To be argued by:
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Time Requested: 10 minutes

New York State Supreme Court

Appellate Division - Third Department

Docket No. 534471

Application of DR. ELIZABETH PLOCHARCZYK,

Petitioner-Respondent

For the Judicial Dissolution of
PATHOLOGY ASSOCIATES OF ITHACA, P.C.

Respondent,

and

DR. DANIEL SUDILOVSKY,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT DR. ELIZABETH PLOCHARCZYK

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PRELIMINARY STATEMENT

As the lower court noted in its Decision and Order granting the Petition by Petitioner-Respondent Elizabeth Plocharczyk, M.D. ("Petitioner") for judicial dissolution of Pathology Associates of Ithaca ("PAI"), Business Corporation Law § 1104 (a) calls for dissolution where "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." (R.10). See *Greer v. Greer*, 124 A.D.2d 707, 707-08 (2d Dep't 1986). The Record on Appeal contains proof of dissension and division between the parties sufficient to support the lower court's holding following an evidentiary hearing. The crucial fact that was evident from all the testimony at the hearing, even that of Respondent-Appellant Daniel Sudilovsky, M.D. ("Respondent"), is that by the end of 2020, the professional relationship between the parties had deteriorated to the point where they could no longer work together. It was clear that what both described as having started out as a good professional relationship, with Respondent acting as mentor and Petitioner as mentee (R.186, 463-464), changed after Petitioner became an equal shareholder and sought to be treated as an equal (R.539-540). It was also clear that the deterioration of the relationship between the two partners "destroy[ed] the orderly function of the [practice]," requiring that it be dissolved. *Greer v. Greer*, at 708.

The evidence offered during the hearing before the lower court clearly met Petitioner's burden of demonstrating that by the time she filed her Petition, her business relationship with Respondent, each of whom was a 50% shareholder in PAI, had deteriorated to the point where it had become impossible for them to continue working together. Significantly, at the hearing, there was testimony from Martin Stallone, M.D., President of Cayuga Medical Center "CMC"), PAI's largest client and the source of more than 80% of its revenue (R.163), that there had been a "steady decline" in the relationship between the parties to the extent that Cornell, with whom CMC had been collaborating in 2020 on a response to the Covid-19 pandemic, had stated that they would not work with CMC if Respondent was involved and would only work through Petitioner. (R.238)

In view of the hearing testimony, Respondent's position on appeal that the Order below should be reversed and the parties should be forced to continue to work together as 50% shareholders is simply not supportable. The lower court's Decision and Order granting dissolution should be affirmed.

QUESTIONS PRESENTED

1. Where both parties, each of whom was a 50% shareholder, testified that their professional relationship had deteriorated to the point where communication between them had broken down, there was an absence of trust, and their biggest client had terminated its contract with their corporation citing the level of

animosity between them, did the lower court properly exercise its discretion to grant the Petition to dissolve on the basis of internal dissension as permitted by Business Corporation Law § 1104 (a)(3)?

This question should be answered in the affirmative.

2. At the fact-finding hearing, did the lower court properly allow testimony regarding admissions made by Respondent on issues relevant to the dissolution over objections by his counsel that such statements constituted hearsay?

Yes, the lower court properly allowed the statements as admissions by a party, an exception to the hearsay rule.

COUNTERSTATEMENT OF FACTS

The facts underlying the Petition for dissolution

PAI was a professional corporation located in Ithaca, New York that provided comprehensive anatomic and clinical pathology services to the region. (R.16) Petitioner began working for PAI in 2013 and became a 50% shareholder in 2018. (R.17, 19) The parties were the only two employees of PAI.

During the several years prior to the commencement of this proceeding, Respondent began to undermine Petitioner in her roles as shareholder, director and medical practitioner, and withdrew from his responsibilities in those roles. (R.18) Consequently, PAI's professional relationship with its clients, most significantly Cayuga Health System and its component hospitals, including CMC and Schuyler

Hospital, was negatively impacted. (R.18) In particular, in 2018, Petitioner began to receive complaints from the medical community that Respondent's behavior was arrogant and narcissistic. (R.19) Respondent lost his bid for re-election to the Cayuga Area Physician Alliance board of directors. (R.19) He also lost two elections for the position of its medical staff president. (R.19) He stopped regularly attending meetings of CMC's medical executive committee, of which he was a member. (R.20, 131)

By 2019, Respondent developed an adversarial relationship with the laboratory director of Cayuga Health System, as a result of which the two were barely communicating. (R.20) In addition, Respondent began instigating arguments and disputes with various departments of CMC and Schuyler Hospital, most notably a public dispute he waged regarding plans to create a new multidisciplinary program to treat benign breast cases. (R.20) Specifically, after missing several key meetings to discuss plans for the program, Respondent announced that he was dissatisfied with the group's plan and that key providers did not have the knowledge necessary to design and execute it. He refused to participate in further meetings, labeling his stance "civil disobedience." (R.20) Petitioner had to assume full responsibility for PAI's role in the program, not only taking on the burden of additional work but also having to deal with the interpersonal friction generated by Respondent. (R.20) Respondent continued to

voice his criticisms of the program to the administration of CMC, PAI's largest client. (R.21) As a result, the program was delayed several months. (R.21)

In mid-2020, after being absent for a number of days, Respondent stormed into the office of CMC's Chief Executive Officer, Martin Stallone, M.D., and demanded a meeting about a CMC employee he claimed was "critical" to the operation of the hospital's lab. (R.21) He claimed that PAI would not be able to fulfill its duties under its contract with CMC without this CMC employee and demanded that CMC increase her pay and enhance her title. (R.21) Petitioner was present at that meeting. (R.21) Following the meeting, Petitioner informed Respondent that she disagreed with his position and that she did not appreciate his having jeopardized PAI's position with CMC by making demands regarding a CMC employee who was not employed by PAI. (R.21)

During another conversation at or about this time, Petitioner tried to address Respondent's increasingly erratic and disruptive behavior, in response to which he declared that he had come to a place in his life where he had decided he "will never compromise again." (R.21)

Petitioner and Respondent, in their roles as the sole directors and shareholders of PAI, became so divided regarding the management of the practice that they were unable to communicate in order to conduct the daily operations of PAI. (R.18) In June 2020, Respondent made statements during a meeting with

CMC's administration that implied that Petitioner lacked leadership abilities. (R.21) By this time, there was a complete breakdown of trust between the parties and Petitioner had lost confidence in Respondent as both a business and medical practice partner. (R.18)

Also at about this time, there was a meeting with Cornell administration regarding a collaboration with CMC to respond to the Covid-19 pandemic. (R.21) Respondent attended that meeting. (R.21) After the meeting, Petitioner was advised by CMC that Cornell's leadership had stated that they would not agree to a collaboration if Respondent was the point of contact. (R.22) Cornell required the service contract to provide that Petitioner would be the only person from PAI who would interact with Cornell. (R.22)

Other issues arose during this time period regarding Respondent's role as medical director of CMC. During his tenure, Respondent failed to attend a number of meetings intended to address deficiencies related to the blood bank and core laboratory, over which he had responsibility. (R.22) He failed to take the steps necessary to correct the deficiencies. (R.22) He also refused to attend meetings hosted by other departments, insisting that they meet his schedule. (R.22) On one occasion, Respondent was challenged by Petitioner regarding his implementation of a system for stocking platelets for the blood bank that resulted in significant

waste and refused to acknowledge her concerns or consider her suggestions to improve the system. (R.23)

