MISSOURI SUPREME COURT

No. SC88812

THOMAS E. MONROE,

Appellant,

v.

WILLIAM O. CANNON,

Respondent.

Appeal from the Missouri Circuit Court
Twenty-First Judicial Circuit (St. Louis County)
Division No. 2
The Honorable Maura B. McShane
Cause No.04CC-229

REPLY BRIEF OF APPELLANT

Francis E. Pennington, III #26194
Laurie A. Shea #56190
PENNINGTON SHEA, LC
7733 Forsyth Boulevard, Suite 680
St. Louis, MO 63105
(314) 863-4080
(314) 862-3080 (facsimile)
fep@penningtonshea.com
las@penningtonshea.com

ATTORNEYS FOR APPELLANT

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Stone v. Crown Diversified Industries Corp., 9 S.W.3d 659, 664 (Mo.App.E.D. 1999)

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Witte v. Beverly Lakes Investment Company, 715 S.W.2d 286 (Mo.App.W.D. 1986),

Fix v. Fix Material Company, Inc. 538 S.W.2d 351 (Mo.App.E.D. 1976)

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ARGUMENT

I. APPELLANT TIMELY AND PROPERLY PRESERVED THE CONSTITUTIONAL QUESTION PRESENTED FOR REVIEW ON APPEAL, AND ACCORDINGLY, THE SUPREME COURT HAS JURISDICTION PURSUANT TO ARTICLE V, SECTION 3 OF THE MISSOURI CONSTITUTION.

Appellant recognizes the rule "that to preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). The Court has explained that the purpose of the rule is to "prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the [constitutional] issue…The purpose of the rule is not to prevent parties from litigating issues that arise during the course of a lawsuit if there is no prejudice to the opposing party." *Id.*

Appellant complied with the rule by timely raising, presenting, and preserving the constitutional question in the trial court, and Respondent's point should be denied.

As a preliminary matter, Appellant filed a jurisdictional statement as part of his notice of appeal in accordance with Rule 81.08, and Respondent filed no suggestions in opposition to the statement.

Appellant initially raised the constitutional challenge to §351.467 in his amended answer, filed on March 10, 2004, less than thirty days after filing his original answer in response to Respondent's petition, which filed on January 16, 2004. LF at 28. Appellant moved for summary judgment on his counterclaim, which was filed with his amended answer. In support of summary judgment, Appellant argued that (i) Respondent had expressly pleaded a desire to discontinue The Safe Deposit Company ("SDC") and to dispose of its assets, (ii) Appellant was therefore entitled to enforcement of the shareholders' agreement that required Respondent to sell his interest in the company to Appellant, (iii) §351.467 could not be applied to supplant a binding agreement between the parties, and (iv) if §351.467 were so applied, it violated the Contract Clause, Article I, Section 13, of the Missouri Constitution. LF at 49-56.[1] Respondent, in his opposition to the

[1] As noted in Appellant's opening brief, at 10 n.5, Appellant addressed the constitutional issue in his memorandum in support of his motion for summary judgment. Since Respondent erroneously states that Appellant did not present the point for the trial court's determination, Appellant attaches his supporting memorandum as an appendix to this brief and refers the Court to the discussion at pages 7-9 of the memorandum.

motion for summary judgment, specifically addressed the constitutional issue.[2] The trial court denied Appellant's motion. LF at 59. Subsequently, Appellant moved for reconsideration of the motion for summary judgment, and reconsideration was denied. LF at 81. After the case was reassigned to Judge McShane, Appellant again moved for reconsideration of the motion for summary judgment, and that motion was denied as well. LF at 125-131, 138. The trial court's findings of fact, conclusions of law and judgment, LF at 255-264, did not address the constitutional question, since the issue had been disposed of at the earlier stages of the case. Nevertheless, in his motion (and amended) motion to amend the court's findings of fact, conclusions of law and judgment, Appellant specifically re-raised the issue of the constitutionality of the statute. LF at 265, 273.

Throughout the proceedings below, the issue of the enforceability of the shareholders' agreement was inextricably linked to the question of the constitutionality of §351.467. Appellant persisted in efforts to persuade the trial court to enforce the agreement, but the countervailing bent of the court favored preemptive application of the statute. The elevation of an unworkable statute over a private, operative, organizational contract implicates Article I, Section 13, and

[2] Respondent did not include his memorandum in opposition to the motion for summary judgment, so Appellant will submit that memorandum in a supplemental legal file.

Appellant could not have been more assiduous in pressing this point. Respondent had a full opportunity to address the constitutional issue in the trial court, and particularly, in opposition to Appellant's motion for summary judgment and two motions for reconsideration. The trial court was presented the same opportunity. For Respondent to argue otherwise, without even a hint at a showing of prejudice, is hollow argument at best. *See Carpenter., supra.*

II. APPELLANT'S POINT I IS PROPERLY BEFORE THE COURT IN THAT APPEAL IS TAKEN FROM A FINAL JUDGMENT IN THE CASE THAT TERMINATED AND RENDERED APPEALABLE THE INTERLOCUTORY ORDER OF DENIAL OF SUMMARY JUDGMENT ON, AND DISMISSAL OF, APPELLANT'S COUNTERCLAIM FOR ENFORCEMENT OF THE SHAREHOLDERS' AGREEMENT AND DISPOSED OF ALL REMAINING ISSUES.

