

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

CORRECTED 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

JURISDICTIONAL STATEMENT.....4

STATEMENT OF FACTS.....6

POINTS RELIED ON.....26

ARGUMENT.....31

CONCLUSION.....53

CERTIFICATE OF SERVICE.....54

CERTIFICATES OF COMPLIANCE.....55

TABLE OF AUTHORITIES

Allied Structural Steel. V. Spannaus, 438 U.S. 234 (1978).....41

Burlington Northern R. Co. v. State of Nebraska,
802 F.2d 994 (8th Cir. 1986).....41

Dreisenszun v. FLM Industries, Inc. 577 S.W.2d 902 (Mo.App.W.D. 1979)...29,50

Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596 (Mo. banc. 2007).....28,43

Educational Employees Credit Union v. Mutual Guaranty Corp.,
821 F.Supp. 1294 (E.D.Mo. 1993).....27,41

Epperson v. Eise, 167 S.W.3d 229 (Mo.App.E.D. 2005).....43

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).....41

Fix v. Fix Material Company, Inc. 538 S.W.2d 351 (Mo.App.E.D. 1976).....29,49

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,
854 S.W.2d 371 (Mo. banc 1993).....32

King v. F.T.J. Inc., 765 S.W.2d 301 (Mo.App.W.D. 1988).....29,50

McCormick v. Cupp, 106 S.W.3d 563 (Mo.App.W.D. 2003).....26, 27, 34, 42

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976).....28, 43

Stith v. Lakin, 129 S.W.3d 912 (Mo.App.S.D. 2004).....26, 38

Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463
(Mo.App.E.D. 1992).....26, 27, 36, 42

Weinstein v. KLT Telecom, Inc., 225 S.W.3d 413 (Mo. banc 2007).....26, 32

U.S. Const. art. I, § 10.....40

Mo. Const. art. I, §13.....4, 9, 10, 27, 40

Mo. Rev. Stat. §347.103 (2007).....	50
Mo. Rev. Stat. §347.143 (2007).....	8
Mo. Rev. Stat. §351.405 (2007).....	29, 49, 50
Mo. Rev. Stat. §351.455 (2007).....	29, 49
Mo. Rev. Stat. §351.467 (2007).....	4, 5, 7-11, 24, 26-29, 33-37, 39-44, 47-49, 51
Mo. Rev. Stat. §351.494 (2007).....	29, 30, 37, 40-45
Mo. Rev. Stat. §351.476 (2007).....	31
Mo. Rev. Stat. §351.755 (2007).....	30
Mo. Rev. Stat. §351.855 (2007).....	30
Mo. Rev. Stat. §351.860 (2007).....	30, 43
Mo. R. Civ. P. 68.02 (2007).....	8
Mo. R. Civ. P. 73.01 (2007).....	36
Mo. R. Civ. P. 74.04 (2007).....	9, 27
Del. Code 8, § 273 (2007).....	30
Kan. Stat. § 17-6804 (2007).....	30
Game Theory.net, available at http://www.gametheory.net (last visited March 11, 2008).....	39
Mark Sophir and John O'Brien, <i>The Family Business Divorce: No-Fault Dissolution in Missouri and Practical Applications for Resolution of Deadlock,</i> 59 J. Mo B. 178 (July-August 2003).....	29
Jay Nathanson, Paul Klug & Mark A. McColl, <i>New Missouri Law Allows No- Fault Judicial Dissolution,</i> 56 J. Mo B. 251 (2000).....	29, 35

JURISDICTIONAL STATEMENT

Article V, Section 3 of the Missouri Constitution provides that “[t]he supreme court shall have exclusive jurisdiction in all cases involving the validity of a...statute...of this state.”

Plaintiff/respondent William O. Cannon (“Respondent”) brought this action under Mo. Rev. Stat. §351.467 (2007)¹, and sought dissolution and distribution of assets of three related companies, in which the parties each owned a one-half interest. Respondent’s action was predicated on the alleged inability of the parties to agree on the desirability of continuing the businesses. *See* §351.467.1, RSMo.

In his answer, defendant/appellant Thomas E. Monroe (“Appellant”) raised the defense of the unconstitutionality of §351.467, and specifically, that the statute was being applied to preempt and impair rights and obligations under a binding and enforceable contract between the parties, in violation of Article I, Section 13 of the Missouri Constitution. *See* Legal File (hereinafter “LF”), v.I, at 28. The contract in question, which Appellant sought to enforce below, was the written shareholders’ agreement between the parties, which entitled either shareholder to buy out the other, at a price determinable under the agreement, if the other shareholder acted either to encumber, sell or dispose of his shares. Respondent,

¹ All further statutory references are to RSMo (2007).

invoking §351.467, alleged a desire to discontinue the businesses and dispose of their assets. Respondent's action and the remedy he was seeking under §351.467 implicated Appellant's rights under the shareholders' agreement, which has remained in force and effect since the parties first formed their business and signed the document. The private agreement of the parties was circumvented and preempted, and Appellant's rights under it went unrecognized, because the Circuit Court gave primacy to an ill-conceived statute that, heretofore, no Missouri appellate court has examined.

Appellant believes this case raises important constitutional and non-constitutional issues, all of first impression.

STATEMENT OF FACTS

A. Introduction

This is a unusual appeal in the respect that the outcome below—the Circuit Court’s ordering one 50% owner of a business (Appellant) to sell, involuntarily, his interest to the other 50% owner (Respondent)—did not follow a trial on the merits on the putative purchaser’s claim; the judgment appealed from, in so far as it upheld Respondent’s claim, was the culmination of three years of litigation and a court-ordered, non-evidentiary procedure under a section of the Missouri Business Corporation Act that was below and is on this appeal the subject of Appellant’s constitutional law challenge.

Since Appellant raises a constitutional challenge to the statute, as applied below, Appellant’s statement of facts necessarily focuses on the peculiar, procedural history of the case. The statement concludes with a summary of the evidence presented by Appellant in support of *his* claims, which the Circuit Court rejected.

B. The Claims of the Parties

1. Respondent’s Claim

Respondent’s petition, filed in January, 2004, sought judicial dissolution of three, interrelated Missouri companies owned 50/50 by the two litigants. Two of the companies, The Safe Deposit Company (“SDC”) and CompuVault, Inc. (“CVI”), are Missouri corporations, and the third, Vault II, LLC (“VII”), is a

Missouri limited liability company. LF at 11, 12.² Count I of the petition relates to SDC and CVI, and in that count, Respondent, invoking §351.467, RSMo., requested that the entities be dissolved and that a receiver be appointed to

² SDC is engaged in the business of providing secure, off-site storage of magnetic computer tapes and cartridges, and valuable, original hard documents (and in particular, student loan documentation maintained by the Missouri Higher Education Loan Authority (MOHELA)). A much smaller part of SDC's business, accounting for approximately 10% of its total revenues, is the rental of traditional retail safe deposit boxes (similar to those provided by banks). SDC's principal operating facility is situated on property owned by it in Frontenac, Missouri. Of the three entities, SDC is the only operating company with any employees; all operating assets and liabilities are held within, and all revenues and expenses are processed through, SDC. CVI was formed solely for the purpose of procuring and protecting exclusive use of the name "CompuVault," which Appellant originated. CVI has no employees or operating assets; its only asset is passive, a \$400,000 note from SDC that CVI has carried on its books for a number of years. VII was formed for the sole purpose of holding title to the land and building in Wentzville, Missouri, that serve as SDC's second operating facility. That property is VII's only asset. Affidavit of Thomas E. Monroe ("Monroe Affi.") (*also* Exh.A) at ¶9; LF at 54-5; Transcript ("Tr.") at 9.

administer and wind up the affairs of the corporations.³ LF at 12. In Count II, relating to VII, Respondent implicitly invoked §347.143, RSMo., and requested dissolution of that entity on grounds that it was not reasonably practicable to carry on VII's business in conformity with the members' operating agreement. LF at 13.⁴

³ Section 351.467, RSMo., the constitutionality of which Appellant is challenging, provides in pertinent part that if two 50% shareholders of a corporation shall be unable to agree upon the desirability of continuing the business of such corporation, either shareholder may file...a petition stating that it *desires to discontinue the business of such corporation and to dispose of the assets used in the business in accordance with a plan to be agreed upon...[and barring which]...the court shall dissolve* such corporation and shall by appointment of one or more trustees or receivers, administer and wind up its affairs in a method intended to realize the maximum value for the shareholders, *including the sale of the company as a going concern (emphasis added).*

Appellant discusses this statute in greater detail below.