In May of 2019, Cayuga Medical Associates approached Petitioner at the suggestion of CMC's laboratory director to suggest that she assume the role of medical director, preferring her over Respondent due to his inability to work with other professionals. (R.22) PAI executed a contract with Cayuga Medical Associates naming Petitioner as medical director. (R.22)

In June of 2020, CMC asked Respondent to transition its medical directorship to Petitioner over the course of the next year. (R.23) Respondent stated his opposition to the transition, offering his opinion that Petitioner lacked the necessary leadership abilities. (R.23) He was informed by Dr. Stallone that both the hospital administration and its staff had confidence in Petitioner's abilities, wanted her to replace him as medical director, and hoped he would participate meaningfully and gracefully in the transition. (R.23) Respondent was ultimately removed as medical director of CMC effective October 1, 2020 and Petitioner assumed the role. (R.23)

Respondent was experiencing difficulties in his personal life during this period. He told Petitioner in September of 2019 that his wife had left him and wanted a divorce. (R.23) Following that announcement, his attendance at work and his productivity dropped off. (R.24) Further, when he was at work, he would often

overturn decisions Petitioner had made or he would disagree with decisions, unpredictably or without justification. (R.24) His continued absences and erratic behavior when he was present resulted in Petitioner's having to carry the brunt of the business, to the point where she developed acute stress-induced gastritis and was taken to the Emergency Department in January 2020. (R.24)

In February 2020, Petitioner asked Respondent to conduct a meeting in her place with personnel from the Medical Examiner's Office, since she was ill. (R.24) He refused, forcing her to conduct the meeting despite her illness. (R.24) In March 2020, Petitioner received a call at home from the Administrative Director of the CMC laboratory at 7 a.m. one morning asking her to come to the hospital because they were mobilizing a command center to respond to COVID-19. (R.24) Respondent did not attend that meeting, refused to engage in the response, and failed to communicate for a substantial length of time. (R.24)

Because of Respondent's inability or failure to communicate effectively with others, CMC's administration became reliant on Petitioner to coordinate with its partners, including Cornell, Tompkins County Health Department and Rheonix, Inc., an Ithaca laboratory. (R.24-25) For example, on one occasion during the first half of 2020, Petitioner had to step in on an urgent matter involving CMC business when Respondent refused to take calls on a weekend. (R.25) When Petitioner reached Respondent, he told her he had not understood the issue, but he refused to

engage productively. (R.25) On another occasion, Respondent was consulted by Schuyler Hospital administration regarding a rapid HIV test that had to be performed at CMC's facilities and refused to authorize the "STAT" transport of the sample, despite the fact that the Hospital had requested it due to a unique situation. (R.25, 132) These incidents created further strife between CMC and PAI. (R.25)

To respond to the COVID-19 pandemic, PAI was asked to assist with the creation and implementation of a testing program in collaboration with Cayuga Health System. (R.25) As part of that program, Petitioner suggested pooling specimens, an innovation that ultimately became the most critical component of the strategy to increase the number of tests that could be performed. (R.26) Respondent summarily rejected the idea of pooling and refused to discuss it with Petitioner. (R.26) He also accused her of wrongdoing and interfered with the work she was performing to validate the analyzer. (R.26) He went so far as to send text messages to CMC insinuating that Petitioner had mishandled viral transport media (the component used to house a swab after taking a specimen in order to preserve the specimen for testing) and that he had the expertise to fix the issue. (R.26) Because of Respondent's unpredictable behavior, CMC decided to address his accusations with Petitioner rather than with him, ultimately determining that his allegations were unsubstantiated and had been intended as a threat to attempt to force CMC to accede to his wishes. (R.26)

During 2020, Respondent failed to attend the required number of meetings for CMC's Cancer Committee, jeopardizing the accreditation of the program. (R.26) He also failed to attend required medical staff meetings. (R.26) After being informed by CMC that they were removing him as medical director, he withdrew further from work, frequently coming in late, leaving early and taking more than a week off each month. (R.27) The laboratory staff regularly complained to Petitioner that when she was working offsite, they could not reach Respondent. (R.27)

By October of 2020, the two shareholders were barely speaking to each other. (R.27) They were unable to discuss what was going on in the lab or share cases. (R.27) Petitioner was routinely performing at least two-thirds of the billed work plus handling the medical directorship work required by PAI's contracts with CMC, Schuyler Hospital and Cayuga Medical Associates. (R.27) At this time, Respondent also made some improper disbursements to himself for medical expenses, taking more than $8,000 from the practice despite the fact that on prior occasions, he had stated that such disbursements were not allowed. (R.27, 129-130, 681) He refused to respond to communications from Petitioner seeking to address the issue. (R.27, 129, 687)

It was Respondent's responsibility to handle the payables for PAI. (R.27) In 2020, he failed to make payments on time, which on one occasion resulted in a

threatened collection action. (R.28) He also miscalculated certain insurance payments, resulting in overpayment. (R.28) As a result, Petitioner had to assume the day-to-day financial responsibilities of PAI. (R.28)

Respondent's increasing unavailability forced Petitioner to rely on pathologists from other systems for consultations. (R.28) Once Petitioner became the medical director at Schuyler Hospital, Respondent refused to respond appropriately to requests for service when he was on call, despite the fact that on-call duty was not in any way dependent on who was medical director but was a shared responsibility. (R.28) During one call, he told the technologist that he was no longer medical director and not to call him. (R.28) He delayed in returning another call for more than 45 minutes, causing a delay in the patient's treatment. (R.28)

In December 2020, over Petitioner's objections, Respondent unilaterally manipulated payroll to defer his year-end bonus to the next tax year. (R.29, 130) When Petitioner informed Respondent that his action made her uncomfortable and was completely against their usual payroll practice, he responded simply that he needed to reduce his income for 2020. (R.29, 130, 689, 690) Petitioner suspected that he was attempting to improperly report his income in his ongoing divorce proceeding. (R.29)

Things came to a head in February 2021. Petitioner made what she believed to be a fair offer to buy out Respondent's shares in the business and attempted to discuss the matter with him on numerous occasions, which he refused to do. (R.29, 128, 152, 691) He then showed up at her door on February 9, 2021, insisting on speaking with her. (R.29) Petitioner asked him to leave and offered to meet with him over Zoom but he refused, blocking her doorway and not allowing her to leave the office. (R.30, 129) Also at about this time, Petitioner became aware of the fact that Respondent had provided incorrect information to a provider regarding a consult for a possible skin biopsy. (R.30) Instead of consulting Petitioner, who is board certified in dermatopathology while he is not, Respondent provided the wrong information, informing the provider that a skin biopsy was not needed when indeed it was. (R.30)

The proceedings in the lower court

Because of the foregoing issues, it was clear that the disagreements between the parties were fundamental and pervasive, touching upon nearly every aspect of PAI. They included its internal management, external communications and client relationships and overall philosophy. Accordingly, Petitioner commenced this proceeding seeking dissolution of the corporation.