Section 512.020, RSMo. states in pertinent part that "[a]ny party to a suit aggrieved by any judgment of any trial court in any civil action in any civil cause…may take his or her appeal to a court have appellate jurisdiction from any…[f]inal judgment in the case [,and] a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case." Rule 74.01(a) of the Missouri Rules of Civil

Procedure provides that "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies."

The trial court's order denying summary judgment and dismissing Appellant's counterclaim was interlocutory at the time entered and not subject to appeal until final disposition of all matters before the court. However, once the trial court entered a final judgment[3] that terminated the interlocutory order of denial and dismissal and disposed of all remaining issues, the order became appealable pursuant to §512.020(5), RSMo. *See Vigil-Keyes v. Vanderwal*, 203 S.W.3d 749, 751 n.1 (Mo.App.W.D. 2006). Rule 81.04, read in conjunction with §512.020(5), makes clear that "[w]hen an appeal is permitted by law from the trial court, a party may appeal from a judgment *or* order…" (Emphasis added)

Appellant moved for summary judgment on his counterclaim seeking a declaratory judgment (a) stating the rights and obligations of the parties under the shareholder's agreement, and (b) adjudicating and declaring that Respondent sell his shares of stock of SDC pursuant to, and for the purchase price determined in accordance with, the agreement. LF at 49-50. All material facts were uncontroverted, and Appellant believes he was entitled to judgment as a matter of law. At the same time, Respondent moved to dismiss the counterclaim for failure to state a claim upon which relief could be granted. LF at 57-8. The trial court's denial of summary judgment, coupled with dismissal of the counterclaim, LF at

[3] Respondent does not question the finality of the trial court's judgment. *See* Rule 81.05.

59, reflects that the court's determination of the claim was rendered as a matter of law. While generally an order denying a motion for summary judgment is not reviewable on appeal, there are cases where review of denial of summary judgment is appropriate. *See Weinstein v. KLT Telecon, Inc.,* 225 S.W.3d 413, 415 (Mo. banc 2007)("An order granting or denying summary judgment is a matter of law that is reviewed *de novo.*") Denial of a motion for summary judgment is reviewable on appeal "where the merits of the motion are intertwined with the propriety of an appealable order granting summary judgment to another party." *Stone v. Crown Diversified Industries Corp.,* 9 S.W.3d 659, 664 (Mo.App.E.D. 1999). In this case, the trial court's denial of Appellant's motion for summary judgment on his counterclaim was intertwined with the court's dispositive order granting Respondent's motion to dismiss the counterclaim. Since there were no material fact issues in dispute, the trial court must have concluded that the merits of the two motions were so intertwined that the decision to deny summary judgment dictated a concurrent decision to dismiss the claim. Thus, the question of the propriety of the trial court's combined order of denial and dismissal is properly presented for review.

Moreover, Rule 84.14 allows an appellate court to "give such judgment as the court ought to give. Unless justice requires otherwise, the court shall dispose finally of the case." Where, as here, there is no dispute as to the facts, but rather only as to their legal significance, it is appropriate for the appellate court to render such judgment. *Apted-Hulling Inc. v. L & S Properties, Ltd.,* 234 S.W.3d 486, 489

(Mo.App.E.D. 2007).

Respondent argues that Appellant failed to avail himself of other "opportunities" at later stages of the proceedings to push enforcement of the shareholder's agreement. Respondent suggests that Appellant could have reasserted the claim by way of another counterclaim or affirmative defense and should have exerted pressure on the court to allow him to introduce evidence in support of the claim.

Respondent's argument curiously ignores the following. First, Appellant's motion for summary judgment was not denied because it was unsupported by evidence; clearly, it was so supported, and the evidence was ample and uncontrovertible. Furthermore, Respondent's motion to dismiss was not granted because Appellant's counterclaim failed to state a cause of action. Clearly, it did state a claim, but the court in effect ruled that Appellant's claim was legally precluded by Respondent's §351.467 claim and so dismissed the counterclaim.[4]

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[4] Note that Appellant had previously moved to dismiss the §351.467 claim on grounds that the allegations of the petition failed to establish the statutorily-required predicate fact that the stockholders were "unable to agree upon the desirability of continuing the business of [the] corporation," §351.467.1, in that Respondent, while alleging a "desire to discontinue the business of [the] corporation and to dispose of the assets," was actually seeking a restructuring and continuation of the business. LF at 42-4. The trial court denied Appellant's

Second, as noted, Appellant twice moved for reconsideration of the order of denial and dismissal, and on the second occasion of doing so, with the retrospective of the then, already-lengthy proceedings, explicitly requested that the court order Respondent to sell his interest to Appellant for the consideration set