⁴ Section 347.143 provides in pertinent part that “[a] limited liability company may be dissolved involuntarily by a decree of the circuit court...[o]n application

Defendant answered the petition and raised the defense, among others, that §351.467 violated Article I, Section 13 of the Missouri Constitution in so far as it would apply to preempt and impair obligations under a binding and enforceable contract between the parties—the SDC shareholders’ agreement entered into by Appellant and Respondent when they formed the business. LF at 28.

After a statutorily prescribed waiting period during which the parties were unable to agree on a “plan of discontinuance and distribution,” §351.467.1, Respondent moved under §351.467.2 and Rule 68.02 to dissolve the SDC companies and appoint a receiver to administer and wind up their affairs. LF at 46-8.

2. Appellant’s Claims

With his answer, Appellant filed a counterclaim for declaratory judgment, seeking to enforce the shareholders’ agreement entered into by the parties when they formed the business. LF at 29-41. The agreement provides that “[i]n the event that any of the Shareholders shall desire to sell, encumber or otherwise dispose of his stock...or any portion thereof...such Shareholder shall first offer to sell the stock...to the remaining Shareholders...for the price determined under paragraph 5 hereof.”

by...a member...whenever it is not reasonably practicable to carry on the business in conformity with the operating agreement.”

Appellant, in accordance with Rule 74.04, moved for summary judgment on his counterclaim, asserting that (i) Respondent had expressly pleaded a desire to discontinue SDC and to dispose of its assets, (ii) Appellant was therefore entitled to enforcement of the shareholders' agreement to require 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 so applied, §351.467 violated the Contract Clause, Article I, Section 13, of the Missouri Constitution. LF at 49-56.⁵

Following hearing, the Circuit Court denied Appellant's motion for summary judgment and, in the same order, granted Respondent's motion to dismiss the counterclaim for failure to state a claim. LF at 57, 59.

By leave of court, Appellant filed a second counterclaim, predicated on §351.494, RSMo., a more familiar corporate statute that Missouri courts have construed in granting equitable relief in cases of shareholder and/or director deadlock. In consideration of the caselaw,⁶ and as an alternative to the relief

⁵ Appellant specifically discussed these points of argument in his accompanying, supporting memorandum, which we have not included in the legal file.

Appellant also submitted a supporting affidavit (Monroe Affi.), LF at 51-56 (*also* Exh. A) with exhibits, and reintroduced the affidavit and exhibits in later proceedings in the case, discussed below. Exh. A, Tr. at 9.

requested by Respondent under §351.467, Appellant requested the remedy that Respondent be required to sell his interest in the business to Appellant *for fair value*, with the court's giving due consideration to the terms of the shareholders' agreement. LF at 74-76.

C. The Proceedings Below on the Respective Claims of the Parties

1. Respondent's Claim Under §351.467, RSMo.

In lieu of hearing scheduled on Respondent's claim under §351.467, LF at 4, the Circuit Court entered a set of agreed-upon findings of fact and conclusions of law. LF at 82-84.⁷ It determined that the allegations of Respondent's petition were sufficient to invoke §351.467,

⁶ A fuller discussion of the law follows in the argument section of Appellant's brief.

⁷ The court's findings of fact and conclusions of law dealt only with Respondent's §351.467 claim and did *not* address Appellant's §351.494 counterclaim.

In agreeing to the form of the court's findings of fact and conclusions of law, Appellant did not expressly or tacitly agree to the appointment of a trustee, which was a foregone conclusion following the court's denial of Appellant's summary judgment motion (which included the constitutional challenge) and accompanying dismissal of Appellant's counterclaim for enforcement of the shareholders' agreement.

accept[ing] 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 Safe Deposit Company and CompuVault, Inc., in that Plaintiff has alleged a desire to discontinue the business of those entities, and Defendant has alleged a desire to maintain those entities as going concerns.

LF at 82-3. The Circuit Court thereupon appointed a trustee to monitor the continuing operation of the business and “to negotiate the sale of the company and the corporate stock.” LF at 84.

When the court-appointed trustee was unable to obtain agreement between the parties on disposition of the business, he recommended to the court, and the court accepted the recommendation, that the businesses and their assets be marketed and sold through employment of a business broker. LF at 87-88. Thereafter, the trustee moved for a court order requiring the parties to sign a contract engaging a business broker to sell the business to a third party. LF at 93-

Prior to the court’s entry of findings of fact and conclusions of law, Appellant petitioned the Missouri Court of Appeals for a writ of prohibition and/or mandamus in respect of the contract-enforcement question and to prevent what then appeared to be the imminent dissolution of the SDC companies. The Court of Appeals denied the petition, without opinion. *State of Missouri, ex rel., Thomas E. Monroe v. Honorable James R. Hartenbach*, No. ED86109 (April 19, 2005).

98. Appellant opposed the trustee's motion and moved for a stay of proceedings due to the potentially deleterious effect of marketing the business for sale, as well as the then on-going political tug-of-war over MOHELA, SDC's largest customer, accounting for 50% of its revenues. LF at 99-106. The court denied the motion to stay and ordered the parties to execute an agreement with the business broker if they were unable to reach an agreement between themselves. LF at 107, 109.

When the litigants were still unable to agree, Appellant filed a motion for reconsideration of his motion for summary judgment or, in the alternative, for an order compelling Respondent to sell his interests in the subject companies to Appellant, along with a supporting affidavit. LF at 125-137. Respondent, for his part, filed a motion to compel execution of the contract with the business broker for the listing of the sale of the businesses, which Appellant continued to resist. LF at 121-24. The Circuit Court denied the motion for reconsideration and granted the motion to compel. LF at 138.

Thereafter, the trustee reconsidered his recommendation to engage a business broker to sell the companies and proposed, instead, to conduct a "private sale" between the shareholders under terms and procedures [to be] established

prior to the commencement of such private sale.” LF at 139, 144-45.⁸ In anticipation of the hearing on the trustee’s formal motion for court approval of a “private sale,” Appellant filed an alternative motion proposing another process for resolving the matter. LF at 157-61. Appellant expressly opposed the trustee’s motion and stated:

Defendant believes, 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. Defendant opposes any process—and most certainly an undefined and unstructured bidding process—that would simply enable plaintiff (or defendant, for that matter) to engage in manipulative bidding in order to extract a premium in excess of fair value for his interest.

LF at 158-59. In connection with his proposal, Appellant requested that an appraisal be performed. LF at 159.