The Petition sought dissolution pursuant to, *inter alia*, Business Corporation Law § 1104 (a) (3), contending that significant differences of opinion and

dissension had arisen between the parties regarding the conduct and management of the business affairs of the corporation which could not be resolved and which had caused Petitioner to experience a fundamental loss of trust in Respondent because of his actions. (R.31) Petitioner pointed out that the internal dissension had caused such a schism between the two equal shareholders that dissolution of the corporation would be beneficial in order to prevent irreparable harm as the inevitable result of the complete breakdown of trust and infighting. (R.31-32) After the Petition was filed, Dr. Stallone sent a letter to the parties stating that because the "dissention (sic) between the two of you is destroying the orderly functioning of PAI", CMC was terminating its agreement with PAI effective as soon as it was able to secure pathology services from a new party." (R.695)

Respondent filed a motion (denominated a cross-motion) to dismiss the Petition summarily and without a hearing, contending that the allegations of the Petition were insufficient on their face. (R.60) In the alternative, Respondent requested that the lower court issue an order enjoining Petitioner from violating the noncompete clause of the Shareholder Agreement[1] and asked the court to stay the proceeding to allow Respondent to purchase Petitioner's shares in the corporation. (R.61)

[1] There is another action pending between the parties brought by Dr. Sudilovsky against Dr. Plocharczyk in which Dr. Sudilovsky has alleged that Dr. Plocharczyk's current agreement with CMC to provide pathology services is violative of the Shareholder's Agreement for PAI. In that action, Dr. Sudilovsky has asserted causes of action for breach of contract, breach of fiduciary duty and tortious interference. (R.167)

Respondent submitted an Affidavit in support of his motion in which he largely refuted the allegations of the Petition. (R.64) He accused Petitioner of a "carefully orchestrated plan" in which she sought to dissolve PAI so she could execute a contract with CMC to perform its pathology work, either individually or through a new entity. (R.72) He admitted in his Affidavit that Dr. Stallone had approached him in the summer of 2020 to ask if he would agree to transfer the medical directorship of the CMC laboratories to Petitioner, but asserted that the transfer would be in exchange for a payment and a promise that CMC would hire him as medical director of a yet-to-be-created new laboratory. (R.72) He also admitted that Dr. Stallone told him that CMC intended to hire Petitioner individually to head its pathology lab, in place of PAI. (R.62) He asserted, however, that Dr. Stallone, who approached him on more than one occasion to ask him to consent to Petitioner's replacing him as CMC's medical director, implied that the offer was being made because Petitioner "threatened to leave the organization if she was not made medical director." (R.73) Respondent denied that he was removed as medical director in October 2020, contending that he agreed to the substitution. (R.73)

Respondent did not deny in his Affidavit that there had been a complete failure of communication between the two shareholders; that they had stopped working with each other on cases; and that there had been a breakdown of trust

between them. (R.74-75) Rather, the focus of his Affidavit was that the fault for those situations lay with Petitioner, not him. (R.74-75) He contended that Petitioner was "simply attempting to manufacture a justification for trying to dissolve PAI so that she can take the CMC contract for herself." (R.78)

Petitioner filed a Reply Affidavit, disputing many of the factual assertions in Respondent's Affidavit. (R.126) Petitioner also provided a letter from Dr. Stallone to Respondent dated June 24, 2020, more than eight months prior to the time she filed the Petition seeking dissolution, in which Dr. Stallone referenced the "outright conflict and alienation" between the parties which he stated was impacting the other lab personnel. (R.134) In that letter, Dr. Stallone suggested as a possible remedy to the situation that Petitioner and Respondent take turns acting as medical director of CMC, in alternating three-year terms. (R.135) He also offered to keep the letter confidential and to make it look as if the new arrangement was Respondent's idea, allowing him to save face. (R.136) Petitioner pointed out that after CMC ended its contractual relationship with PAI, it sent an RFP (request for proposal) to her as well as to other parties, but chose not to send one to Respondent. (R.127) Further, the March 29, 2021 letter from Dr. Stallone to PAI noted that "the inability of PAI to function in an orderly manner and the inability of the two of you to practice medicine in the manner in which you desire as a result of the internal dissention is concerning." (R.110)

The lower court heard argument on the Petition and Respondent's motion and issued a Decision and Order dated July 1, 2021 directing a hearing "to determine whether dissolution should be granted [and] whether the differences on this issue are genuinely irreconcilable or terminal to the well-being of the corporation", quoting *In re Dissolution of Glamorise Founds.,* 228 A.D.2d 187, 189 (1st Dep't 1996). The lower court noted that "[o]n the face of the petition, Petitioner has set forth a prima facie case of oppressive conduct and it appears there is a breakdown of communication sufficient for dissolution." (R.167) It also noted that Respondent had demonstrated "the existence of a question of fact and the possibility of an alternative remedy." (R.167) The lower court also cited the separate action brought by Respondent against Petitioner as further proof of the "breakdown of communication" between the parties. (R.167).

The fact-finding hearing

At the hearing, Petitioner testified that her professional relationship with Respondent began to change in September of 2019 when he told her his wife had left him. (R.195) He started taking significantly more time off and disengaged from activities both in the laboratory and with respect to his participation in interdisciplinary programs with other departments of CMC. (R.195, 199-200) In addition, Petitioner testified that Respondent began to "pick arguments with people." (R.195) With respect to the benign breast project, Respondent criticized

the way other doctors were handling cases and said that he had more expertise; that they should follow his lead; and that he was not going to participate in the program unless it was done exactly the way he wanted it. (R.201) In particular, Petitioner testified regarding a conference that had been set up that Respondent refused to participate in, stating that he was "going to be a conscientious objector." (R.202) The project "blew up" as a result of Respondent's behavior and Petitioner developed stress-induced gastritis. (R.203) Petitioner described Respondent's behavior during this time as "aggressive. He was disruptive. And he was noisy." (R.204)

Petitioner also testified to the situation during the pandemic and Respondent's failure to address the need to increase testing capabilities. (R.212) The volume of testing needed to respond to the pandemic was far greater than any prior testing and pooling was being explored as a method of increasing testing capacity. (R.214-15, 666, 670) Respondent absolutely refused to consider allowing pooling in the lab, notwithstanding that other hospital and laboratories were exploring it and that, ultimately, it became the strategy that was adopted to allow the lab to perform as many tests as it did. (R.219-20, 225) Petitioner described Respondent's dealings with her as condescending and dismissive, testifying that he excluded her from conversations regarding pooling and began to disparage her to others. (R.231)

At another meeting to discuss a collaboration between CMC and Cornell to accomplish testing on a mass scale for the Cornell population, Respondent frequently interrupted speakers, not allowing them to continue their train of thought, and redirected the conversation to his personal accomplishments. (R.237) Petitioner described his behavior as "very off-putting" since they had only limited time to discuss matters and he was derailing the meeting. (R.237) After that meeting, which took place in June of 2020, Dr. Stallone advised Petitioner that at Cornell's insistence CMC wanted her rather than Respondent to be the primary contact with Cornell. (R.238) She agreed, but found it difficult because Respondent was still the medical director at that time and put stumbling blocks in the way, becoming increasingly adversarial. (R.240) At the end of June, the parties met with Dr. Stallone to discuss transitioning the medical directorship from Respondent to Petitioner. (R.242) In addition, the medical directorship of Schuyler Hospital was transferred to her at that time. (R.242)