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motion to dismiss. LF at 45. Thereafter, Respondent moved to *dissolve* the business and to appoint a receiver *to administer and wind up its affairs.* LF at 46-8. Once the court disposed of Appellant's motion for summary judgment on his counterclaim, Respondent's motion to dismiss the counterclaim, and Appellant's first motion for reconsideration of those motions, the matter was set for hearing on Respondent's §351.467 claim and, specifically, his motion for dissolution and appointment of a receiver. The result of the court's previous rulings was to place the case on an inexorable track toward court-ordered dissolution and appointment of a receiver, as mandated by §351.467. In lieu of a hearing, the parties stipulated to a set of findings of fact and conclusions of law, in which (a) "[t]he Court accept[ed] the allegations of Plaintiff's petition that Plaintiff Cannon and Defendant Monroe are unable to agree upon the desirability of continuing the businesses of [the companies], in that Plaintiff alleges a desire to discontinue the business of th[e] entities, and Defendant has alleged a desire to maintain [the] entities as going concerns," and (b) the court appointed a receiver without expressly dissolving the business entities. LF 82-4.

out in the shareholder's agreement and/or on "just and reasonable" terms set by the court; LF at 81, 125-31.[5]

Third, when the court-appointed trustee requested court approval to conduct an ill-defined "private sale," LF at 144-45, Appellant filed a motion , in which he explicitly opposed the trustee's recommendation, and stated his belief that "barring court enforcement of the parties' shareholder agreement, that the most legally and factually supportable—and reasonable—disposition of this matter is defendant's being ordered to purchase plaintiff's interest in the businesses for fair value;" alternatively, Appellant requested a trustee-mediated process of negotiation, and if that failed to produce agreement, a one-half day evidentiary hearing followed by a court determination "based on the pleadings, the law, testimony of the parties and other evidence introduced in the hearing…(a) that one party shall purchase the interest of the other and who the purchasing party shall be, and (b) the fair value of the businesses and a fair and reasonable price that the buyer shall pay the seller," LF at 157-61.[6]

Fourth, after the disputed "private sale" was conducted, the court, upon Appellant's request, LF at 243-48, convened a hearing on Appellant's

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[5] Appellant submitted his revised affidavit in support of the second motion for reconsideration. LF at 132-37.

[6] The court ordered the parties to proceed with the non-evidentiary process of the "private sale," and Appellant's motion was deemed denied. LF at 166-70.

counterclaim for relief under §351.494, RSMo.; during the hearing, Appellant offered testimony and evidence of various computations of value of Respondent's one-half interest in the business, including evidence of the purchase price calculated in accordance with the formula set forth in the shareholder's agreement; Appellant maintained that evidence of the latter was relevant to the remedy that he was seeking under §351.494, but Respondent's counsel objected to the evidence on the basis that "[a]ny issue of the shareholders agreement is irrelevant…that claim has been dismissed by the Court." Tr. at 35.

There is ample demonstration in the record from the proceedings below of Appellant's commitment to the principle that force and effect should be given to the private agreement of the parties, and that application of §351.467 in derogation of that agreement renders the statute unconstitutional. Respondent's argument that Appellant did not press the point vigorously enough to preserve it for appellate review turns a blind eye to the record and is further avoidance and obfuscation by Respondent on the seemingly endless path to proper resolution of this controversy.

Respondent's argument on the merits of Appellant's counterclaim for declaratory relief belies his own allegations and actions before the trial court. In his petition, tracking the language of §351.467, Respondent alleged a "desire to discontinue [the business] and to dispose of the assets in accordance with [*his*] plan of discontinuance and distribution." Failing agreement on the plan, Respondent requested that the court "dissolve [the company] and appoint a trustee or receiver to administer and wind up [its] affairs and distribute [the] assets." LF

at 12. The statute itself declares that the duty of the court-appointed trustee or receiver is to "administer and wind up [the company's] affairs in a method intended to realize the maximum value for the stockholders, *including* the sale of the company as a going concern." §351.467.2, RSMo. Once appointed, and as events unfolded, the trustee in this case recommended "that the businesses and their assets be marketed and sold through the use of a recognized and experienced business broker." LF at 88. The court accepted the trustee's recommendation. LF at 90.

Appellant was vehemently opposed to retention of a business broker to sell the business, not only due to his opposition *per se* to the involuntary sale of the business, but also because (1) such a sale could jeopardize the company's sensitive contractual relations with the Missouri Higher Education Loan Authority ("MOHELA"), the company's largest customer, which accounted for 50% of its annual revenues, and (2) at that critical juncture in the litigation, there was considerable uncertainty surrounding MOHELA as a result of the Governor's announced plan to sell MOHELA and use the sale proceeds to fund various state projects. Appellant therefore moved to stay proceedings in the case. LF at 99-102. Nevertheless, the trustee proceeded to recommend court approval of a contract with Clayton Capital Partners, a business broker. Over Appellant's objection, the court ordered the parties to enter into that contract. LF at 103-06, 108-09. Following a brief hiatus, Respondent moved to compel Appellant, despite his continuing, strong objections, to execute an agreement with the business

broker, asserting that he, Respondent, stood "ready and willing and prepared to execute all necessary documents for the appointment of Clayton Capital" to effect the sale of the business. LF at 121-23.[7]