Appellant proposed, as a second alternative, a process similar to that proposed by the trustee, but one that would be *non-binding*, and proceed instead as

⁸ The trustee filed a formal motion for court approval of a private sale, *infra*, erroneously suggesting that the parties had agreed to participate in a binding private sale. LF at 144.

a *structured, facilitated negotiation*. Appellant further requested that if that process were to conclude with no agreement between the parties, the court should proceed to conduct a ½-day evidentiary hearing, allow testimony and other evidence, and make a determination, based on the pleadings, evidence and the law, as to (i) who should buy out whom, and (ii) the fair value of the businesses and a reasonable price that the purchasing party should pay the other. LF at 159-60.

Following a hearing, the court rejected each of Appellant’s proposals, including his request for an evidentiary hearing, and ordered a “private sale,” as recommended by the trustee. LF at 166-70.

Pursuant to the court’s order, the trustee conducted a “private sale,” an essentially negotiation-less bidding process between the parties that was facilitated by the trustee. Respondent was the “high bidder,” with an offer to purchase Appellant’s one-half interest in the businesses for \$1,755,000. LF at 171.

The trustee submitted a report of the “private sale” to the court, and recommended that the court accept and approve it. LF at 171-72.

2. Appellant’s Claim Under §351.494, RSMo.

Following the “private sale,” which Appellant opposed, Appellant moved for an evidentiary hearing on his claim under §351.494, stating:

2. [C]ounterclaimant Monroe seeks adjudication and a decree and judgment ordering counterclaim defendant Cannon to sell his shares of SDC stock to Monroe for fair value.

...

3. The relief sought by Monroe in his counterclaim, if not recognized explicitly by statute, is recognized in long-standing decisions of Missouri appellate courts in shareholder-dispute litigations.

...

7. Monroe is entitled to a trial on the merits of his claim under §351.494.

...

8. The last order entered by the Court provided for the trustee's conducting a private sale between the two owners.

...

9. Defendant opposed the private sale because one, the pleadings, two, the evidence—not only the evidence that has already been adduced [in support of defendant's motion for summary judgment] but also the evidence and facts that will be developed at trial—and three, the pertinent case authority impel the granting of, and judgment for, a remedy in this case that comports with established caselaw and principles of equity that have long applied in shareholder-dispute cases.

...

11. Defendant requests that the matter be set for trial, and that the Court, based on the evidence presented at trial, the entire record of the case and the pertinent caselaw, order Monroe to purchase the interests of Cannon for fair value (if not at a price determined in accordance with the shareholders' agreement).

12. The private sale ordered by the Court was inherently at risk of becoming, and was, a procedurally-undefined and unstructured and uncontrollable bidding process. The private sale became another device for plaintiff to abjure due process, exploit a heretofore unlitigated, unexplained statute, and to extract a premium price for his interest in the businesses to which, in fairness and equity, he is not entitled.

13. Fundamental principles of due process require that a trial be conducted in this case.

LF at 244-46.

The Circuit Court allowed an evidentiary hearing on Appellant's §351.494 counterclaim. Appellant testified and introduced other evidence in support of his

claim, and following is a brief summary of that evidence, which is entirely un rebutted.⁹

Appellant is the chairman and chief executive officer of SDC and CVI, and the managing member of VII.¹⁰ Respondent is the president of each of the two corporations. The parties are the only directors of the corporations. Appellant, along with Respondent, is a 50% shareholder of SDC and CVI and a 50% member of VII. Tr. at 9-10; Exh. A.

Appellant's duties and responsibilities are, and have been, managing all aspects of the business, including client development and relations, contracts and contract renewals, and hiring, supervising, and reviewing and approving salaries of employees. Tr. at 10; Exh. A. Respondent's only responsibility in the business has been co-signing checks; he has not participated, and has declined to participate, in the management or any management decisions of the business, has had no involvement with the key clients or client accounts, has not participated in salary reviews or decisions, and comes on company premises only to pick up his personal mail. Tr. at 11; Exh. A.

For at least two years preceding the filing of Respondent's petition, the parties, as the shareholders, directors and members of the SDC entities, had held

⁹ Respondent did not testify and introduced no exhibits in the hearing.

¹⁰ The business of SDC and related entities is described in Footnote 1, *supra*. See also Tr. at 9.

no annual shareholders or directors meetings and were deadlocked. Tr. at 14-15. The deadlock posed a continuing threat of irreparable, financial injury to the business. Tr. at 15.¹¹ Appellant testified about several instances of Respondent's acting unilaterally, in ways that threatened the well-being of the business. Respondent, without Appellant's knowledge or approval, wrote a letter to the company's CPA firm, purporting to terminate its services. Tr. at 18. Respondent also wrote several letters to First National Bank, where SDC maintains its primary operational accounts; in one letter, he told the bank to ignore the SDC banking resolutions on file, and in another letter, he instructed it to close all the business accounts and send him a check for the balance in the accounts. Tr. at 18-9. The corporate banking resolutions require the signature of two authorized persons. During the pendency of the litigation, Respondent, without Appellant's knowledge or approval, wrote checks totaling \$34,000 to his personal company, Cannon

¹¹ Respondent admitted the allegations of Appellant's counterclaim that the shareholders of SDC are deadlocked in voting power, the directors are deadlocked in management of the company's affairs, the shareholders are unable to break the deadlock, irreparable injury to the company is threatened or being suffered, and the business and affairs of the company can no longer be conducted to the fullest advantage of the shareholders because of the deadlock. LF at 75; Supplemental Legal File at 1.

Enterprises, signed only by him, and in violation of the company's banking resolutions. Tr. at 19-20.

Appellant testified that he opposed the "private sale" recommended by the trustee and personally wrote the trustee and deputy trustee to that effect. Appellant opposed the "private sale" because he believed that it would be an "unchecked bidding process" and a method of resolving the litigation that was neither "fair" nor "reasonable," stating further:

I have always maintained the position that I am not a seller and, therefore, getting into a bidding process with someone who has always presented himself as someone who wants to liquidate the company doesn't make sense.

Tr. 21-22.¹²

Appellant acknowledged that Respondent's bid to pay \$1, 755,000 was the "high" bid. Tr. at 28. Reiterating his position that he did not wish to sell his interest, Appellant testified:

I feel the business to me is worth not only a cash consideration, but also has intangible value in terms of a place to work the rest of my

¹² Appellant, in anticipation of the Court's ordering the "private sale," requested that the trustee require the parties to exchange financial statements in order to give the process more transparency. The trustee declined to recommend, and the court refused to order, the exchange of such information. Tr. at 22.

working career, a place to conduct not only that business but other investments that I have, and it provides a staff for me as well. I've worked very hard over the last 17 years to build that business, and it does not have a net present cash value to it.

Whenever a person [i.e. Respondent] has a passive investment that they have no business involvement in, their interest in worth less because they are not key, they are not a key management person. They are not germane to the success of the future of the business or the relationship with the underlying customers or the employees. So their [having to] accept...a cash number which is substantially less than the operating person is very common place.

Tr. at 29-30.