After that, the relationship with Respondent continued to deteriorate. She felt like she was a target. (R.242) She did not trust him. (R.242) In addition, he started at that time to write himself checks from the PAI business account for "medical expense reimbursement", which was not permitted by the Shareholders Agreement. (R.244-45, 249) When she raised the issue with Respondent, he would not discuss it. (R.249, 250) As time went on, the parties had fewer and fewer

conversations and "barely interacted." (R.250) Petitioner described the relationship as "tense" and "difficult." (R.250) In addition, Respondent stopped attending root cause analyses, investigations into the causes of patient safety events. (R.251) Although as medical director he was responsible for enacting and implementing policies and procedures to avoid such events, he missed the meetings, disengaging from the responsibilities of the position. (R.252-53)

Further, people began complaining to her about Respondent and became increasingly reliant on her to perform tasks that were his responsibility even though she lacked the authority of the position, which put her in a tough spot. (R.254) One big issue was Respondent's failure to attend meetings of the Cancer Committee, which was required per the regulation for accreditation. (R.255) The Pathology Department was the only department that did not meet the accreditation requirement in 2020 because of Respondent's absence and his refusal to ask Petitioner to attend the meetings in his stead. (R.256) That caused her additional stress, because it was alienating CMC, PAI's largest client, putting them in jeopardy from a compliance standpoint. (R.256) By the time Respondent was removed as medical director of CMC in October of 2020, Petitioner described their relationship as follows:

> He continually disengaged. We barely spoke to each other. Fewer than a handful of conversations between us. We showed even fewer cases to each other. It was a true breakdown, and it was not, it was not good for patient care. It

> was not good for us. It was not good for, it was not a good state of affairs.

(R.256-57) When asked what had prompted her filing of the Petition for dissolution, Petitioner testified:

> I was unwilling to practice anymore beyond, I had exhausted my mental and emotional capabilities of trying to change the situation, and I knew it couldn't go on. It wasn't good. If I couldn't change the situation, I was going to have to leave. I was going to have to go find another job and work somewhere else.

(R.260-61) Eventually they stopped speaking to each other altogether. (R.264) The last straw was when Respondent changed payroll at the end of 2020 to reduce his income for purposes of his divorce, causing PAI to incur tax liability. (R.265, 267)

Dr. Stallone also testified at the hearing in his capacity as CEO of both CMC and Cayuga Health System. (R.310) Dr. Stallone testified that in those roles, he worked with both parties. (R.317) He testified that when he began working with Respondent in 2009, their relationship was "generally positive", although it was "challenging from the beginning" whenever Respondent had to admit there were "metrics that he needed substantial improvement on." (R.318-19) He described Respondent as strong clinically, but often difficult administratively. (R.319)

In 2019, Dr. Stallone became "keenly aware that there was increased conflict" between Respondent and Petitioner. (R.321) As the Covid pandemic began and CMC was scrambling to set up mobile testing operations, Respondent

did not participate and Petitioner was assuming a larger and larger role. (R.323) Dr. Stallone testified that Respondent reasserted himself when testing returned to the main lab, but that he had a number of vehement objections that were expressed with "terseness and, in my opinion, disrespect." (R.324)

Dr. Stallone also testified with respect to conversation during meetings with Cornell when CMC and Cornell were attempting to collaborate to increase Covid testing capacity when New York was under a state of declared emergency. (R.329) Dr. Stallone explained that because of Respondent's behavior during those meetings, Cornell refused to work with CMC unless Petitioner rather than Respondent was the point person. (R.330) According to Dr. Stallone, "I think throughout the entire pandemic there were sincere efforts by Dr. Plocharczyk to do what needed to be done, and meet the needs that were very substantial despite resistance from Dr. Sudilovsky. So I was very aware that she was extremely frustrated, and that there was a cumulative effect that was building on her." (R.330-331)

Dr. Stallone explained that his motivation for suggesting to Respondent in June 2020 that the parties share the role of medical director was to create a time frame in which Petitioner could be "brought up to speed and at a high level." (R.332) He also testified that he disagreed with Respondent's assessment that Petitioner needed to be mentored. (R.332) He intended his communication at that

time to be "an appeal to him to improve the relationship, and work together." (R.332) Dr. Stallone testified that the fact that the parties were not getting along was becoming known to the medical staff and was impacting their work. (R.332) People were afraid to approach the lab for fear that it would cause further conflict. (R.332)

Significantly, Dr. Stallone also testified that he was afraid of "losing Dr. Plocharczyk to the environment that she was being troubled by." (R.332) She was doing the majority of the work. (R.332) Respondent was resisting "things that most individuals, including [Dr. Stallone] felt needed to be done. Like pooling." (R.332) He confirmed that it was Petitioner who had originated and championed the concept of pooling, and testified that he was a "strong proponent, because it expanded our lab testing capability to meet the actual needs of the population" despite the fact that Respondent objected to it. (R.386-87)

Dr. Stallone was aware that Respondent was making derogatory comments and expressing derogatory opinions about Petitioner. (R.332) He testified regarding a letter he received from Respondent in which Respondent characterized Petitioner as having "lost her composure" and "panicked." (R.407-408, 677) He also testified to "several conflicts" that Respondent was involved in with other providers at CMC. (R.337)

Dr. Stallone testified that despite the agreement by both doctors that they would accept the transition plan outlined in June 2020 to transfer the medical directorship from Respondent to Petitioner, Respondent continued to express his belief to other people in the lab that Petitioner was not qualified. (R.341-42) By October, it was clear that the transition was not working and, in fact, the situation was worse. (R.344) According to Dr. Stallone, "I felt that Dr. Plocharczyk was at risk of leaving imminently, which would not have served the hospital's interests." (R.344) He based that belief not only on conversations with Petitioner directly, but also on communication with other lab personnel. (R.344)

After Respondent was removed as medical director in October 2020, Dr. Stallone observed that he became "less involved and less present. He stopped participating in any, any of the administrative aspects of his former role." (R.347) Dr. Stallone also observed that there was continuing conflict between the parties. (R.347) He testified that it is "critical" that members of a medical department within a hospital are able to work together and collaborate, and that "collaboration, compromise, negotiation are all necessary skills within a group." (R.350)

On cross-examination by Respondent's counsel, Dr. Stallone testified that pooling of samples is a "practice in the world of medicine." (R.355-356) He could not state precisely when it received official approval by the FDA with respect to

Covid testing but knew that it was approved at some point and was performed at CMC. (R.356)

Dr. Stallone testified in response to questioning by Respondent's counsel that he had no discussions whatsoever with Petitioner regarding dissolution of PAI prior to the time the Petition was filed, and he made no representations to her regarding whether CMC would continue to use her services if PAI was dissolved. (R.358) Petitioner was one of three parties who received a request for proposal from CMC to provide pathology services after CMC ended its contract with PAI. (R.361) While Petitioner was selected to receive an RFP, Respondent was not. (R.361)

When questioned about the complimentary comments about Respondent that were included in Dr. Stallone's June 24, 202 letter to Respondent (R.673), Dr. Stallone explained that he was "trying to encourage [Respondent] to do better. . . . And so this was an encouragement document, and so I didn't see the need to be completely negative." (R.364). He also made reference to the "outright conflict and alienation" in the lab that were "felt by other lab personnel". (R.364) Dr. Stallone explained that he was not removing Respondent as medical director at that time, since he "wanted this to be [Respondent's] plan." (R.368)

Dr. Stallone testified on cross-examination that many aspects of Respondent's performance during the pandemic "fell short of expectation."