Appellant recounts the above portion of the pleading/procedural history of the case because much of Respondent's argument against enforcement of the shareholder's agreement is predicated on the notion that Respondent never acted in a manner reflecting a move "to sell, encumber or otherwise dispose of his stock in the [company]," within the meaning of the agreement. LF at 32. In arguing that the shareholder's agreement cannot reasonably be construed to confer on Appellant a right to acquire Respondent's one-half interest, despite his unilaterally acting to encumber his interest by invoking §351.467 and the jurisdiction of the court, requesting the statute's radical remedy of dissolution, and then enlisting a court-appointed trustee to pursue a brokered sale of the business to a third party, Respondent ignores the agreement's essential purpose of permitting the non-selling, non-disposing and non-encumbering co-owner a reasonable opportunity to retain control of and continue the business.

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[7] In the immediate aftermath of Respondent's motion and pronouncement, Appellant moved again for reconsideration of his motion for summary judgment and Respondent's motion to dismiss Appellant's counterclaim for declaratory relief for enforcement of the shareholder's agreement. LF at 125-31.

In response to Respondent's assertion that '[t]here is no evidence that Plaintiff attempted or desired to sell his shares of stock to a third party or to dispose of his shares of stock," Respondent's Brief at 36, we raise this question: Who's to say that the business broker selected by the trustee to market and sell the company to a third party, or the third-party purchaser itself, would not have sought to structure the ultimate transaction as a stock sale and purchase? In answering that question, Appellant directs the Court's attention to the Clayton Capital Partners contract that both the trustee and Respondent[8] recommended approval of. The contract explicitly states that "[t]he objective of the engagement is to retain CCP to assist *in the sale of the stock* of the Companies and/or the assets of the Companies." LF at 93-8 (emphasis added).

There is more than sufficient manifestation in the record of Respondent's desire to sell or dispose of his stock and business interests to support Appellant's contention that Respondent be ordered to sell to Appellant in accordance with the terms of their agreement.

To further punctuate the point, we repeat what Appellant has maintained all along—that there can be no greater imaginable *encumbrance* on the stockholdings of both parties than Respondent's unilaterally subjecting the company and its assets to the authority of a circuit court and the supervision of a court-appointed

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[8] Recall that Respondent specifically moved to compel execution of the contract with Clayton Capital Partners. LF at 121-24.

trustee. That fact, along with Appellant's reasonable expectation of the enforceability of their agreement should not be swept aside by ascribing unduly narrow meaning and intendment to the agreement's terms. [9]

Respondent cites several decisions from other jurisdictions, two of which we will address. *In re McKinney-Ringham Corp.*, 1998 WL 118035 (Del.Ch. 1998), was decided under an earlier version of a Delaware statute discussed in Appellant's opening brief. Appellant's Brief at 35. The Delaware statute, 8 Del.Code §273, contained language somewhat similar to that of §351.467, RSMo. in that it required a predicate showing that two 50% shareholders engaged in a "joint venture" are "unable to agree upon the desirability of discontinuing such joint venture and disposing of [its] assets…" (Section 351.467 states only that the two 50% shareholders "shall be unable to agree upon the desirability of *continuing* the business of such corporation…") The petitioner in *McKinney-Ringham* sought actual dissolution of the enterprise. The respondent opposed dissolution, and in so

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[9] Respondent quotes the purely legal definition of "encumbrance" in *Black's Law Dictionary* (8th ed. 1999). However, the shareholder's agreement cannot reasonably be construed to so limit the terms "encumber" or "encumbrance." *Webster's New Universal Unabridged Dictionary* (2003) defines "encumber" as "to burden or weigh down; to burden with obligations, debt, etc.," and "encumbrance" as "something that encumbers; something burdensome; burden; hindrance."

opposing it, cited the parties' shareholders' agreement *only* in so far as it supported the respondent's view that the dissolution statute in the first instance was not invocable since the existence of an agreement established that the parties were not in disagreement on how to dispose of the venture's assets. The respondent did *not* argue that petitioner's actions, legal or otherwise, triggered respondent's right to buy out the petitioner's interest in the enterprise under the agreement, and notably, the respondent was *not* seeking affirmative relief under the agreement. *Id.* at *4.[10] Moreover, Missouri's statute, unlike Delaware's, explicitly (and paradoxically) mandates that the court "shall dissolve [the] corporation," and that the court "shall [appoint] one or more trustees or receivers

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[10] *See Haley v. Talcott*, 864 A.2d 86 (Del.Ch. 2004), in which the court, in a case brought under Delaware's LLC-dissolution statute, considered the effect of the LLC's operating agreement, stating:

The Delaware LLC Act is grounded on principles of *freedom of contract.* For that reason, the presence of a reasonable exit mechanism bears on the propriety of ordering dissolution under 6 Del.Code §18-802. When the agreement itself provides a fair opportunity for the dissenting member who disfavors the inertial status quo to exit and receive the fair market value of her interest, it is at least arguable that the limited liability company may still proceed to operate practicably under its contractual charter because the charter itself provides an equitable way to break the impasse. *Id.* at 96 (emphasis added).