In support of his claim that he be permitted to purchase Respondent's interest, Appellant performed two calculations: one, the price of Respondent's interest based on the formula set forth in their shareholders' agreement; and two, the fair value of Respondent's one-half interest based on a commonly utilized and generally accepted approach to valuing small, closely-held businesses. Tr. 34-5;

Exh. F.¹³ Appellant explained the methodology that he used to perform each calculation. Tr. 34-42.¹⁴ Appellant's calculation of fair value of Respondent's

¹³ Appellant introduced, as back-up for his calculations, pertinent financial statements of the three SDC-entities, which he is personally responsible for reviewing and finalizing. Tr. 42-3, 44; Exhs. G,H, I, J, K, L, M, N and O. Appellant has an undergraduate and graduate academic background in business and finance. For many years, he was employed by Chromalloy American, a large conglomerate where he had responsibility for approximately 80 business transactions ranging from a few million dollars to \$50 million. Subsequently, he bought and sold four businesses, in one of which, SDC, he has been principally involved since 1981. Tr. 31-32, 33; Exh. A, ¶7.

¹⁴ Appellant's method of determining the fair value of the business (and Respondent's one-half interest) reflects two components: the tangible book value of underlying assets *and* a multiple of 4 x EBITDA (earnings before interest, taxes, depreciation and amortization). Tr. 34-42; Exh. F.

His method of valuing the stock (and Respondent's one-half stock interest) under the shareholders' agreement followed the formula of the agreement, which establishes a buy-out price of one-half of the greater of *either* 2 x net book value *or* 5 x earnings before interest and taxes, less debt. Tr. 35; Exh. F; Exh. 2 to Monroe Aff. (Exh. A).

one-half interest is \$1,012,379, and his calculation of price, based on the shareholders' agreement, is \$685,612. Exh. F.

Appellant also introduced excerpts of the deposition of Respondent, who did not testify or offer evidence in the hearing. On deposition, Respondent acknowledged that, with the exception of one special shareholders' meeting, the shareholders and directors of SDC and CVI, and the members of VII, had held no meetings in five years. Tr./Deposition of William O. Cannon ("Cannon Depo."), at 15-16. Asked the basis of the allegation in his petition that "Cannon and Monroe are unable to agree on the desirability of continuing the business of SDC and CV," Respondent answered: "The, that the businesses shouldn't continue as they had been going and should be dissolved, put through dissolution." Tr./Cannon Depo. at 51. Later, Respondent was asked, "In seeking dissolution of the company and in the way you described that in your testimony here today, is your ultimate objective to effect the sale of The Safe Deposit Company to a third party purchaser?" Respondent answered: "I just want it dissolved...I just want it dissolved...Unwound, the assets disbursed...[T]he assets disbursed, basically, the operations, as they are now, discontinued." Tr./Cannon Depo. at 110-11.

D. Conclusion of the Proceedings Below

Following the evidentiary hearing on Appellant's claim, the Circuit Court entered its findings of fact, conclusions of law and judgment, ordering Appellant to sell his one-half interest in the SDC-entities to Respondent for the amount of \$1,755,000. LF at 255-64.

The court, at an earlier phase of the case, found, as a jurisdictional fact, that the parties were unable to agree upon the desirability of continuing the businesses in that Respondent was desirous of discontinuing the businesses and Appellant was desirous of maintaining the businesses as going concerns. LF at 83. Upon entry of those earlier findings, LF at 83, which related solely to Respondent's §351.467 claim, the case was allowed to proceed under that statute.

In the second set of findings of fact and conclusions of law, LF at 255-64, the court noted that most of the procedural history of the case had been a process of determining the method and manner of complying with §351.467—that is, the method and manner of winding up the affairs of the businesses. LF at 256. The court also found that the jurisdictional facts alleged in Appellant's counterclaim under §351.494 had been proved, and therefore, it determined that relief under either §351.467 *or* §351.494 is warranted. LF at 260.

Concluding that it had discretion to fashion a remedy under either statute, the court determined that reliance on §351.467 was more appropriate, and that, as between the two, §351.467 should govern because of the parties' status as 50/50 owners. LF at 262.

Appellant timely filed his motion to amend the Circuit court's findings of fact, conclusions of law and judgment and/or motion for new trial, LF at 265-80, which the court denied in all but one respect. LF at 282, 283.¹⁵

Appeal was timely taken from the order and amended judgment of the Circuit Court. LF at 283, 284-85.

¹⁵ Appellant also filed a motion, which the court granted, to amend his first amended counterclaim to conform to the evidence to expand the scope of the counterclaim and relief sought to include all three SDC-entities. LF at 251-52.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR SUMMARY JUDGMENT ON, AND IN DISMISSING, HIS CLAIM FOR DECLARATORY JUDGMENT FOR ENFORCEMENT OF THE SHAREHOLDERS’ AGREEMENT BECAUSE APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS CLAIM IN THAT THE EXISTENCE OF A BINDING, ENFORCEABLE AGREEMENT WAS UNDISPUTED, AND THE REQUEST OF RESPONDENT IN HIS PETITION TO DISCONTINUE, AND DISPOSE OF AND LIQUIDATE HIS INTEREST IN, THE SAFE DEPOSIT COMPANY IMPLICATED APPELLANT’S CONTRACTUAL RIGHT TO PURCHASE RESPONDENT’S SHARES OF SDC STOCK.

McCormick v. Cupp, 106 S.W.3d 563 (Mo.App.W.D. 2003)

Stith v. Lakin, 129 S.W.3d 912 (Mo.App.S.D. 2004)

Struckhoff v. Echo Ridge Farm, Inc. 833 S.W.2d 463 (Mo.App.E.D. 1992)

Weinstein v. KLT Telecom, Inc., 225 S.W.3d 413 (Mo. Banc. 2007)

Mo. Rev. Stat. §351.467 (2007)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON, AND IN DISMISSING, HIS CLAIM FOR DECLARATORY JUDGMENT FOR ENFORCEMENT OF THE SHAREHOLDERS' AGREEMENT BECAUSE APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS CLAIM IN THAT SECTION 351.467, RSMO, AS APPLIED, SUBSTANTIALLY IMPAIRS THE CONTRACTUAL RELATIONSHIP BETWEEN THE SDC SHAREHOLDERS AND THEREFORE VIOLATES ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

Educational Employees Credit Union v. Mutual Guaranty Corp.,

821 F.Supp. 1294 (E.D.Mo. 1993)

McCormick v. Cupp, 106 S.W.3d 563 (Mo.App.W.D. 2003)

Struckhoff v. Echo Ridge Farm, Inc. 833 S.W.2d 463 (Mo.App.E.D. 1992)

Mo. Rev. Stat. §351.467 (2007)

Mo. Const. art. I, §13

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT'S CLAIM UNDER §351.467 BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT IT IN THAT THE COURT DID NOT TAKE, AND RESPONDENT FAILED TO ADDUCE, ANY EVIDENCE TO SUPPORT THE CLAIM.

Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976)

Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596 (Mo. banc. 2007)

Mo. Rev. Stat. §351.467 (2007)

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT’S CLAIM UNDER §351.467 BECAUSE IT IS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT RESPONDENT FAILED TO ADDUCE ANY EVIDENCE IN SUPPORT OF HIS CLAIM FOR RELIEF AND APPELLANT INTRODUCED SUBSTANTIAL EVIDENCE IN SUPPORT OF HIS CLAIM FOR RELIEF UNDER §351.494.

