outstanding shares of common capital stock.” This is not a case where a court has created a “loophole.” It is a case where a court has appropriately declined to write new provisions into agreements that the parties never agreed to.

Under the Amended Articles, Preferred Shares are a very different class of stock compared to the New Common Shares; the owner of one class has dramatically different rights compared to the owner of the other class. Those differences included:

	Preferred Shares	New Common Shares
Par Value	Preferred Shares have a par value of \$10 per share.	New Common Shares have no par value.
Dividends	Holder of Preferred Shares receive “cumulative dividends at the rate of \$1.00 per Preferred Share,....”	No limitation of cumulative dividends.

	Preferred Shares	New Common Shares
Liquidation	Upon liquidation of the company, holders of Preferred Shares get paid “the sum of \$10.00 plus accumulated dividends [of \$1.00 per share], if any, per share.”	Holder of New Common Shares receive all remaining profit without limitation.
Redemption	The board can force the redemption of Preferred Shares “at any time... on the payment of \$10.00 plus accumulative dividends, if any, per share.”	The board can only force the redemption of New Common Shares from a holder “who is not at the time of redemption a full-time employee of the Corporation.”
Voting Rights	The holders of Preferred Shares have no voting power.	“[Holders] of New Common Shares shall possess all voting power for the election of directors and for all other purposes.”

By design, Preferred Shares are virtually worthless and New Common Shares are highly valuable. ESI entered into no agreement with Appellant whereby it agreed to purchase virtually worthless Preferred Shares.

So, as a matter of law, one Preferred Share is an apple and one New Common Share is a chicken. They each have very different attributes and have difference values. ESI agreed to purchase chickens, but not apples. To find otherwise, the lower courts essentially would have had to write in a new provision in the Stock Purchase Agreement that the parties never negotiated and never agreed to – an obligation of the company to purchase Preferred Shares.

It has long been settled that when construing a contract, “common words appearing in a written instruction will be given their ordinary meaning... .” Alexander v. Buckeye Pipe Line Co. (1970), 53 Ohio St.2d 241, paragraph two of syllabus. The words in the Stock Purchase

Agreement and Employment Agreement should be “given their ordinary meaning.” Shares of “common capital stock” means common capital stock, not preferred shares of stock.

Likewise, the term “issued and outstanding” must be given its plain and ordinary meaning. It is not enough that Appellant at one time was the owner of Old Common Shares. Even if he still possessed those old certificates, they still had to be certificates of stock that were “issued and outstanding.” As a result of the legal corporate clean-up, the Old Common Shares were no longer “issued and outstanding.”

1. The Amended Articles Did Not Modify The Stock Purchase Agreement; They Did Not Have To.

The Amended Articles of Incorporation did not modify the agreements. Such agreements never created an obligation to purchase shares of Preferred Stock. And again, neither agreement created a restriction on the company’s legal right to convert shares of common capital stock to preferred stock. The company followed the statutory process and Appellant did not assign as error the trial court’s finding that such process was properly undertaken and was legally valid.

If Appellant’s complaint is that the company unfairly stripped him of the value of Old Common Shares by replacing them with virtually worthless Preferred Shares, he had two remedies. He could have (1) pursued the loss of that value in court, or (2) exchanged the fairly worthless Preferred Shares for valuable New Common Shares. But he chose neither.

This is especially true of the Employment Agreement. Appellant was entitled to receive deferred compensation upon the termination of his employment only “*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,...*” (Emphasis added.) That is, the obligation to pay deferred compensation could only be triggered upon two events happening: (1) Appellant’s employment is terminated, and (2) at the time of his termination, he is “an owner of

any of the issued and outstanding shares of common capital stock” of ESI. He had no contractual rights to deferred compensation if at the time of his termination he was the owner of only Preferred Shares.

In fact, Appellant really shot his own foot off in regard to his employment agreement. If he had exchanged his Preferred Shares for New Common Shares, he would have been the “owner of any of the issued and outstanding shares of common capital stock” and he would have been entitled to payment of deferred compensation. His signing a new stock subscription agreement would not have changed that. This was a known right that he gave up when he deliberately chose not to exchange his Preferred Shares for New Common Shares.