(R.377) Particularly during the early part of the pandemic, Respondent was "absent from a lot of the operations that we commenced in our community." (R.378) Dr. Stallone described Respondent's involvement as "underengaged relative to what was going on" and characterized him as "difficult." (R.388) He testified that he had opportunities to observe the relationship between the parties and, in fact, he met with both of them in June of 2020 for "at least an hour" during which time the entire discussion was about their issues. (R.393) When questioned about whether Respondent's performance issues began after his matrimonial problems, Dr. Stallone testified that he recalled one conversation when Respondent "made a suicide gesture" and "talked about shooting himself", following which Dr. Stallone ordered a mental health evaluation. (R.400) He described Respondent as "while a good and talented Pathologist, [as] very difficult for the hospital to work with". (R.401) According to Dr. Stallone, by February of 2021, just prior to the time Petitioner filed the Petition for dissolution, the relationship between the parties was so strained that "there were beginning to even be quality concerns and operational concerns pursuant to that." (R.421)

There was also testimony at the hearing from Robert Lawlis, CEO of Cayuga Health Partners, a provider network that is part of CMC. (R.432) The principal role of Cayuga Health Partners is "pulling providers together to work on

greater activities." (R.435) As such, the relationships between providers is important. (R.435)

Mr. Lawlis testified that at the beginning of the pandemic, members of the CMC leadership and medical directors were consistently involved, but he did not recall Respondent being present at any of those meetings. (R.441) Later, during discussions between CMC personnel and Cornell personnel regarding pooling, he remembered Respondent being "dismissive of some of the ideas that they were bringing to the table" and making "specific reference to his ultimate authority in the Medical Director capacity", behavior Mr. Lawlis characterized as "off-putting." (R.446) He confirmed that as fallout from that meeting, Cornell insisted that contact going forward be with Petitioner, not Respondent. (R.447)

Mr. Lawlis also testified to being present in the lab when Petitioner presented findings and Respondent disagreed with them, "revealing that to her for the first time in front of an audience", which he found "unusual". (R.451)

Respondent was the last witness to testify at the hearing. He testified that under his mentorship, Petitioner was able to develop a successful practice in her specialty of dermatopathology. (R.462) He described her as "very green." (R.464)

Respondent disagreed with the characterizations by both Dr. Stallone and Mr. Lawlis that he was "absent" from CMC's response to the pandemic. (R.472) He testified that he was initially out of town for ten days on vacation, but no one

called on him for help. (R.472-473, 542). He also testified that this was more in Petitioner's "wheelhouse as a public health trained person" and he did not have experience with remote site collection centers. (R.473) He told her that "if and when we ever get the ability to do testing in-house, that's a responsibility that I will need to claim, because that is in my area of expertise and experience." (R.474) He also testified, however, that he never called to see if his help was needed, and he did not realize that the Covid crisis was serious "on a local level." (R.542)

Respondent was responsible for the validation studies for the testing instruments eventually put into use at CMC. (R.479) Contrary to the testimony of both Petitioner and Dr. Stallone, Respondent denied that he was opposed to pooling despite the fact that he had stated that it was "completely out of the realm of anything that we've ever attempted in our laboratory" and "wasn't being widely used on a national level." (R.482) Rather, it was his testimony that he objected to it only because he didn't feel the staff was in a proper state to handle it, and he felt it should wait until "the staff had sort of regrouped themselves and gotten their composure back." (R.483)

When questioned about the June 2020 meeting with Dr. Stallone and Petitioner regarding transitioning the medical director position to her, Respondent testified that he was "shocked, stunned" because he believed he was going to have that position for the rest of his career. (R.495) When questioned about the lab

meeting at which he criticized Petitioner's findings and analysis in front of the lab personnel, Respondent asserted that he had not had time to talk to her first, since he only received the data "moments" before the meeting. (R.508-09) When shown an email dated six days earlier providing data, Respondent first testified that he did not recall having seen it, then later changed his testimony, stating, "I now remember that I saw this email previously." (R.534, 538, 697) Respondent also disagreed with Dr. Stallone's testimony that he was removed as medical director, stating that he "stepped down." (R.510-11)

Respondent admitted to a failure of communication with Petitioner throughout 2020, first attributing it to Petitioner failing to invite him to meetings, and then saying it was because they were working on an "every other week cycle" during the summer because their volume of work had dropped. (R.516) He agreed that there was a complete breakdown of communication, but said it was due to Petitioner's failure to interact with him, not any fault on his part. (R.518)

With respect to the June 25, 2020 meeting with Petitioner and Dr. Stallone, Respondent said that Dr. Stallone had not been truthful when he testified that a topic of discussion at that meeting was the issues CMC and Dr. Stallone had with some of the ways Respondent was doing things. (R.526-27) He also admitted to taping a meeting with Dr. Stallone on another occasion because he felt Dr. Stallone had been "duplicitous" with him. (R.527)

Respondent admitted that during the collaboration with Cornell to respond to the pandemic, any participation by him was through Petitioner and not direct but contended that he was not made aware at the time that the Cornell people had refused to work with him. (R.547) He also conceded that there were "problems" in his relationship with Petitioner as "Medical Director and Assistant Director, yes," but denied that those problems spilled over into their business partnership in PAI. (R.551) When questioned about the fact that he stopped attending medical staff meetings at CMC in his capacity as Chairman of the Pathology Department once Petitioner became medical staff President, Respondent stated that he did so not because he chose not to support Petitioner in that role, but because he believed that if he was there, "it might be a distraction" since the attention would be focused on him. (R.553-54)

With respect to his objection to pooling, Respondent admitted on cross-examination that the approval of the FDA was not required. (R.566) He also admitted that while he had testified on direct that his objection was based on his belief that the staff was not able to handle pooling, his email of April 10, 2020 on the subject made no mention of the staff but, rather, stated incorrectly that pooling was "beyond the capabilities of the laboratory". (R.565-66, 670)

Respondent was also questioned about his June 26, 2020 letter to Dr. Stallone in which he stated that he would no longer support the benign breast

program; acknowledged the "conflict" with the group; stated that Petitioner "as a pathologist, my partner, and as a woman" should have backed him up, and accused Dr. Stallone of validating Petitioner's "grievance" "simply because she is aggrieved" and of "mollify[ing] her given her financial contributions over the past years". (R.579, 582, 677).

Decision of the lower court

Following the hearing, the lower court issued a Decision and Order describing what it characterized as the very different "story" of each party as reflected by their testimony. (R.6) The court then related the testimony of Dr. Stallone, who described Respondent as "terse and disrespectful"; confirmed Petitioner's testimony that Cornell refused to work with CMC if Respondent was involved; expressed his concern at the time about Respondent's ability to cooperate with others; and described the "steady decline in the parties' interactions." (R.9) Based on the testimony and exhibits introduced at the hearing, the lower court concluded that the proof regarding the dissension between the parties made it appropriate to direct dissolution, citing, among other cases, *In re Cunningham & Kaming, P.C.*, 75 A.D.2d 521 (1st Dep't 1980), *Greer v. Greer*, 124 A.D.2d 707 (2d Dep't 1986), *Application of Sheridan Construction Corp.*, 22 A.D.2d 390 (4th Dep't 1965) and *Matter of Cellino v Cellino & Barnes, PC*, 175 A.D.3d 1120 (4th Dep't 2019).