[to] administer and wind of its affairs in a method intended to realize the maximum value for the stockholders, *including the sale of the company as a going concern."* §351.467, RSMo (emphasis added).

We can presume that Respondent, unlike the petitioner in *McKinney-Ringham,* was not literally seeking to dissolve the enterprise when he filed his petition, since that would be anathema to one seeking to maximize the value of his business interest by forcing its sale as a going concern. Rather, we must presume that Respondent, by invoking §351.467, was seeking to maximize the value of his one-half interest in the business by effecting the sale of stock and assets for the going-concern value contemplated by the statute. Thus, he most certainly communicated a desire and intent to sell so as to trigger Respondent's obligation to sell and Appellant's right to buy under their agreement.

Respondent also cites a Michigan case, *Levant v. Kowal,* 86 N.W.2d 336 (Mich. 1957), which to is inapplicable. *Levant v. Kowal* was a Michigan common law action for corporate dissolution and liquidation. The court rejected the defendants' argument that the filing of the bill of complaint implicated an option agreement covering transfer of capital stock; the court declined to enforce the option agreement because "[w]hat [plaintiffs] are praying is that the court sell the assets, not that the parties sell their stock." *Levant,* of course, does not address the statute at issue and circumstances presented in this appeal.

By filing his petition under §351.467, Respondent invoked the statutory mandate that a trustee or receiver wind up the affairs of the business "in a method

intended to realize maximum value for the stockholders," and aggressively advocated the retention of a business broker whose stated objective was "to assist *in the sale of the stock* of the Companies and/or the assets of the Companies."

Respondent revealed that his intention in bringing this action was not to dissolve and liquidate the enterprise (although he foolhardily pushed it to the precipice), but rather to effect a transfer of the business as a going concern, via a brokered stock and asset sale, for a greater amount of money than the shareholders' agreement would yield to him. It is no different than if Respondent had announced to Petitioner that, with or without Petitioner's consent and notwithstanding their agreement, Respondent intended to privately sell his one-half interest to a third party.[11]

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[11] In a footnote, Respondent discusses *Witte v. Beverly Lakes Investment Company*, 715 S.W.2d 286 (Mo.App.W.D. 1986), which held that a restriction on the transferability of stock did not apply to a court-ordered transfer of the stock following a dissolution of marriage. The holding in *Witte* is not analogous as Respondent argues. Transfer of the stock at issue in Witte—one share in a private club that was owned by the ex- husband—was opposed by both the ex-husband and the club based on the non-transferability restriction, and thus, the transfer was deemed involuntary. Here, by contrast, Respondent urged court approval of the contract with the business broker that was contemplated to lead to the sale of his

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT'S CLAIM UNDER §351.467 BECAUSE (A) THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT IT, AND (B) IT IS AGAINST THE WEIGHT OF THE EVIDENCE.

This case is anomalous in a number of respects because of the peculiar statute under which it arose. Respondent's observation that "[t]he statute is essentially self-executing," Respondent's Brief at 43 n.14, underscores the point and invites the basic question raised in this appeal is: What role did **evidence** play in the ultimate resolution of the case?

To begin with, §351.467, in all its Draconianism, requires nothing more than the mere *allegation* that 50/50 shareholders "shall be unable to agree upon the desirability of continuing the business of the [subject] corporation." §351.467.1, RSMo. Thus, Respondent alleged that Respondent and Appellant "are unable to agree upon the desirability of continuing the business" and that Respondent "desires to discontinue [it]," LF at 12. Appellant answered by affirmatively stating "that it is in the best interests of the shareholders of [the companies] to maintain [them] as going concerns." LF at 26-7. The issue of the desirability of continuing the business was joined in the pleadings, but in this case, joinder of the

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stock and the business assets, and thus, the transfer of Respondent's stock would have been entirely voluntary.

issue had the effect of establishing, and Respondent's never having to prove, the predicate fact of the existence of a disagreement upon the desirability of continuing the business, which triggers application of the statute. Appellant does not question that particular, pleading/procedural result, but simply wishes to illustrate the ease with which the statute and its dictates can be invoked.[12] To be sure, the statute allows time, before the court intervenes, for the parties to try to agree on a "plan of discontinuance and distribution." The nuances and details of the unsuccessful negotiations in this litigation are beyond the scope of the appeal and the record of the case.[13] Suffice to say that the parties were unable to reach agreement, and in such circumstances, the statute becomes inexorable. The court

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[12] Contrast §351.467 with §351.494, which imposes on the proponent a far less ethereal burden of proving deadlock and threat of irreparable harm, or illegality, oppression or fraud, or misapplication or waste of corporate assets, among other predicate circumstances that typically require the taking and weighing of evidence.

