

**WHY THIS IS NEITHER A CASE OF PUBLIC OR GREAT GENERAL INTEREST
NOR A CASE INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The trial court below applied settled law to facts it found after a fairly conducted evidentiary hearing. As a result, there is neither a case of public or great general interest nor a case involving a substantial constitutional issue.

Defendant-appellant Dr. Chun Bin Lim (“Lim”) and defendant-appellant Trionix Research Laboratory, Inc. (“Trionix”) claim plaintiff-appellee Robert Sobin (“Sobin”) breached a “fiduciary duty” to document a sale of his ownership of Trionix stock. They rehash evidence fully considered at trial. They present no novel propositions of law. They repeat explanations of Lim rejected after the trial judge heard testimony from plaintiff-appellee Robert Sobin (“Sobin”) and noted contradictions between what Trionix corporate documents stated and what Lim claimed they really meant. In the end, a judgment based upon credible evidence declared Sobin to be the owner of Trionix stock. Sobin therefore had no duty to making entries into corporate records to show a sale of stock that never occurred.

Lim and Trionix further insist this case is about the Appellate Court’s alleged failure to apply a *de novo* standard of review to their laches defense. Once again, they present no novel propositions of law. The Appellate Court recognized that the trial court made findings of fact and cited well established legal precedents in support of its conclusions. Therefore, appellate review was conducted properly. Lim and Trionix are merely aggrieved that the result of this review was not favorable to them.

Finally, Lim and Trionix allege a deprivation of their constitutional right to a jury trial. They argue they “never consented to a bench trial.” This is an artful way to avoid admitting they

never raised an objection at trial and did not raise this allegation with the Appellate Court, as a result of which they are prevented from raising this issue now.

STATEMENT OF THE CASE AND FACTS

The trial court decided after its careful consideration of evidence that Sobin is the legal owner of shares of common stock of Trionix.

Sobin, Lim and seven others were founding shareholders of Trionix, each receiving stock in 1987 and 1988. Lim has been President of the company and on its Board of Directors at all times since then. Sobin was initially Secretary and a member of its Board. As a result of several transactions now being questioned by Sobin, Lim became a majority owner of Trionix stock with a controlling interest in the company.

Four of the founding shareholders sold their interests to Trionix and surrendered their stock certificates in 1989, with all legal formalities of transfer being followed. During 1991 and 1992, Lim alleges having conversations with Sobin about a sale of Sobin's stock to Trionix. Sobin denies having such conversations. Certain payments were made in 1991 and 1992 to Sobin by Trionix which corporate records documented as "back pay" for calendar years 1987-1988 and repayment of a "loan." Lim and Trionix now claim what these records actually state about reasons for these payments should be disregarded because they really were for the purchase of Sobin's stock. However, Lim's income tax records show his receipts of similar payments at the time were not treated by him as compensation for sale of his own stock. Sobin never agreed in writing to sell his stock. He never endorsed his stock certificates to transfer ownership. No corporate resolution authorized Trionix to purchase stock from Sobin. None of the legal formalities used when the four shareholders were bought out in 1989 were used in the

alleged purchase of stock from Sobin in 1991 and 1992. Sobin denies selling his stock and denies any intent to sell his stock.

Sobin continued working for Trionix as Vice President of Engineering after receiving the aforementioned payments until he resigned in August of 1994. He was invited by a notice sent expressly to all shareholders to a shareholder's meeting held on January 20, 1997. He attended that meeting, on which occasion Lim used his majority shareholder interest to have Sobin voted off the Board of Directors. That same date, Lim signed a mortgage deed as President of Trionix in which Sobin was expressly identified as a "Current Shareholder." Trionix has not held a shareholder or director meeting since then. Sobin was never asked to surrender his stock at any time after his resignation from employment in 1994.

Sobin first learned Lim believed himself to be the sole shareholder of Trionix during a discussion with Lim in December of 2009. Sobin disputed Lim's assertion of sole ownership, and accordingly he filed a complaint for declaratory judgment and other relief on May 25, 2010.

Motions for summary judgment filed by each party were each denied on September 29, 2011 because the trial court believed there were issues of fact. Without objection, a bench trial was held on January 23 and January 24, 2012 on the sole issue in Count One of the Complaint of whether Sobin is an owner of corporate stock. Counts Two and Three requested relief to which Sobin would be entitled only as a stockholder. The case therefore was bifurcated because all parties agreed Sobin would not be entitled to relief under Counts Two and Three unless he first was declared to be a shareholder. The trial court declared per Count One that Sobin does own 655 shares of Trionix stock, and this decision was affirmed subsequently by the Eighth District Court of Appeals.

ARGUMENTS AGAINST PROPOSITIONS OF LAWS

Proposition of Law No. 1: An officer of a privately held corporation should not be permitted to utilize his own negligent or intentional failure to perform fiduciary duties as both a shield from liability and a sword for gaining impermissible shareholder advantage.

Lim and Trionix acknowledge that courts below found it compelling that Sobin had retained possession of stock certificates and is listed as a shareholder in the corporate ledger. However, they claim now that Sobin had a fiduciary duty to document his surrender of shares of stock in the absence of sufficient proof that he ever sold his rights to them.