This is why Appellant is bluntly wrong when he states:

“In other words, under the Tenth District holding, regardless of his stock purchase inactions, Dr. Van Ligten was **never** going to realize the benefits of the Agreements following ESI’s Amendment to the Articles of Incorporation.” Appellant’s Brief, p. 9; emphasis in original.

If Dr. Van Ligten had redeemed his Preferred Shares for New Common Shares and then signed the new subscription and stock purchase agreement, he absolutely would have received his deferred compensation under the existing Employment Agreement. And he would have received the same benefits of every other shareholder under the new stock purchase agreement.

Again, the words in the Employment Agreement must be given their plain and ordinary meaning. The right to be paid deferred compensation was limited to owners of “common capital stock.” It was not a right given to anyone who merely owned stock regardless of whether it was preferred or common. Contracts are to be read so that their words are given meaning and not so that words are rendered meaningless. Sunoco, Inc. v. Toledo Edison Company, et al. (2011), 129 Ohio St.3d 397; 2011 Ohio 2720; 953 N.E.2d 285 (“In interpreting a contract, we are required, if possible, to give effect to every provision of the contract.”).

A ruling that Appellant was entitled to receive deferred compensation because he owned *any* stock of ESI would render meaningless the term “common.” He likewise could not rely upon his possession of Old Common Shares where those shares were no longer “issued and outstanding.” To hold otherwise would likewise render meaningless the term “issued and outstanding.”

CONCLUSION

Appellant is the owner of twenty-five Preferred Shares. There is no dispute that those shares are worth \$10 each. There is also no dispute that ESI has no current obligation to pay him \$250 to redeem those shares until it wants to. And there is no dispute that Appellant finds himself in this situation as a result of a “proper and legal” corporate restructuring that he did not challenge on appeal. And he does not dispute that for reasons known only to himself, he chose not to exchange his virtually worthless Preferred Shares for much more valuable New Common Shares. And it remains unexplained why he started the statutory dissenter’s rights process to pursue “fair cash value” for the loss of his Old Common Shares, but then stopped.

He came to the lower courts essentially asking that they re-write provisions in the Employment Agreement and the Stock Purchase Agreement. He asked them to cross out the provision in the Employment Agreement which required that he be the owner of “issued and outstanding shares of common capital stock” at the time of his termination. He asked the courts to write in a new provision in the Stock Purchase Agreement which would create an obligation of ESI to buy his Preferred Shares and that it be done at a price much higher than \$10 per share. Neither request had any support in the law.

Appellant knew from the description set forth in the Amended Articles of Incorporation that he would enjoy many more benefits by being an owner of New Common Shares. And as a

lawyer, he must have known that those benefits would also have included his right to receive payments under the new stock purchase agreement as well as payments under his existing Employment Agreement. But he deliberately and intentionally chose to forego those benefits.

This case is not one of great public or general interest. No new law was created here. No statute was broken here. And no contract was breached here. The only thing that happened here was the fixing of a very bad problem which was opposed by the very person who caused the problem. The fix was not aimed at that person, but was applied equally to all twenty-five shareholders who also had their own employment agreements and stock purchase agreements.

This case is only about a petulant shareholder. Every company has them. But that does not make this case one of great and general interest.

WHEREFORE, for the foregoing reasons, Appellees respectfully request the Court to issue an order affirming the decisions of the trial court and overruling each of the assignments of error of the Appellant.

Respectfully submitted,



Quintin F. Lindsmith (0018327)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (facsimile)
qlindsmith@bricker.com
Attorney for Appellees-Defendants

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing document was served, via regular
U.S. mail, this 7th day of September, 2012, upon:

Robert B. Graziano, Esq.
Michael R. Traven, Esq.
ROETZEL & ANDRESS, LPA
PNC Plaza, Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215



Quintin F. Lindsmith (0018327)