[13] Respondent should not be permitted to blithely dismiss Appellant's defenses to the statute with statements like, "Defendant himself brought on the necessity of the having the Court appoint [a trustee]," or "[h]ad the Defendant reached an agreement with the Plaintiff, there would have been no appointment of [a] Trustee," or "[t]he Defendant's action, in refusing to accept Plaintiff's Petition for distribution…, resulted in the Court exercising its jurisdictional and equitable power to appoint a Trustee." Respondent's Brief at 37-8.

*shall (*not *may)* appoint a receiver or trustee and dissolve the corporation. §351.467.2, RSMo.

Respondent correctly notes that the trial court entered stipulated findings of fact and conclusions of law, but Respondent's assertion that "[t]his stipulation represented an agreement that the evidence supported a finding in favor of Plaintiff under the statute" is malarkey. Respondent's Brief at 43. The most important feature of the court's findings and conclusions is its explicit "accept[ance of] the allegations of Plaintiff's Petition that Plaintiff Cannon and Defendant Monroe are unable to agree upon the desirability of continuing the businesses…in that Plaintiff has alleged a desire to *discontinue* the business…and Defendant has alleged a desire to *maintain those entities as going concerns,*" a statement by the court that reflects nothing more than the content of the parties' pleadings. LF at 83 (emphasis added). The court's appointment of a trustee was a foregone, wholly non-discretionary judicial act.[14] Other than identify the trustee and generally set out his duties, the court's order made no provision whatsoever for final disposition of the case. What we now know is that the controversy morphed from Respondent's invoking the jurisdiction of the court by alleging a desire to *discontinue* the business, in stark counterposition to Appellant's stated commitment to *continuing* the business, to Appellant's being ordered, contrary to

[14] The Court will note that the trial court's findings and conclusions do not order dissolution of the corporate entities. LF at 83-84.

his wishes, to sell his one-half interest and walk away from the business that has been his livelihood. The lack of evidentiary support for that outcome is one of the essential flaws in the judgment of the trial court.

After reconsidering his ill-advised recommendation to the court to hire a business broker to market and sell the business—a recommendation that Respondent urged the court to accept, LF at 121-24—the trustee moved for court approval to conduct a "private sale." LF at 144-45. Contrary to the statement in Respondent's brief, Appellant did not agree with the trustee's recommendation. The trustee erroneously reported to the court that both parties had expressed willingness to participate in a "binding private sale," when in fact, what had been agreed was to hold further discussions that might lead to a mutually-acceptable process for resolving the dispute. Appellant promptly moved for court approval of an alternate process to that recommended by the trustee. Appellant explicitly opposed the amorphous, trustee-proposed process and proposed as an alternative a process consisting of a trustee-facilitated negotiation, to be followed, if there were no agreement, by a formal evidentiary hearing to allow the court to decide who should buy out whom and the "fair value" that the buyer should pay and the seller should receive. LF at 157-61.[15] Over Appellant's objection, the court ordered a

[15] Exhibit "B" to Appellant's motion is correspondence to the trustee and Respondent's counsel regarding the need for further discussions on the terms and

non-judicially supervised, non-evidentiarily-based, binding "private sale." LF at 166-70.

The procedure surrounding the court's decision to order the "remedy" of a trustee-conducted "private sale" was entirely off the record, other than Appellant's and the trustee's dueling motions, which we discussed above. The court, at that juncture of the proceedings, rejected any notion of an evidentiary hearing. It ordered the "private sale" to proceed solely on the basis of the recommendation of the trustee. And therein lies the problem with the statute, §351.467. It fosters a departure from traditional due process. It discourages reasoned exercise of powers vested in a court that is supposed to be acting in equity. It compels the appointment of, and thereby exalts the role of, a trustee in difficult, complicated, fact-sensitive and fact- specific shareholder disputes. It deprives the court of discretion and tilts the judicial process toward allowance of virtually exclusive deference to the judgment and recommendations of the trustee, who, like the court itself, lacks the benefit of precedent, much less the ability to apply it. In the words of Respondent, the statute becomes "self-executing." Thus, Appellant, upon nothing more than the recommendation of the trustee, was *ordered* to participate in an unchecked bidding process that was not reasonably calculated to produce a properly sustainable outcome.

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conditions of the trustee-proposed "private sale." LF at 164-65. Terms and conditions were *never* agreed upon.

The "process," Respondent argues, is defensible because it "resulted in a value of $1,755,000 for Defendant's one-half share" that is consistent with the provision of the statute requiring trustee administration and winding up of the affairs of the business "in a method intended to realize maximum value for the stockholders." Respondent's Brief at 44-5; §351.467.2, RSMo. It may be that Respondent subjectively believes that by paying $1,755,000 for Appellant's one-half interest, Respondent would obtain "maximum value." But it does not follow that Respondent's paying the seemingly high price of $1,755,000 produces "maximum value" for Appellant. Indeed, Appellant's being forced to sell his business interest at that price, given his earnest desire to continue in the business and enjoy the fruits of his labor, monetary and otherwise, throughout the coming years, does not constitute "maximum value" to him, as he testified. The question becomes, therefore, whether the trustee-recommended method of disposition—the "remedy" ordered by the court—produced "maximum value" for *both* shareholders. By what standard and rules, and under what evidence, law and principles of equity, can an appellate court critique the fairness and reasonableness of ordering divestment of an individual's means of earning a living when he has said all along that he wishes to retain it? These questions become the more compelling when considering that Respondent is, quite literally, under no compulsion to purchase Appellant's interest for the "bid price" of $1,755,000. The court's order approving the "private sale process" contained a loophole that permitted Respondent to bid up the price, strategically "default," flip the