The lower court noted that it is not the underlying reason for the dissension that matters, but the fact of the dissension, which impedes the ability of the business to function. (R.11) The court rejected Respondent's argument that dissolution was improper because there was no proof of an opportunity to vote on an issue and therefore no proof of a "deadlock" between the parties, holding that a number of courts had held that "'intense strife' or 'discord affecting Management' and 'dissension impeding the ability to function' are prime examples of deadlock." (R.11) Citing the fact that PAI's clients had terminated their contracts because of the degree of animosity between the partners, the lower court concluded that "the level of animosity between the parties prevents an efficient operation of the partnership and demonstrates sufficient dissension among the parties to direct dissolution." (R.12) Accordingly, the lower court granted the Petition for dissolution.[2] The Order granting dissolution should be affirmed on appeal.

POINT I

THE LOWER COURT'S HOLDING THAT DISSOLUTION WAS APPROPRIATE WAS SUPPORTED BY THE PROOF INTRODUCED AT THE HEARING

The Verified Petition in this matter sought dissolution under Business Corporation Law § 1104 (a). (R.31) That statute lists three grounds on which the holders of shares representing 50% of the votes of all outstanding shares of a

[2] Respondent's cross-motion and request for a stay of proceedings were deemed moot by the lower court. (R.12)

corporation entitled to vote in an election of directors may present a petition for dissolution. Subsections (1) and (2) allow dissolution if 50% of the shareholders cannot obtain enough votes to either take action by the board (subsection 1) or elect directors (subsection 2). Those subsections address a situation where there is a voting deadlock. Subsection (3) does not. That subsection allows a 50% shareholder to petition for dissolution if "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." It does not require either a voting issue or a deadlock on that issue. Further, each subsection is separate and discrete. Sufficient proof of any of the three grounds permits a petition for dissolution.

Throughout his Brief, Respondent refers to the lack of a "deadlock" between the parties, meaning a deadlock on a voting issue. In fact, the word "deadlock" appears at least 15 times in his Brief. Proof of a voting deadlock, however, is only required if a shareholder seeks dissolution pursuant to subsection (1) or (2) of BCL § 1104. Here, Petitioner demonstrated by a preponderance of the evidence that there was internal dissension between her and Respondent, and that they were so divided that dissolution would be beneficial. By so proving, she demonstrated her entitlement to dissolution of PAI. No proof of a voting deadlock was necessary, and any argument by Respondent that the lower court acted improperly by granting the Petition without proof of such a deadlock is incorrect and must be rejected. The

cases citing BCL § 1104 (a)(3), the subsection pursuant to which the dissolution in this case was granted by the lower court, use the term "deadlock" in the dictionary sense, referring to "a state of inaction or neutralization resulting from the opposition of equally powerful uncompromising persons or factions." *Merriam-Webster Dictionary*. That is precisely what the proof at the hearing demonstrated.

Cases interpreting BCL § 1104 (a)(3) and the degree of internal strife that must be shown to warrant a dissolution clearly support the lower court's grant of Petitioner's application. For example, in *Cellino v. Cellino & Barnes, P.C.*, 175 A.D.3d 1120, 1121–22 (4th Dep't 2019), the Court held, "The determination whether a corporation should be dissolved is within the discretion of the court (see Business Corporation Law § 1111 [a]; *Matter of Kemp & Beatley [Gardstein*], 64 NY2d 63, 73 [1984]), and 'the benefit to the shareholders of a dissolution is of paramount importance' in making that determination (§ 1111 [b] [2])." 175 A.D.3d at 1121.

In *Cellino*, as here, there were two 50% shareholders, one of whom sought dissolution and the other who opposed it. Significantly, the party opposing the dissolution argued that it was not appropriate because the corporation was continuing to operate at a profit. The court rejected that argument, holding that "dissolution is not to be denied in a proceeding brought pursuant to Business Corporation Law § 1104 simply because the corporate business has been

conducted at a profit (see § 1111 [b] [3]) or because the dissension has not yet had an appreciable impact on the profitability of the corporation (see *Molod v Berkowitz*, 233 A.D.2d 149, 150 [1st Dep't 1996], lv dismissed 89 N.Y.2d 1029 [1997])." Id. at 1121. That argument, which Respondent has raised on his appeal, must be rejected in this case as well.

While the Court did note in *Cellino* that there was proof of both "dissension and deadlock", the petitioner in that case sought dissolution under all three subsections and the Fourth Departmentaddressed the proof on all three. Here, by contrast, the proof at the hearing focused on subsection (3), requiring only proof of internal dissension. That is only logical since, unlike the law firm in *Cellino* with many employees and many voting issues, Petitioner and Respondent were the only employees of PAI. There were no directors to elect, no compensation issues regarding employees, no marketing or strategic planning, and no other similar issues to vote on as there were in *Cellino.* However, as the Court held in *Cellino*, "When a point is reached at which the shareholders who are actively conducting the business of the corporation cannot agree, dissolution may be in the best interests of those shareholders", citing *Matter of Gordon & Weiss,* 32 A.D.2d 279 (1st Dep't 1969).

A point raised by the Appellate Division in *Gordon & Weiss* is relevant here. During the hearing in this proceeding, Respondent spent much time trying to

demonstrate that the admitted internal dissension between the parties was the fault of Petitioner, not him. In other words, he opposed dissolution on the ground that the culpability for the ample internal dissension demonstrated at the hearing was that of Petitioner, so that her Petition should not be granted. The Appellate Division rejected that very argument when it was raised by the party opposing dissolution in *Gordon & Weiss*: "The so-called issue here presented is not whether [internal dissension] exists but rather why it exists. *That being of no relevance, there is no issue.*" (Emphasis added) 32 A.D.2d at 281.

It is well settled in New York that a closely held corporation may be dissolved where, as here, the dissension between two 50% shareholders has reached a level where the corporation cannot continue to function effectively. See, e.g., *Neville v. Martin*, 29 A.D.3d 444 (1st Dep't 2006) (holding that the grant of the dissolution petition was proper "given the record evidence of dissension between the two 50% shareholders of the subject close corporation. This evidence left no doubt that the corporation could not continue to function effectively"); *Goodman v. Lovett*, 200 A.D.2d 670, 670–71 (2d Dep't 1994) (granting dissolution in a case where the two 50% shareholders had stopped speaking to each other over a dispute about distribution of profits and further noting that "the underlying reason for the dissension is of no moment, nor is it at all relevant to ascribe fault to either party"; *In re Dissolution of Eklund Farm Mach., Inc.*, 40

A.D.3d 1325 (3d Dept 2007) granting dissolution because of the dissension between two groups of shareholders "even if petitioners were shown to have created dissension to obtain dissolution" since the dissension would be nonetheless irreconcilable).[3]

Turning to the proof at the hearing, Petitioner demonstrated both through her own testimony and that of Dr. Stallone that Respondent was largely absent during the crucial first weeks of the crisis response to the Covid-19 pandemic. While Respondent offered various reasons for his absence, such as his vacation to Cleveland, and stated that he later became more present, the absence was demonstrated. Further, Petitioner proved serious dissension between the two 50% shareholders on a number of issues that were significant to the operation of PAI, including the use of pooled samples to test for Covid-19; the handling of the benign breast project; the proposed partnership between CMC and the Cornell Veterinary Laboratory; and the appropriateness of validation studies conducted by Petitioner.