Dreisenszun v. FLM Industries, Inc. 577 S.W.2d 902 (Mo.App.W.D. 1979)

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

King v. F.T.J. Inc., 765 S.W.2d 301 (Mo.App.W.D. 1988)

Mo. Rev. Stat. §351.467 (2007)

Mo. Rev. Stat. §351.494 (2007)

Mo. Rev. Stat. §351.405 (2007)

Mo. Rev. Stat. §351.455 (2007)

Mo. Rev. Stat. §351.860 (2007)

Mo. Rev. Stat. §347.103 (2007)

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT'S CLAIM, AND IN FAILING TO ENTER JUDGMENT IN FAVOR OF APPELLANT ON APPELLANT'S CLAIM, BECAUSE THE SUBSTANTIAL WEIGHT OF THE EVIDENCE SUPPORTS ENTRY OF JUDGMENT IN APPELLANT'S FAVOR ON HIS CLAIM IN THAT THE EVIDENCE INTRODUCED BY HIM IS THE ONLY LEGALLY ADDUCED EVIDENCE OF RECORD IN THE CASE.

Mo. Rev. Stat. §351.494 (2007)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR SUMMARY JUDGMENT ON, AND IN DISMISSING, HIS CLAIM FOR DECLARATORY JUDGMENT FOR ENFORCEMENT OF THE SHAREHOLDERS’ AGREEMENT BECAUSE APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS CLAIM IN THAT THE EXISTENCE OF A BINDING, ENFORCEABLE AGREEMENT WAS UNDISPUTED, AND THE REQUEST OF RESPONDENT IN HIS PETITION TO DISCONTINUE, AND DISPOSE OF AND LIQUIDATE HIS INTEREST IN, THE SAFE DEPOSIT COMPANY IMPLICATED APPELLANT’S CONTRACTUAL RIGHT TO PURCHASE RESPONDENT’S SHARES OF SDC STOCK.

“There is no surer way to misread any document than to read it literally.”

—Learned Hand

A. Standard of Review

Appellant moved for summary judgment on his counterclaim for declaratory judgment, seeking a determination that Respondent’s action to discontinue, and dispose of and liquidate his interest in, SDC triggered Respondent’s obligation to offer to sell his shares of SDC stock, and Appellant’s right to purchase the stock, for a price determined under the formula set forth in the agreement. LF at 49-50. The Circuit Court denied the motion for summary

judgment and, concurrently, granted Respondent's motion to dismiss the counterclaim for failure to state a claim. LF at 57-59.

The court's order denying summary judgment on, and granting dismissal of, Appellant's counterclaim for declaratory judgment was a dispositive determination of the claim and is a final, appealable order. "An order granting or denying summary judgment is a matter of law that is reviewed *de novo*." *Weinstein v. KLT Telecom, Inc.*, 225 S.W.3d 413, 415 (Mo. banc 2007). Summary judgment is appropriate if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Rule 74.04(c)(6). *Id.* The propriety of denying summary judgment, like the propriety of granting it, is purely an issue of law, and thus, the Court need not defer to the trial court's order. *Cf. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. The Shareholders' Agreement

SDC was formed in 1989, and during the entire period of its existence, Appellant and Respondent have been the only shareholders and directors of the company. Monroe Affi., ¶¶1,3, LF at 51-2 (*also* Exh. A); Exh. 2 to Monroe Affi. (Exh.A). At the time of formation of SDC, the parties entered into a shareholders' agreement, which has always remained in force and effect and has never been revised or amended. Exh. A, at ¶3. The agreement gives a shareholder the right to buy the shares of the other in the event the other desires to sell, or otherwise encumbers or seeks to dispose of, his shares, or in the event he dies. Paragraph 5

of the agreement states the methods for determining the value of SDC stock in the event the right of a shareholder to buy out the other is triggered. Exh. A, at ¶4; Exh. 2 to Monroe Aff.

This litigation commenced with Respondent's filing his petition, alleging a desire to discontinue the business, and asking the court to dissolve it and appoint a trustee to wind up its affairs and distribute its assets in the event the shareholders could not otherwise negotiate and agree on a disposition. LF at 11-12.

Since the inception of the case, Appellant has opposed, in one way or another, Respondent's use of §351.467, RSMo., and the specter of judicial dissolution, receivership and either liquidation or a forced sale of the business, to try to circumvent the pre-existing agreement of the parties. Because the existence of the shareholders' agreement is not in dispute, the Circuit Court's denial of summary judgment on Appellant's claim to enforce it must have been based on one of two conclusions: (i) Respondent's action was not tantamount to a move by him to sell, dispose or encumber his interest within the meaning of the agreement, or (ii) the statute trumps the agreement.¹⁶

C. An Overview of §351.467, RSMo.

Section 351.467 of the Missouri Business Corporation Act enables a shareholder to petition to dissolve a jointly-owned enterprise simply upon the

¹⁶ The conclusion that the statute supersedes the pre-existing agreement of the parties renders the statute, so applied, constitutionally infirm. *See* Point II below.

allegation that the shareholders are “unable to agree upon the desirability of continuing the business” and that the petitioner “desires to discontinue the business...and to dispose of the assets.” §351.467.1, RSMo. The statute was hastily enacted in 1999, is supported by no legislative history, and, to our knowledge, has never been critically analyzed or interpreted by any Missouri appellate court. See Mark Sophir and John O’Brien, *The Family Business Divorce: No-Fault Dissolution in Missouri and Practical Applications for Resolution of Deadlock*,” 59 J. Mo B. 178 (July-August 2003). In one reported case, *McCormick v. Cupp*, 106 S.W.3d 563 (Mo.App.W.D. 2003), the court only briefly addressed the statute, as the parties agreed that the subject company should be dissolved, and none of them raised any legal challenge to the statute’s application. In its limited discussion of the statute, the *McCormick* court noted the contrast between it and §351.494, with the latter’s higher threshold of proof of “fault,” whether it be managerial deadlock, misapplication or waste of corporate assets, or illegal, oppressive or fraudulent acts. *Id.* at 567.¹⁷ The *McCormick* court

¹⁷ The court in *McCormick v. Cupp* cites Jay Nathanson, Paul Klug & Mark A. McColl, *New Missouri Law Allows No-Fault Judicial Dissolution*, 56 J. Mo B. 251 (2000), one of few sources of information on the origins of §351.467. *McCormick, supra*, at 567. That article reveals that the provisions comprising §351.467 might have been inserted into a pending, unrelated bill to address a particular lawsuit in which the sponsoring senator’s law firm was then actively

also implied that the statutory scheme of §351.467 *could* be affected by a shareholders' agreement but did not squarely address the issue because there was no finding of the trial court that such an agreement existed. *Id.* at 568, 569.

Section 351.467 appears to have been loosely modeled on a Delaware statute, Del. Code 8 §273 (2007), which permits a 50% stockholder to petition for dissolution of a corporation if there is disagreement over the desirability of continuing the corporation, *unless* the stockholders have a written agreement providing otherwise. Missouri's statute makes *no* allowance for any such prior agreement of the shareholders. Furthermore, the Delaware statute allows the court discretion to dissolve the corporation or to appoint a trustee or receiver if the predicate showing is made, whereas Missouri's statute allows *no* such discretion.¹⁸

Section 351.467 also contrasts with §351.494, RSMo., on which Appellant's counterclaim is based, in that the latter provides that the circuit court

involved. The revised bill was designated non-controversial legislation, placed on the consent calendar and passed unanimously in both the House and Senate. Thus, there was no debate on the legislation, and there is no legislative history accompanying it.