transaction, and force Appellant to buy him out for slightly more than 10% of Respondent's "bid price"—that is, for an amount in excess of any amount that a truly arm's-length transaction would yield and the amount that Appellant reasonably believes constitutes "fair value." LF at 170. The possibility of that scenario's playing out looms large in this case, and Respondent says nothing about that in his brief.[16]

As discussed in his opening brief, Appellant requested an evidentiary hearing following the "private sale." Appellant's claim under §351.494 was still pending.[17] Missouri caselaw is clear that although §351.494 is commonly known as a "corporate dissolution" statute, a court is not limited to the remedy of dissolution but may consider other appropriate alternative equitable relief. *Fix v. Fix Material Company, Inc.*, 538 S.W.2d 351, 357 (Mo.App.E.D. 1976).

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[16] Clearly, Appellant would not be prosecuting this appeal if he had a hidden motive of participating in the "private sale" in order bid up the price for his share of the business.

[17] The trial court dismissed Appellant's initial counterclaim for enforcement of the shareholder's agreement for failure to state a claim upon which relief could be granted. Appellant subsequently filed another counterclaim based on §351.494, RSMo. LF at 74-8. Appellant cannot be deemed to have abandoned his initial claim because he did not reassert it in the subsequent counterclaim, since the court dismissed the earlier claim.

Section 351.494 is accompanied by a body of illustrative caselaw. Section 351.467 is not. Section 351.494 promotes basic due process, inviting the presentation of evidence and consideration of all relevant facts and circumstances with the view to a court's determining an appropriate equitable remedy. Section 351.467 wrests discretion from the court, and as evidenced by this case, can become a process of the court's defaulting to the recommendations of the trustee without regard for relevant, surrounding facts and circumstances.

We have already detailed the testimony and evidence that Appellant presented in the hearing and will not repeat it here. The trial court apparently chose to ignore that evidence, which, after all, bore directly on the important issues that should be the focus of a trial and resolution of a shareholder dispute such as this: (a) in fairness and equity and in consideration of all the circumstances, who, as between these two shareholders—one of whom, Respondent, a passive owner having little or no involvement in the business, who started and constantly fanned the litigation with explications that the *only* remedy he was seeking (if Appellant did not agree to his buy-out terms) was dissolution and sale of the business,[18] and Appellant, the active owner who built the business,

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[18] Respondent states that "[t]he record does not contain any deposition testimony [of Respondent]" in which he "'affirmed that his objectives were to discontinue, dissolve and liquidate the business.'" Respondent's Brief at 53. Respondent is incorrect! Appellant quoted Respondent's deposition testimony and cited the

whose livelihood is managing and operating the business, whose "sweat equity" is in the business, and whose consistently stated desire is to continue to own and operate it in the years to come—should be permitted to buy out the other?; and (b) what is the "fair value" and thus a fair price that the purchasing shareholder should pay?

The trial court eschewed the process of taking evidence and determining the merits of the competing claims in favor a mere recommendation[19] of the trustee that the court accept the flawed and artificial construct of a "private sale."

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transcript where that testimony appears. The transcript of Respondent's deposition immediately follows the transcript of the evidentiary hearing in the Transcript on Appeal. Appellant's Brief at 23; Tr./Deposition of William O. Cannon at 15-6, 51, 110-11.

[19] At the conclusion of the hearing, the following exchange occurred:

MR. MCCARTER [Trustee]: Well, my request, your Honor, is that you approve the trustee's Report of private sale, that you enter an order directing the parties to comply with that request by a date with 45 days from the date of your order [per the court's previous order approving the trustee's recommendation to conduct the "private sale"]…that the successful buyer under the private sale bring to closing cash of $1.755 million, that the parties execute documents* attached to the private sale, and that the sale be concluded by all parties complying with the

order. That's, in my mind, the only way to bring this to a resolution on the part of the case.

THE COURT: Okay. So that's what you are asking as the trustee is that I approve the sale?

MR. MCCARTER: Yes.

Tr. at 79. The above exchange between the trustee and the court is the entire record of the presentation of the trustee's report and recommendation. Appellant objected to the report, not because it was not "authentic,"or that it did not include the "bids" and documents that passed between the parties during the "private sale," or that it was inadmissible, but because, in the first instance, the report does not constitute evidence. Tr. at 83. The court "overruled" Appellant's objection and received the report. Tr. at 83.