In fact, the testimony of Dr. Stallone established that CMC was so concerned about the breakdown of trust and communication between the parties that it decided to terminate its contract with PAI. Dr. Stallone's letter so advising

[3] It should also be noted that in each of these cases, the Appellate Division upheld the grant of a dissolution petition on papers, without a hearing. Here, by contrast, the lower court directed a hearing and had the advantage of hearing testimony from live witnesses, including Dr. Stallone and Mr. Lawlis, to determine whether there was internal dissension between the parties sufficient to warrant a dissolution.

stated, "Obviously, the inability of PAI to function in an orderly manner and the inability of the two of you to practice medicine in the manner in which you desire as a result of the internal dissention (sic) is concerning." (R.110-111)

While it is true that Dr. Stallone's letter also referenced the fact that Petitioner had filed for dissolution, that merely confirmed that the level of dissension between the two had risen to a point where PAI could no longer operate effectively. As was the case in *Goodman v. Lovett*, the parties were no longer communicating with each other. As was the case in *Cellino*, the parties no longer trusted each other. Clearly, in a closely held company consisting solely of two 50% shareholders, a breakdown of communication and complete lack of trust prevent the orderly conduct of the business and support dissolution under BCL § 1104 (a).

Again, Respondent's Brief focuses not on the *fact* of the internal dissension between the parties on each of these critical issues but, rather, on the *reason* or *fault* behind each difference of opinion, attempting to demonstrate that his position on each issue was more correct or warranted or reasonable than that of Petitioner. As set forth in each of the cases cited above, however, fault is immaterial. As the Court held in *Goodman v. Lovett,* it is the *fact* of the dissension that warrants dissolution, not the *reason* for it. 200 A.D.2d at 670. There can be no doubt that there was sufficient internal dissension demonstrated at the hearing in this proceeding to support the lower court's grant of the dissolution Petition.

Respondent also argues that to the extent the lower court granted dissolution based on a common law right, it was unwarranted because Petitioner failed to demonstrate the "egregious" breaches of fiduciary duty needed for such relief. Respondent's Brief, p. 16. While Petitioner did include a cause of action in her Petition for common law dissolution, there was absolutely no mention of that cause of action during the hearing. The lower court's Decision and Order focused exclusively on whether Petitioner had made the necessary showing under BCL § 1104 (a). (R.10-12) In fact, in granting the Petition, the lower court quoted BCL §1104 (a)(3): "Based on all the facts and evidence presented at the hearing, the Court finds that there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders. Therefore, the Petition for dissolution is granted." (R.12)

While it is true, as Respondent notes in his Brief, that there is no absolute right to dissolution (Respondent's Brief, p. 17) the Court of Appeals has held that "[t]he appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application." *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73 (1984); see, also, *Cellino*, 175 A.D. 3d at 1121. Here, given the proof at the hearing—including the testimony of Dr. Stallone and Mr. Lawlis, two non-party disinterested witnesses—the lower court's grant of the dissolution Petition was an appropriate exercise of discretion. The preponderance

of the evidence demonstrated that the internal dissension between Petitioner and Respondent was at such a level that dissolution was proper. As the lower court noted in its Decision and Order,

> When PAI's only clients, terminate their contracts because of the level of animosity between the partners, the Court can only take that into consideration and conclude that the intense discord among the partners necessitates dissolution benefiting the stockholders and does not injure the public. The Court finds that based on the testimony and evidence presented, the level of animosity between the parties prevents an efficient operation of the partnership and "demonstrates sufficient dissension among the parties to direct dissolution."

(R.12)

Respondent's contention that the Petition should have been denied because Petitioner had "obvious bad faith intentions" should also be rejected by this Court and the cases cited by Respondent in support are unpersuasive. For example, in *Application of Clemente Bros., Inc.,* 19 A.D.2d 568, 569 (3d Dep't 1963), this Court merely stated that the good faith of the petitioner was a factor to consider. In *In re Dissolution of Glamorise Founds.,* 228 A.D.2d 187, 189 (1st Dep't 1996) the allegation by the respondent that the petitioner had "deliberately created the underlying dispute for the very purpose of securing judicial dissolution and thereafter seizing the corporation" was merely cited as the basis for directing a fact-finding hearing, not for a ruling favoring one party over the other. In *Wollman v Littman*, 35 A.D.2d 935 (1st Dep't 1970), the Appellate Division similarly held

that the allegations by one side that the other side was acting in bad faith simply meant that a hearing was necessary. The lower court in this matter conducted just such a hearing, listened to the witnesses, observed their demeanors and considered—and rejected—Respondent's charge that Petitioner was acting in bad faith by manufacturing the underlying dispute. The existence and level of internal dissension between the parties was demonstrated at the hearing to be genuine. Further, Respondent's demonstrated inability to work and collaborate not only with Petitioner but also with others, including the Cornell personnel, members of the medical staff and hospital committee members, was the subject of a great deal of the hearing testimony.

Respondent's argument that the dissension demonstrated by Petitioner was inadequate to warrant dissolution must also be rejected by this Court. The cases cited by Respondent to support this argument are not cases involving closely held companies with only two shareholders, as is this case. Rather, they are cases involving multiple shareholders and a board of directors. The question of whether a business can continue to operate under those circumstances, in the face of dissension between factions of shareholders, is vastly different from the situation here, where the entire business consisted of the two parties. Where the operation of the business is entirely in the hands of two people who clearly do not trust each other and have ceased communicating with each other, and where the dissension

between them has escalated to the point where it has caused one of the parties to suffer from stress-related illnesses, the conclusion is compelled that dissolution of the closely-held business is an appropriate exercise of discretion.

The record does not support Respondent's claim that Petitioner "colluded" with CMC to oust him and accomplish a *coup d'etat*. Respondent's Brief, p.25-26. Dr. Stallone testified without refute that prior to the time Petitioner filed for dissolution, he never at any time had any conversation with her regarding the possibility that she could continue to work with CMC outside of PAI. (R.346-347) Further, the dissolution did not impermissibly favor one shareholder over the other. In this regard, the proof at the hearing was unrefuted that after CMC terminated its contract with PAI, they sent out RFPs. Dr. Stallone testified that the decision of who those RFPs were sent to was made not by him but by Tracy Gates, CMC's Chief Operating Officer with responsibility over its lab operations. (R.335) There was proof at the hearing that Respondent identified Tracy Gates as someone who "supported him completely." (R.676, 339) Yet, when it came time to decide who would be sent an RFP from CMC for a new pathology contract, Ms. Gates selected Petitioner but not Respondent. (R.359)

Finally, Respondent has misconstrued the cases he cites in support of his claim that dissolution would not be beneficial to the shareholders. In *Application of Dubonnet Scarfs, Inc.,* 105 A.D.2d 339 (1st Dep't 1985), the court dismissed the

petition for dissolution because "nowhere in the petition do the petitioners allege that such control by Olshan has led to a single instance of internal dissension." 105 A.D.2d at 342. Obviously, that was not the case here. *Matter of Catelmo,* 275 A.D. 231 (1st Dep't 1949) was decided under a prior statute, not BCL § 1104. In addition, the court in that case noted that "there was no real difference in opinion between the parties as to matters of management." *Id.* at 232.

In sum, there was more than sufficient proof at the hearing before the lower court to support the conclusion that the internal dissension and division between Petitioner and Respondent were such that they were affecting the operation of PAI so that dissolution was beneficial for the shareholders. The lower court's Order and Decision granting dissolution following a fact-finding hearing should be affirmed.