¹⁸ A Kansas statute, more akin to Delaware's than Missouri's, gives the court discretion to dissolve a corporation and/or appoint a trustee or receiver if the predicate showing of disagreement between the shareholders is made. *See* Kan. Stat. §17-6804 (2007).

may but is *not required* to dissolve a corporation upon a showing that the shareholders or directors are deadlocked, or that those in control are acting illegally, oppressively or fraudulently, or that corporate assets are being misapplied or wasted.¹⁹

Section 351.467, improvidently applied, derogates the traditional view that “[d]issolution is a drastic remedy and courts should resort to this procedure only to prevent irreparable injury, imminent danger or loss or miscarriage of justice.”

Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463, 466 (Mo.App.E.D. 1992).²⁰

¹⁹ Provisions of Missouri’s General Business and Corporation Law relating to statutory close corporations are illustrative. If, in respect of a statutory close corporation, §351.755, a court finds that there exists one or more grounds for dissolution under §351.494, the court may order “ordinary relief” under §351.855, or failing that, “extraordinary relief” under §351.860. “Extraordinary relief” *may* include dissolution, and it *may* include ordering a share purchase. If the court orders a share purchase, it is *required* to determine “the fair value of the shares, considering among *other relevant evidence* the going-concern value of the corporation [and] *any agreement* among some or all of the shareholders fixing the price or specifying a formula for determining share value...” §351.860. 1 & .2 (*emphasis added*).

²⁰ Another provision of Missouri’s General Business and Corporation Law, §351.476.1, speaks specifically to the effect of dissolution: “A dissolved

In the wisdom of the drafters, §351.467 was written in a way to enable one shareholder to coerce the other shareholder to agree upon some plan for disposition of the business, failing which the court *shall* dissolve the corporation and *shall* appoint one or more trustees/receivers to oversee the administration and winding up of the corporation's affairs in a method intended to realize the maximum value for the shareholders. §351.467.2. The statute provides that in order for the petitioning shareholder to invoke circuit court jurisdiction, the petitioner must demonstrate that the shareholders are unable to agree upon the desirability of *continuing* the business, that petitioner *desires to discontinue* the business and dispose of the assets, and that, if the shareholders are unable to agree on a method of disposition, petitioner desires to *dissolve* the corporation. §351.467.1.

The language of §351.467 cannot and should not be construed to invite court intervention in every instance of disagreement between 50/50 owners of a business. Yet, once the court makes the determination that the statute applies, the plain language of the statute seems to allow the court little latitude in applying it.

“Statutory construction is a question of law, and not judicial discretion. ‘The primary rule of statutory interpretation requires [the] Court to ascertain the intent

corporation continues its corporate existence *but may not carry on any business except that appropriate to wind up and liquidate its business and affairs...*”

(*emphasis added*). See also *McCormick v. Cupp, supra*, at 568.

of the legislature by considering the language used while giving the words used in the statute their plain and ordinary meaning.’” *Stith v. Lakin*, 129 S.W.3d 912, 917 (Mo.App.S.D. 2004) (*citations omitted*).

Considering the nature and profound potential impact of this statute on an affected business, the allegations of a would-be litigant seeking to invoke it should be closely scrutinized and, like the words of the statute itself, given their ordinary, purported meaning.

D. Respondent’s Legal Action to Discontinue, and Dispose of and Liquidate His Interest in, The Safe Deposit Company Implicated Appellant’s Contractual Right to Purchase Respondent’s Shares of SDC Stock.

The shareholders’ agreement was an operative, organizational document. If one shareholder wishes to sell his shares, or acts to encumber or dispose of his shares, or if he dies,²¹ the other shareholder has the right to acquire the selling/encumbering/disposing shareholder’s one-half interest for the price determinable under the agreement. It may be that the Circuit Court determined that Respondent’s taking legal action to force a sale or disposition of both individuals’ stock was not a move to sell or dispose of the shares within the meaning of the agreement. Nothing about the language of the agreement suggests

²¹ If Appellant died during the course of this litigation, Respondent would have an unquestionable right to purchase Appellant’s one-half interest in the business and, likely, would exercise that right.

that it should be read so literally, however. It may be that the court concluded that Respondent's lawsuit did not amount to an encumbrance on the shares, even though the legal and practical constraints created by the court's assuming jurisdiction over the company were weightier and more restrictive than the pledging of stock to secure a loan. The agreement, however, cannot reasonably be read so narrowly as to ignore the encumbering effect of Respondent's action on Appellant's business interests.

The parties, of course, could not have anticipated the enactment of §351.467 when they entered into their agreement, so Appellant cannot argue that inclusion in the agreement of the words "sell," "dispose" or "encumber" contemplated the particular legal maneuverings of Respondent in this case. At the same time, words like "discontinue" and "dissolve," coupled with the request for appointment of a trustee "to administer and wind up [the companies'] affairs...and distribute their assets or proceeds from the sale of such assets," which are included in the allegations of Respondent's petition, should be given their ordinary, purported meaning. If Respondent's allegations are given their plain meaning, the objective and effect of his legal action are indistinguishable from a move by him to sell, dispose of or encumber shares under the parties' agreement.

Appellant is entitled to enforcement of the shareholders' agreement, or an otherwise valid and existing contract is rendered a dead letter.

**II. THE TRIAL COURT ERRED IN DENYING APPELLANT’S
MOTION FOR SUMMARY JUDGMENT ON, AND IN DISMISSING, HIS
CLAIM FOR DECLARATORY JUDGMENT FOR ENFORCEMENT OF
THE SHAREHOLDERS’ AGREEMENT BECAUSE APPELLANT IS
ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS CLAIM IN
THAT SECTION 351.467, RSMO, AS APPLIED, SUBSTANTIALLY
IMPAIRS THE CONTRACTUAL RELATIONSHIP BETWEEN THE SDC
SHAREHOLDERS AND THEREFORE VIOLATES ARTICLE I, SECTION
13 OF THE MISSOURI CONSTITUTION.**

It may be that the Circuit Court denied summary judgment and dismissed Appellant’s counterclaim for enforcement of the shareholders’ agreement, not because the agreement is inapplicable, but because the statute trumps the agreement. Application of §351.467 to nullify the preexisting agreement of the parties violates the Contract Clause of the Missouri Constitution, Article I, Section 13, which provides that “no...law impairing the obligation of contracts...can be enacted.”²²

A three-part inquiry of a suspect statute has developed in the federal system and may be applied by analogy in this case. Under that inquiry, a statute violates

²² Missouri’s Contract Clause is similar to that in the United States Constitution, Article I, §10, which reads: “No State shall...pass any Law impairing the Obligation of Contracts.”

the Contract Clause if it is determined that (i) there is a contractual relationship, (ii) the statute impairs that contractual relationship, and (iii) the impairment is substantial, unless (iv) the statute “is supported by a ‘significant and legitimate public purpose’” and (v) “the adjustment of the ‘rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’”

Educational Employees Credit Union v. Mutual Guaranty Corp., 821 F.Supp. 1294, 1301 (E.D.Mo.) (citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983); *Allied Structural Steel. V. Spannaus*, 438 U.S. 234, 241-42 (1978); *Burlington Northern R. Co. v. State of Nebraska*, 802 F.2d 994, 1005 (8th Cir. 1986).

It is undisputed that Appellant and Respondent had/have a contractual relationship by virtue of their shareholders’ agreement. It cannot be reasonably disputed that Appellant’s contractual right to purchase Respondent’s shares was substantially impaired—indeed, preempted—as a result of the Circuit Court’s deferential application of §351.467. The more salient question in this case is whether §351.467 serves any “significant and legitimate public purpose,” and whether that public purpose justifies the statute’s being applied to nullify the operative, binding agreement of the parties.