Sobin's possession of stock certificates establishes his ownership rights continued even after he resigned from Trionix in 1994. As the Appellate Court observed, there is "no general rule that stock ownership can grow stale, much less a rule that requires shareholders to actively participate in the running of a corporation as a means of preventing their stock ownership from going stale." *Journal Entry and Opinion*, ¶19. The trial court had much other evidence upon which to rely based upon corporate actions after 1994. Corporations are required by law to maintain "records of [their] shareholders showing their names and addresses and the number and class of shares issued or transferred of record to or by them from time to time." R.C. 1701.37(A). A shareholder is defined as a person "whose name appears on the books of the corporation as the owner of shares." R.C. 1701.01(F). By continuing to list Sobin in its Share Journal as an owner of record, by noticing him as a shareholder to attend a shareholders meeting, and by referencing him in a mortgage deed as a "current" shareholder, Lim and Trionix took affirmative corporate actions that recognized Sobin's ownership of stock. Such records are themselves prima facie evidence of ownership. R.C. 1701.37(B). See, *Henn & Alexander, Laws of Corporations* (3 Ed.1983) 447 ("record ownership is accepted as conclusive and binding on

the courts"). The decision of the trial court in Sobin's favor therefore was supported by ample evidence.

Lim and Trionix argued at trial that Sobin as corporate Secretary had a duty to make entries in corporate records to document a change in stock ownership. This argument was rejected by courts below because no such change was found to have occurred.

Proposition of Law No. II: The Appellate Court erred by failing to apply a *de novo* standard of review to Defendant-Appellants' laches defense which was raised as part of a summary judgment motion.

Appellants state that the trial court below "affirmatively determined that there were no questions of fact as to the application of laches." However, Sobin had maintained he had no reason to know there was a question regarding his ownership status until that status was challenged in December of 2009. By contrast, Lim and Trionix claimed there was a delay by Sobin in asserting his ownership rights of between 15 and 20 years. For purposes of summary judgment, the trial court properly construed evidence of a factual matter most favorably to Sobin. Civ.R. 56 (C). It then applied settled law, citing correct legal authority that the doctrine of laches cannot apply unless there was an unreasonable delay or lapse of time in asserting a right. *State ex rel. Ascanti, et al. v. Stark Cty. Bd. Of Elections, et al*, 83 Ohio St.3d 490, 493 (1998), quoting *State ex rel. Polo v. Cuyahoga Cty. Bd of Elections*, 74 Ohio St.3d 143, 145 (1995). It had to believe Sobin for purposes of summary judgment and was required to conclude that delay or lapse was not unreasonable and that the doctrine of laches did not apply.

The Appellate Court used a correct standard of review. It stated that because laches is a component of equity, claimed error in application of the doctrine is reviewed for an abuse of discretion per *Payne v. Cartee*, 111 Ohio App.3d 580, 590 (4th Dist. 1996). Appellants now rely

improperly upon cases such as *Grafton v. Ohio Edison Co*, 77 Ohio St.3d 102, 105 (1996), which state that an appellate court has complete and independent power to review questions of law decided by summary judgment. In the case at bar, review was based upon a determination of fact (i.e. when Sobin first became aware of a dispute) and not upon a determination of law. Therefore, the Appellate Court correctly used an abuse-of-discretion standard of review per *Payne* instead of a *de novo* standard of review per *Grafton*.

Proposition of Law No. III: The Appellate Court denied Defendant-Appellants their Constitutional right to a jury trial on questions of fact related to the declaratory judgment action by which Sobin was determined to be a Trionix shareholder.

Appellants state that they “never consented to a bench trial” and, without proof in the record, that they “reiterated that demand during a pre-trial with the trial court.” A two-day bench trial was held during which appellants never objected once to the absence of a jury. Having lost after a fair trial, they now want a do-over.

The proposition of law stated herein was not discussed with the Appellate Court by either party. Appellants claim that error still should have been addressed by the Appellate Court. However, the general rule is that an appellate court will not consider any error which counsel for a party could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus; *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus; *State v. Lancaster*, 25 Ohio St.2d 83 (1971), paragraph one of the syllabus; *State v. Williams*, 51 Ohio St.2d 112 (1977). Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time. *State v. Childs*, supra, 14 Ohio St.2d at 62, citing *State v. Davis*, 1 Ohio St.2d 28 (1964); *State, ex rel. Specht, v. Bd. of Edn.*, 66 Ohio St.2d 178,

182 (1981), citing *Clarrington v. Althar* (1930), 122 Ohio St. 608 (1930). Nor was it the duty of the Appellate Court to construct on its own legal arguments in support of appellants' appeal. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, at ¶94, appeal not allowed, 110 Ohio St.3d 1439, 2006-Ohio-3862, reconsideration denied, 111 Ohio St.3d 1418, 2006-Ohio-5083. Finally, appellants waived any right to assert this proposition of law at the Supreme Court level by failing to raise it at all with the Appellate Court as an Assignment of Error. *State ex rel. DeGroot v. Tilsley*, 128 Ohio St. 3d 311, 2011 Ohio 231, ¶ 9.

For all of these reasons, this proposition of law cannot be considered now because it is untimely and inappropriately raised.

CONCLUSION

There are no important legal issues presented by this appeal for consideration. Courts below applied settled law to determinations of fact made after due consideration of documentary evidence and testimony. Therefore, for reasons stated above, this Court should not expend more time considering a case that was fully, fairly and reasonably decided below.

Respectfully submitted,

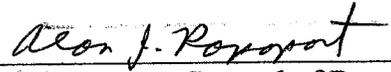


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Certificate of Service

I certify that a copy of this Memorandum In Response Of Appellee Robert Sobin was sent by ordinary U.S. mail to counsel for appellants, H. Alan Rothenbeucher, Ice Miller LLP, Fifth Third Center, 600 Superior Avenue East, Cleveland, OH, 44114 on February 4th, 2013.



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