*The documents to which the trustee referred was a draft of a purchase agreement prepared by Respondent's attorney and submitted with one of Respondent's "bids," in which he offered to buy Appellant's one-half interest for $1,590,000, simultaneously offered to sell his one-half interest for $1,675,000, and conditioned the latter on the "parties accept[ing] the attached transaction documents without further revision…" LF at 207.

Respondent defends the outcome with liberal reliance on another Delaware case, *Fulk v. Washington Service Associates, Inc.*, 2002 WL 1402273 (Del.Ch. 2002), in which the court ordered a "private sale" akin to that ordered here. Two important aspects of the *Fulk* case warrant consideration in this case. First and foremost, the court emphasized that

> [t]he core of the problem is that although [the enterprise] is a joint venture corporation with two 50% stockholders, [its] owners never agreed to an "exit strategy" to recover the value of their investment in the event the joint venture was terminated. In many ventures of this kind the governing instruments create an exit strategy, which typically takes the form of a "buy out" by one stockholder of the other's interest. In some cases the buy out price is either an agreed-upon dollar amount, a formula by which the price can be calculated, or a procedure or process by which the buy out price can be determined…Unfortunately, in this case, when [the enterprise] was formed its governing instruments did not set forth an agreed buy out price, formula or process.

Id. at *6. In this case, of course, there *is* such an agreement, but Respondent, with the trial court's blessing, has been able to circumvent it.

Second, the *Fulk* court ordered appointment of a receiver/custodian *after* the court conducted a two-day trial and presumably was able to make an informed decision based on the evidence and testimony of the principals. It is apparent that

the court reached a conclusion on the ultimate resolution of that dispute only after deliberatively considering all relevant facts and circumstances, the evidence, and the law.

As we have previously noted, the Delaware joint-venture dissolution statute confers considerably more discretion on a court than §351.467 does, so the *Fulk* court wisely observed that "[n]othing in the stature requires [the] process to be contorted into a procedural straightjacket that limits the Court to only one structure for discontinuing the [enterprise] in the absence of an agreed-upon plan." *Id.* at *10.

Appellant comes to this Court on issues of substance and procedure recognized in *Fulk*: the court's giving due regard to the governing agreement of the parties in a shareholders' dispute; and two, the court in equity not becoming so procedurally hamstrung as to ignore basic principles of equity and due process.

Here, the trial court found that relief under §351.467 *or* §351.494 was warranted but concluded "that reliance on Mo.Rev.Stat. Sec.351.467 is appropriate in this case because the parties each own fifty percent (50%) of the stock in the Companies." LF at 262. The court's finding and conclusion reflects the juxtaposition in this case of two competing processes—one that proceeded in lockstep with the recommendations of the trustee in apparent conformity with the dictates of an illogical statute, and a second that bore hallmarks of a trial on the merits but that, in the final analysis, was subjugated to the first.

CONCLUSION

For the reasons discussed above and in Appellant's opening brief, the judgment of the Circuit Court should be vacated, and this Court should enter judgment, or remand the case for entry of judgment, in favor of Appellant on his claim for declaratory relief that (i) the shareholder's agreement is a valid and enforceable agreement of the parties, and (ii) Respondent be and is ordered to sell his one-half interest in The Safe Deposit Companies and related entities to Appellant for the sum of $685,612.00.

In the alternative, the judgment of the Circuit Court should be vacated, and this Court should enter judgment, or remand the case for entry of judgment, in favor of Appellant on his claim under §351.494, RSMo. that Respondent be and is ordered to sell his one-half interest in The Safe Deposit Company and related entities to Appellant for the sum of $1,012,379.00.

PENNINGTON SHEA, LC

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Francis E. Pennington, III #26194
Laurie A. Shea #56198
7733 Forsyth Boulevard, Suite 680
St. Louis, MO 63105
314-863-4080
314-862-3080 (fax)
fep@penningtonshea.com
las@penningtonshea.com

CERTIFICATE OF SERVICE

The undersigned certifies that Appellant's Reply Brief and a pdf attachment of Appellant's Reply Brief, were served via First Class Mail, Postage Pre-Paid, and electronic mail, this 26th day of June, 2008 to:

Mr. Gary Growe ggrowe@deverauxgrowe.com
Devereux Growe LLC
190 Carondelet
Suite 1100
St. Louis, MO 63105

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(b) of the Missouri Supreme Court Rules of Civil Procedure that the reply brief of appellant in the above-captioned case complies with the limitations contained in the Rule, and that it contains words 7059, excluding the cover, certificate of service, other certificates, and the signature block, as determined by Microsoft Word's word-counting system.

CERTIFICATE OF VIRUS-FREE ELECTRONIC DOCUMENT

I hereby certify, pursuant to Rule 84.06(g) of the Missouri Supreme Court Rules of Civil Procedure, that the electronic copy of the brief in the above-captioned case has been scanned for viruses and is virus-free.

PENNINGTON SHEA, LC

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Francis E. Pennington, III #26194
Laurie A. Shea #56198
7733 Forsyth Boulevard, Suite 680
St. Louis, MO 63105
314-863-4080
314-862-3080 (fax)
fep@penningtonshea.com
las@penningtonshea.com