There is no legislative history to §351.467 from which to discern any underlying public purpose, and in fact, the circumstances surrounding the statute’s enactment indicate that it owes its existence to a private legal controversy and not to a widely- perceived need for another corporate-dissolution/remedial statute.

See McCormick v. Cupp, 106 S.W.3d at 567, *citing* Jay Nathanson, Paul Klug & Mark A. McColl, *New Missouri Law Allows No-Fault Judicial Dissolution*, 56 J. Mo B. 251 (2000). The statute deleteriously undermines public policy reflected in long-standing caselaw and other provisions of the General Business and Corporation Law that judicial dissolution by shareholder action is a drastic remedy that should only be imposed to prevent irreparable injury, imminent danger of loss, or a miscarriage of justice (circumstances that are *not* exigent in this case). *See Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 466 (Mo.App.E.D. 1992).

Section 351.467 addresses *no* serious or recurring problem affecting Missouri corporations, shareholders or existing law relating to those subjects. The present controversy is a case study of the statute's maladies. It wrests discretion from the court, detracts from consideration of other, viable remedies, and vitiates private contracts. It is constitutionally infirm and should be struck down.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT'S CLAIM UNDER §351.467 BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT IT IN THAT THE COURT DID NOT TAKE, AND RESPONDENT FAILED TO ADDUCE, ANY EVIDENCE TO SUPPORT THE CLAIM.

Supreme Court Rule 73.01(c) provides that in cases tried without a jury, “[t]he court shall render...judgment...under the law and *the evidence*” (*emphasis*

added). “[A]ppellate ‘review...as in suits of an equitable nature,’ as found in Rule 73.01, is construed to mean that the decree or judgment of the trial court will be sustained by the appellate court *unless* there is no substantial evidence to support it, *unless* it is against the weight of the evidence, *unless* it erroneously declares the law, or *unless* it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (*emphasis added*). Thus, it is well established that a judgment must be supported by legally adduced evidence. Pleadings are not self-proving. Where evidence is not presented, and there is no evidence to support a judgment, the judgment must be reversed. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 601-02 (Mo.banc 2007); *Epperson v. Eise*, 167 S.W.3d 229, 231 (Mo.App.E.D. 2005).

Basic due process requires that in a court-tried case, there be a fair and meaningful hearing for the taking of evidence, and that the judgment be based on evidence adduced on hearing. *See Eaton v. Mallinckrodt, Inc.*, 2006 WL 198460*2 (Mo.App.E.D.), *aff’d*. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.2d 596 (Mo.banc 2007).

The Circuit Court entered two sets of findings of fact and conclusions of law in the course of the proceedings below. In the first set, the court determined that the allegations of Respondent’s petition were sufficient to invoke §351.467 and appointed a trustee to monitor the continuing operation of the business and “to negotiate the sale of the company and the corporate stock.” LF at 84. Following the subsequent, court-ordered “private sale,” presided over by the trustee, and an evidentiary hearing on Appellant’s §351.494 claim, presided over by the court, the

court entered the second set of findings and conclusions and its judgment. LF at 255-64.

The Circuit Court found as “fact” that the trustee conducted the “private sale” and concluded “as a matter of law that [Respondent] proved his case for dissolution under Mo.Rev.Stat.Sec. 351.467 [,that the] remedy fashioned...by the Trustee and the Court, including a Private Sale to allow one shareholder to buy out the other [was] appropriate... under...Mo. Rev. State. Sec. 351.467 [,and that the] equitable remedy of appointing a Trustee and breaking the deadlock through a procedure which allowed each shareholder to freely assess fair value was fair and equitable...” LF at 259, 262-63.

The remedy of the “private sale,” upon which the court, by its judgment, placed its imprimatur, was unsupported by any evidence and fundamentally flawed. Appellant opposed the “sale,” and notwithstanding his objection, the court ordered that it proceed under the direction of the trustee. Thus, the notion that both parties could “freely assess fair value,” as if they were freely participating in a bilateral bidding process, is patently wrong. With respect to the “sale,” Appellant had a Hobson’s choice. He could decline to attend and participate in the “sale,” and in that case, risk that Respondent would make a single, low “bid” to purchase Appellant’s one-half interest in the business and then seek a court order to enforce that outcome. Appellant’s only other alternative was to attend the “sale” and involuntarily participate in an unchecked, artificially-driven bidding process.

The “private sale,” as a method of resolving the controversy, was inherently flawed. Throughout the litigation, in communications and submissions that preceded the trustee’s initial recommendation (accepted by Respondent and the court) to retain a broker to sell the business, and the trustee’s later recommendation (also accepted by Respondent and the court) to conduct a “private sale,” Appellant was clear that he did not wish to sell his business interest, to Respondent or anyone else, whereas Respondent was craftily noncommittal as to his desire to buy or sell. Much has been written about game theory and its application to auctions, *see, e.g.*, “Game Theory.net,” available at <http://www.gametheory.net> (last visited March 11, 2008), but to even the uneducated observer, it should be apparent that a two-participant auction in which both participants have *not* assented to participate in the process, in which one participant is an announced buyer and the other participant is an un-announced buyer *or* seller,²³ and which requires the participants to increase the current bid by

²³ Respondent’s pleadings, request for relief and support for the appointment of a trustee and the trustee’s initial recommendation to sell the business to a third party through a business broker are inconsistent with his status as buyer in the “private sale” ordered by the court. One of Respondent’s “bids” is especially telling, indicative of Respondent’s motive to use \$351.467 and the process ordered thereunder to game the system, that is, extract the highest possible price for *his*

some predefined increment, has none of the indicia of an arm's-length transaction or any markings of fairness and reasonableness. The *coup de grace* of the process was the provision, recommended by the trustee and ordered by the court prior to commencement of the "sale," that if the high-bidder/putative buyer ultimately defaulted on his commitment to buy, the putative seller would have the right to buy out the defaulting buyer for 10% less than the amount of the "winning bid." LF at 170. That provision, which effectively granted Respondent an option, was an additional taint on the process, in as much as it created an incentive for Respondent to bid up the price with a view to "flipping the transaction" and forcing Appellant to pay Respondent a mere 10% less than the bid price—an amount well in excess of any amount that a truly arm's-length transaction would yield.²⁴

one-half interest; in that "bid," Respondent offered to buy *Appellant's* one-half interest for \$1,590,000 and sell *his* one-half interest for \$1,675,000. LF at 207.

²⁴ The judgment below provides that the closing of the "sale" was to take place 45 days after entry of judgment. LF at 263. Appellant timely filed his motion to amend findings of fact, conclusions of law and judgment and/or motion for new trial, and, of course, this appeal ensued. Thus, the question of Respondent's commitment to purchase Appellant's one-half interest still looms. In any event, Appellant does not want to sell his interest for the bid price, nor does he wish to buy Respondent's for \$1,579,000, which is 10% less than Respondent's bid.

The Circuit Court ordered the “private sale” merely upon the recommendation of the trustee, and without taking evidence.²⁵ The “sale” was then conducted “off the record.” Following the “sale,” Appellant requested an evidentiary hearing on his §351.494 claim, which the court allowed. At the conclusion of that hearing, which focused on Appellant’s claim for relief, the trustee submitted an unverified “report of trustee on private sale” requesting court approval of the “sale.” LF at 171-73; Tr.79.

In its findings, conclusions and judgment, the court held that the “private sale” was a fair and equitable remedy under §351.467 and ordered that Respondent pay Appellant \$1,755,000 for the latter’s one-half interest in the business.

