



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**WILLIAM and ELIZABETH FEARNOW v. RIDENOUR,  
SWENSON CLEERE & EVANS  
CV-05-0217-PR; 1 CA-CV 03-0650 (Opinion)**

**PARTIES:**

**Petitioner-Cross-Respondent:** The Fearnows are represented by Paul Ulrich and Pamela Peterson.

**Respondent-Cross-Petitioner:** Ridenour, Swenson, Cleere & Evans (“RCSE”) is represented by Mark Harrison, Thomas Hudson, and Diane Meyers of Osborn Maledon.

**FACTS:**

In 1987, Fearnow became a partner in RSCE. He paid \$33,674.42 for his partnership interest by directly paying five existing partners rather than making a capital contribution. The payments entitled Fearnow to share in partnership profits, to vote, and receive compensation. As others joined the partnership, Fearnow pocketed direct payments from new partners. The trial court considered the payment by Fearnow to existing partners to be a capital contribution.

In 1991, the partnership dissolved and several of the prior partners, including Fearnow, formed RSCE. Fearnow received one share of stock in RSCE and was deemed to have contributed \$33,674.42 based on what he had paid to the five individuals when he bought into the prior partnership. In November 1997, RSCE executed the last version of its shareholder agreement which included a section governing “Withdrawal of Stockholders,” with a “Voluntary Withdrawal” provision that said: “Other than retirement, a Stockholder who withdraws from the Corporation shall tender his or her Share to the Corporation for no compensation.”

In February 1998, Fearnow voluntarily left RSCE to practice law at Ellsworth, He demanded that RSCE pay him \$33,674.42 for his share of the stock. RSCE refused. He sued, seeking to invalidate the voluntary withdrawal provision of the shareholder agreement and seeking compensation from RSCE. The court ruled the shareholder agreement restricted a lawyer’s right to practice law, in violation ER 5.6 which stated:

**Restrictions on Right to Practice**

A lawyer shall not participate in offering or making . . .

- (a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

The court concluded that the striking of the provision left a “large gap in the [S]hareholder [A]greement . . . [with] no remaining term cover[ing] what happens in the event of voluntary withdrawal or retirement.” The court held the entire agreement invalid, ruled Fearnow was a “disqualified person” under the Act, and ordered appraisal of his share under the Act’s forced

acquisition provisions. The court determined that the fair value of Fearnow's equity interest was \$86,500, entered final judgment to that effect, and awarded Fearnow attorneys' fees, expert fees, and costs.

RSCE appealed, challenging the court's partial summary judgment rulings concerning the invalidity of the Shareholder Agreement and Fearnow's status as a "disqualified person" under the Act. The court affirmed the trial court's holding that the Agreement is unenforceable as void against public policy. The Agreement §3(c) unlawfully restricted Fearnow's right to practice law and violated ER 5.6(a) because the rule guarding against restrictive covenants among lawyers was created to "prevent[] lawyers from 'bartering in clients, thereby protecting the client's freedom to choose, discharge, or replace the lawyer at will.'" Opinion at ¶ 13. The court noted that any financial disincentive was not based upon any actual loss RSCE suffered due to Fearnow's departure. Rather, the agreement required Fearnow to forfeit all capital contributions regardless of whether he took any of RSCE's clients.

The court also addressed the compensation issue, noting that the parties agree that Fearnow was properly issued his share. The court rejected RSCE's position that Fearnow had to return his share without compensation because the agreement was void as against public policy. However, the court rejected Fearnow's two theories of recovery: (1) that the Act entitles him to the fair market value of his share; or (2) alternatively, that he is entitled under the unjust enrichment theory to reimbursement of his capitol contribution. The court noted that under the current Act, a professional corporation must repurchase a shareholder's shares upon either of two circumstances: (1) the death or dissolution of the shareholder when the person to whom the shares would be devolved is not a person eligible to hold that stock pursuant to A.R.S. § 10-2220; or (2) when the shareholder becomes a "disqualified person," a term defined as "an individual or entity that is not or ceases to be a qualified person." A.R.S. § 10-2220(1). "Qualified person" is defined as "a person that is eligible under the chapter to be issued shares by a professional corporation." §10-2201(7).

A.R.S. § 10-2220(A)(1) states that a professional corporation may issue shares to "[i]ndividuals who are licensed by law in this or another state to render a professional service described in the corporation's articles of incorporation." Fearnow, is a licensed attorney, is eligible to be issued shares by the law firm and is a "qualified person" under the Act. He will remain a qualified person for so long as he is licensed to practice law in Arizona or another state. Consequently, the court held that he could not require that RSCE repurchase his shares on the basis that he is "disqualified" under the Act. Fearnow also was not entitled to recover under an unjust enrichment theory. RSCE has not been unjustly enriched because it has not retained anything that belongs to Fearnow. Fearnow still owns his share in the professional corporation and may exercise all shareholder rights. Finally, the court denied as moot Fearnow's motion for reconsideration informing the court that Fearnow retired in 2002.

#### **ISSUES PRESENTED:**

"1. The court of appeals erred in finding that Fearnow was not a "disqualified person" entitled to redemption of his RSCE shares under the Arizona Professional Corporations Act ("Act") because such an interpretation renders the Act unconstitutional as applied to attorneys.

2. The court of appeals erred in holding it was not empowered to order RSCE to purchase Fearnow's share because Fearnow's lack of a redemption remedy violated public policy and numerous ethical rules within the judiciary's exclusive jurisdiction.

3. The court of appeals erred in holding RSCE was not unjustly enriched because RSCE was allowed to retain the value of Fearnow's share even though its shareholder agreement accomplishing the same result was voided as a monetary penalty upon lawyers who withdraw from the firm and compete.

4. The court erred in denying Fearnow's motion for reconsideration because Fearnow is now retired from the practice of law and is clearly "disqualified" under the Act."

#### **RSCE's CROSS-PETITION**

"If the Court decides to review any other issue in the case, then it should also review whether Rule 5.6 of the Professional Rules of Conduct entitled Fearnow to escape the agreement he made to "tender his . . . share to the corporation for no compensation."

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