

Summary of SC93719, *Daniel B. Nickell v. Michael F. Shanahan Sr., et al.*

Appeal from the St. Louis circuit court, Judge Joan L. Moriarty

Argued and submitted May 21, 2014; opinion issued July 29, 2014

Attorneys: Nickell was represented by Francis A. Bottini Jr. of Bottini & Bottini Inc. in LaJolla, California, (858) 914-2001; Timothy J. Becker and Tim E. Dollar of Dollar, Burns & Becker LC in Kansas City, (816) 876-2600; and Richard B. Hein of The Hein Law Firm LC in St. Louis, (314) 645-7900. The DRS chief executive officer and chairman was represented by Lisa A. Pake, Robert T. Haar and Michael A. Brockland of Haar & Woods LP in St. Louis, (314) 241-2224. The other ESSI defendants were represented by James G. Martin, Edward L. Dowd Jr., James F. Bennett, John D. Comerford and Erika M. Anderson of Dowd Bennett LLP in St. Louis, (314) 889-7300; Erwin O. Switzer III, Richard E. Greenberg, Wendy S. Menghini and Michael A.T. Schwalbert of Greensfelder, Hemker & Gale PC in St. Louis, (314) 241-9090; Jim J. Shoemake of Guilfoil Petzell & Shoemake LLC in St. Louis, (314) 241-6890; Eric M. Walter, E. Calvin Matthews IV, Jeffrey T. McPherson and F. Scott Galt of Armstrong Teasdale LLP in St. Louis, (314) 621-5070; Robert Schultz and Ronald J. Eisenberg of Schultz & Associates LLP in Chesterfield, (636) 537-4645; Barry A. Short, Evan Z. Reid and Steven D. Hall of Lewis Rice & Fingersh LC in St. Louis, (314) 444-7600; David von Gontard and Howard A. Wittner of Wittner, Spewak & Maylack PC in St. Louis, (314) 862-3535 in Clayton; Jack B. Spooner of Spooner Law LLC in St. Louis, (314) 725-4300; and Thomas W. Wack of Bryan Cave LLP in St. Louis, (314) 259-2000. Lillian Theresa Ruyle and Linda Ann Hoffman, who filed a brief as friends of the Court, were represented by John L. Davidson of John L. Davidson PC in St. Louis, (314) 725-2898.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A shareholder appeals the trial court's dismissal of three counts of his lawsuit against certain officers and directors of two companies that merged, alleging their conduct or representations decreased the value of shares and induced shareholders to approve the merger and sell their stock at a reduced rate. In a 7-0 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri affirms the judgment. The trial court did not err in dismissing the claims. The claims are not individual claims that can be brought by individual shareholders on their own behalf but are derivative claims that affect the company's stock as an entirety and the alleged injury was to the value of the corporation and not individual shares.

Judge Byron D. Luber, an associate circuit judge in Pemiscot County, sat in this case by special designation in place of Judge Patricia Breckenridge.

Facts: In January 2006, Engineered Support Systems Inc. (ESSI) merged with DRS Technologies Inc. Daniel Nickell subsequently sued ESSI's officers and directors as well as the chief executive officer and chairman of DRS. He alleged these defendants took certain actions and made certain misrepresentations that decreased the value of ESSI shares and that induced him and other ESSI shareholders to approve the merger and sell their stock at a reduced price. His petition alleged three counts still at issue before this Court: that ESSI officers and directors

breached their fiduciary duty to shareholders; that the DRS chief executive officer and chairman aided and abetted the ESSI officers and directors in breaching their fiduciary duties; and that some ESSI directors and officers were enriched unjustly. The trial court granted the defendants' motions to dismiss. Nickell appeals.

AFFIRMED.

Court en banc holds: The circuit court did not err in dismissing Nickell's claims. To file suit against an officer or director of a corporation, shareholders normally must bring a derivative action – a suit conducted by the shareholders as the corporation's representatives in which the shareholders are plaintiffs in name only and the corporation is the real party in interest. A derivative action generally is required even when the plaintiff alleges the corporate directors or officers have breached their fiduciary duty, resulting in injury to the shareholders. This is because fiduciary duty obliges corporate officers and directors to act in the best interests of all shareholders on a collective basis, and injury is to the shareholders collectively, not to shareholders individually. Individual actions by shareholders are permitted when the injury was to a shareholder directly, such as in claims alleging shareholders were denied their personal right to inspect corporate books or alleging shareholders were removed from their positions as controlling shareholders. Nickell's claim, however, is derivative, not individual, and his reliance on one of this Court's prior opinions is misplaced. As that case held, an action based on acts relating to capital stock as an entirety is a derivative action, not an individual action. And, although corporate shares are the property of individual shareholders and not corporate property, Nickell's allegation necessarily is that the sale of all ESSI shares diminished the value of ESSI as a corporation – a derivative action.