The court’s judgment should be vacated because it is wholly unsupported by evidence.

²⁵ Appellant moved for approval of an alternative to the process recommended by the trustee. Appellant proposed a non-binding, trustee-facilitated negotiation; if that process failed to produce an agreement, Appellant proposed, the court should conduct a ½-day evidentiary hearing, allow testimony and other evidence, and decide, based on the pleadings, evidence and law, (i) who should buy out whom, and (ii) the fair value of the business and a reasonable price that the buyer should pay the seller. LF at 159-60. The court rejected Appellant’s proposal, his motion deemed to have been denied. LF at 259.

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT’S CLAIM UNDER §351.467 BECAUSE IT IS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT RESPONDENT FAILED TO ADDUCE ANY EVIDENCE IN SUPPORT OF HIS CLAIM FOR RELIEF AND APPELLANT INTRODUCED SUBSTANTIAL EVIDENCE IN SUPPORT OF HIS CLAIM FOR RELIEF UNDER §351.494.

The challenges to §351.467 raised in this appeal are warranted by the statute’s sheer rigidity and ineffectuality in resolving shareholder disputes. Since the language of the statute is so oppressively unwieldy²⁶ and avails the court no guidance or discretion whatsoever, and since there is no explanatory caselaw, Appellant countered Respondent’s action with a claim under the more commonly known statute, §351.494. The Circuit Court concluded that relief was appropriate under both §§351.467 and 351.494, but opted to approve the trustee-recommended

²⁶ The statute provides that if a showing of the predicate facts is made, the court *shall* dissolve the corporation and then appoint a trustee or receiver to administer and wind up its affairs in a way to maximize value for the shareholders, *including* the sale of the company as a going concern. The statute’s requirement that the court dissolve the corporation is totally anathema to the notion of a sale of the business as a going concern.

remedy under §351.467 because the litigants were 50/50 shareholders. LF at 262. If the language of §351.467 expressly limits its application to 50/50 ownership controversies, §351.494 is not so expressly limited. We know of no caselaw that holds that the former preempts the latter in the circumstances presented here. The Court, however, need not decide that issue, because as the case unfolded below, Respondent, claiming under the one statute, §351.467, offered *no* evidence in support of the relief ultimately ordered by the court, whereas Appellant, claiming under the other statute, §351.494, did introduce evidence.

In *Fix v. Fix Material Company, Inc.*, 538 S.W.2d 351 (Mo.App. E.D.1976), the court carefully examined the predecessor to §351.494 and concluded that the court sitting in equity is not limited to the remedy of dissolution but may consider other appropriate alternative equitable relief. *Id.* at 357. One of the remedies recognized by the *Fix* court, and by other Missouri cases decided before and after *Fix*, is an order requiring one shareholder (or group of shareholders) to purchase the stock of the other (or others) “at a price to be determined according to a *specified formula* or at a price determined by the court to be a *fair and reasonable price*.” *Id.* (*emphasis added*).

Although §351.494 does not define “fair and reasonable” price or employ the term “fair value,” other Missouri business-law statutes expressly incorporate the concept of “fair value” in respect of valuing stock and membership interests. *See, e.g.*, §351.405.4 (right of dissenting shareholder to be paid fair value for shares in connection with sale or exchange of assets); §351.455.2 (right of

dissenting shareholder to be paid fair value for shares in connection with merger or consolidation); §351.860.2 (determination of fair value by court in fashioning remedy of buy-out by shareholder in statutory close corporation, where one or more grounds for judicial dissolution under §351.494 exist)²⁷; and §347.103.2 (right of withdrawing member of LLC to payment of fair value for membership interest).

There is “‘no simple, precise mathematical formula’ for determining the ‘fair value’ of corporate stock under §351.405 or other statutes employing this term.” *Dreisenszun v. FLM Industries, Inc.*, 577 S.W.2d 902, 907 (Mo.App.W.D.1979). The term “fair value,” as used throughout the various corporate statutes, has the same general meaning, and those statutes, “purposefully if not wisely establish a flexible general standard for fixing value.” *King v. F.T.J., Inc.*, 765 S.W.2d 301, 304-05 (Mo.App.W.D.1988). In any case, the court must “consider every relevant fact and circumstance that enters into the value of corporate property and reflects itself in the worth of corporate stock.” *Id.* at 305.

²⁷ Section 351.860.2(1) states that in determining fair value, the court should consider “among other relevant *evidence* the going-concern value of the corporation, any *agreement* among some or all of the shareholders fixing the price or specifying a formula for determining share value for any purpose [and] the recommendation of appraisers, if any, appointed by the court...” (*emphasis added*).

The issue (in addition to “fair value”) presenting itself in this case—who should buy out whom—typically does not arise in shareholder-dispute litigation. It bears repeating that Respondent, in bringing his action under §351.467, did not seek the remedy of a court order requiring Appellant to sell his one-half interest to Respondent; he sought dissolution, and later, the appointment of a receiver to wind up the company’s affairs and/or to market and sell it to a third party. During the hearing on Appellant’s §351.494 claim, Appellant introduced excerpts of Respondent’s deposition in which he affirmed that his objectives were to discontinue, dissolve and liquidate the business, not acquire Appellant’s interest and maintain the company as a going concern. Appellant testified in the hearing (Respondent did not) and affirmed his position that he did *not* wish to sell, that the business is his livelihood, and that as the chief executive he has had virtually complete responsibility of managing all aspects of the business, including client development and relations, contracts and contract renewals, and hiring, supervising and approving and reviewing employee salaries.

Appellant also testified, without objection or contradiction, concerning his calculations of the price of Respondent’s interest based on the formula of the shareholders’ agreement, and the fair value of Respondent’s interest based on a commonly utilized and generally accepted approach to valuing small, closely-held businesses.

Appellant's evidence was the only legally adduced evidence in the case. The judgment of the Circuit Court is manifestly contrary to the weight of that evidence, and accordingly, the judgment should be vacated.

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENT ON RESPONDENT'S CLAIM, AND IN FAILING TO ENTER JUDGMENT IN FAVOR OF APPELLANT ON APPELLANT'S CLAIM, BECAUSE THE SUBSTANTIAL WEIGHT OF THE EVIDENCE SUPPORTS ENTRY OF JUDGMENT IN APPELLANT'S FAVOR ON HIS CLAIM IN THAT THE EVIDENCE INTRODUCED BY HIM IS THE ONLY LEGALLY ADDUCED EVIDENCE OF RECORD IN THE CASE.

For the reasons discussed in Points III and IV above, which are incorporated herein this reference, the judgment of the Circuit Court should be vacated, and the Court should enter judgment, or remand the case for entry of judgment, in favor of Appellant on his claim for relief under §351.494, RSMo.

CONCLUSION

For the reasons discussed in Points I and II above, 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 shareholders' 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 Company and related entities to Appellant for the sum of \$685,612.00.

In the alternative, and for the reasons discussed in Points III, IV and V above, 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

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 Brief and a pdf attachment of Appellant's Brief, were served via First Class Mail, Postage Pre-Paid, this 24th day of March, 2008 to:

Mr. Gary Growe
Devereux Growe LLC
190 Carondelet
Suite 1100
St. Louis, MO 63105

ggrowe@deverauxgrowe.com

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(b) of the Missouri Supreme Court Rules of Civil Procedure that the brief of appellant in the above-captioned case complies with the limitations contained in the Rule, and that it contains words 10,158, 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

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