POINT II

THE LOWER COURT PROPERLY ALLOWED TESTIMONY REGARDING STATEMENTS ATTRIBUTABLE TO RESPONDENT AS ADMISSIONS BY A PARTY

On a number of occasions during the hearing, Petitioner and Dr. Stallone testified regarding statements that Respondent had made. Each time, Respondent's counsel objected strenuously and repeatedly to such testimony as inadmissible hearsay. Respondent now argues on appeal that the admission of those statements into evidence requires a reversal of the lower court's Order. It is respectfully submitted that Respondent's position is without merit.

Contrary to Respondent's contention, testimony by a witness regarding what the witness heard a party say is not inadmissible hearsay, as it is a party admission. *Grieve v. MCRT Ne. Constr., LLC*, 197 A.D.3d 623, 625 (2d Dep't 2021), citing *Amann v. Edmonds*, 306 A.D.2d 362, 363 (2d Dep't 2003); Guide to N.Y. Evid rule 8.03, *Admission by a Party*. Further, if a party makes an admission, that admission is receivable even though knowledge of the fact stated therein was derived wholly from hearsay. *Christopher P. v. Kathleen M.B.*, 174 A.D.3d 1460, 1462 (4th Dep't 2019), citing Prince, Richardson on Evidence § 8–206 [Farrell 11th ed 1995] and *Reed v. McCord*, 160 N.Y. 330 (1899).

An admission by a party to a lawsuit will also be received at trial as evidence in chief of the matter asserted. *Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223 (2d Dep't 1980). "It is one of the elementary principles of the law of evidence that the statements of a party as to any fact in issue, or relevant to any issue, are admissible as primary evidence against the person by whom they are made." *Mindlin v. Dorfman*, 197 App. Div. 571, 572 (1st Dep't 1921).

Further, it has been held that "[i]n a civil action the admissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever or to [whomever] made." *Smolinski v. Smolinski*, 78 A.D.3d 1642, 1644 (4th Dep't (2010), quoting *Reed v. McCord*.

In his Brief, Respondent points out a number of examples where Petitioner or Dr. Stallone were permitted to testify to statements made by Respondent over the objection of Respondent's counsel. Respondent's Brief, Point IV. For example, at page 325 of the Record, Dr. Stallone was permitted to testify that he had heard Respondent had denied disagreeing with the use of pooling, but he also testified that he later was shown an email from Respondent in which he said exactly that, and Dr. Stallone also confronted Respondent about his statement.

At page 343, Dr. Stallone was permitted to testify over objection that he had heard that Respondent was being derogatory or disrespectful toward Petitioner. The lower court allowed the testimony not for its truth, but for the limited reason that the fact that it was reported meant that Dr. Stallone had to take action as part of his supervisory responsibilities at CMC. (R.325, 333)

At page 405 of the Record, Respondent's counsel objected to the following question to Dr. Stallone as calling for hearsay: "In your communications with Dr. Sudilovsky, did he provide information with respect to the relationship that he had with Dr. Plocharczyk?" (R.405) The lower court overruled the objection, both because it concerned a party statement and because, once again, the response was being received for the limited purpose of touching on Dr. Stallone's supervisory role at CMC. (R.406) Similar objections were made and overruled at pages 408 and 409 of the Record, when Dr. Stallone was asked about a conversation he had

with Respondent in which Respondent made disparaging statements about Petitioner, and about similar conversations Respondent had had with others. It is respectfully submitted that the testimony in question, particularly in light of the limitations expressed by the lower court, was properly admitted in each instance as a statement by a party.

Respondent also contends on appeal that the lower court was incorrect in ruling that an admission by a party of any fact material to an issue at trial is competent evidence against him or her, whenever, wherever or to whomever made, despite the fact that the Court of Appeals held precisely that in *Reed v. McCord, supra*. In support of his contention, Respondent relies on *Borden v. Capital Dist. Transp. Auth.*, 307 A.D.2d 1059, 1060 (3d Dep't 2003). Respondent's Brief, p. 39. Respondent's reliance is misplaced. In *Borden*, in a footnote, this Court noted that the lower court had erred in admitting evidence that the defendant had pled guilty to certain crimes in a plea allocution, which might be admissible as a statement against penal interest but only upon a showing, *inter alia*, that the declarant was not available to testify. No such showing was made in that case, which is why the admission of the statement was found to be erroneous. Here, to the extent it is even relevant, Respondent was present and did testify. Further, *Borden* involved an admission against *penal* interest, which is a different exception to the hearsay rule

and carries with it constitutional protections applicable to a criminal, but not a civil, case. See *People v. Hardy*, 4 N.Y.3d 192 (2005).

Respondent's reliance on *Edmonds v. Quellman*, 277 A.D.2d 579, 580-81 (3d Dep't 2000) is similarly misplaced. The issue in that case was not whether a hearsay statement was admissible at trial but, rather, whether a prior inconsistent hearsay statement raised a question of fact sufficient to defeat a motion for summary judgment. *Id.* This Court held that under the circumstances of that case it did not, since the defendant who was alleged to have made the prior inconsistent statement testified under oath that he did not recall it, making it inadmissible as a prior inconsistent statement.

Kaufman v. Quickway, Inc. 64 A.D.3d 978 (3d Dep't 2009) is also distinguishable. That case was a Dram Shop action, where the plaintiff sought to defeat defendant's motion for summary judgment with an unsworn statement by a store clerk employed by defendant that the driver who caused the accident in which plaintiff's son was killed appeared intoxicated when she sold him a 12-pack of beer. In her sworn deposition testimony, however, the clerk denied having made that statement. This Court held that the clerk's prior statement was not allowable as a prior inconsistent statement because she was available to testify, and it was not allowable as an admission against a party because no evidence was offered that she had authority to speak on the defendant's behalf. 64 A.D.2d at 980.

Finally, Respondent claims that the statements attributable to him that Dr. Stallone was allowed to testify to should not have been allowed because they lacked appropriate indicia of reliability, citing *Nucci v. Proper,* 95 N.Y.2d 597, 602-03 (2001). The issue in that case, however, was whether the Court of Appeals should interpret its holding in *Letendre v Hartford Acc. & Indem. Co.,* 21 N.Y.2d 518 (1968) as creating an exception to the hearsay rule premised solely on witness availability. In declining to do so, the Court of Appeals discussed the factors to be considered when determining whether hearsay statements are reliable:

> Relevant factors include "spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, ... unlikelihood of faulty recollection and the degree to which the statement was against the declarant's ... interest" (see, People v James, 93 NY2d 620, 642 [citing Idaho v Wright, 497 US 805, 821; Dutton v Evans, 400 US 74, 89]). Courts have also "considered the status or relationship to the declarant of the person to whom the statement was made ..., whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor." (citations omitted).

95 N.Y.2d at 603. Applying those factors to this case, the lower court properly allowed Dr. Stallone's testimony.

CONCLUSION

The evidence received at the fact-finding hearing conducted by the lower court established that the relationship between Drs. Plocharczyk and Sudilovsky had deteriorated to the point where it brought about "internal dissension" and the

two partners were "so divided that dissolution would be beneficial to each of them." Such being the case, the elements of BCL § 1104 (a)(3) were established, and Petitioner met her burden of demonstrating her entitlement to an order dissolving PAI. Further, the statements of Respondent that were admitted into evidence through the testimony of other witnesses were properly admitted by the lower court as party admissions. The lower court's order granting dissolution was a proper exercise of discretion and should be affirmed on appeal.

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