

No. 98,663

SEP 2 2004

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

OKLAHOMA DEPARTMENT OF SECURITIES
ex rel., IRVING L. FAUGHT, ADMINISTRATOR,

Plaintiff/Appellee

v.

ACCELERATED BENEFITS CORPORATION and
AMERICAN TITLE COMPANY OF ORLANDO,

Defendants/Appellants

v.

TOM MORAN,

Court-Appointed Conservator/Appellee

**RESPONSE OF THE OKLAHOMA DEPARTMENT OF SECURITIES
TO PETITION FOR REHEARING OF DEFENDANTS/APPELLANTS**

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
CASE NO. CJ-99-2500
THE HONORABLE DANIEL L. OWENS
ACTION FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

September 2, 2004

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RESPONSE OF THE OKLAHOMA DEPARTMENT OF SECURITIES

INTRODUCTION

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its response in opposition to Defendants/Appellants' Petition for Rehearing and Brief in Support ("Petition for Rehearing"). Defendants/Appellants seek this Court's reconsideration of its decision affirming two journal entries issued in the Oklahoma County District Court ("District Court") on November 20, 2002 ("November Orders"). The arguments and cases used in the Defendants/Appellants' Petition for Rehearing are indistinguishable from Defendants/Appellants' Brief In Chief. The Department asserts that this Court's decision affirming the November Orders issued by the District Court was correct and asks that the Petition for Rehearing be denied.

A. DEFENDANTS/APPELLANTS RAISE NO GROUNDS FOR REHEARING

Defendants/Appellants' Petition for Rehearing raises no new issues for this Court's consideration. In fact, the arguments and cases used in the Petition for Rehearing are identical to those argued in the Brief In Chief. See the following examples:

- ξ Appellants' Brief in Chief, pgs. 14-16 and Petition for Rehearing, pgs. 3-4.
- ξ Appellants' Brief in Chief, pgs. 16-20 and Petition for Rehearing, pgs. 4-9.
- ξ Appellants' Brief in Chief, pgs. 20-22 and Petition for Rehearing, pgs. 9-12.
- ξ Appellants' Brief in Chief, p. 13 and Petition for Rehearing, p.23.

The grounds asserted by Appellants in support of the Petition for Rehearing are that the Court failed to follow "time-honored principles of contract construction," "improperly ignored settled law," and "ignored the basic provisions of the Conservatorship Order." Because these issues have already been fully briefed, argued and considered in this appeal,

the Department urges this Court to reject the Petition for Rehearing. No basis exists to justify a rehearing and no new issue has been raised for this Court's consideration.

B. THE CONSERVATORSHIP ORDER IS NOT AMBIGUOUS

The terms of the Conservatorship Order are clear. Only if the Conservatorship Order is ambiguous on the face of the record may a court construe it. *Dickason v. Dickason*, 1980 OK 24, 607 P.2d 674. Finding the Conservatorship Order to be unambiguous, the District Court did not construe the order.

In addition, the Court cannot extend its inquiry beyond the instruments that comprise the judgment roll. The judgment roll in this case is not ambiguous. Defendants/Appellants are seeking the assistance of this Court in making a new judgment--one that is more favorable to them.

Should this Court decide to rehear this matter and find the language of the Conservatorship Order to be ambiguous, the Conservatorship Order must then be construed to carry out its evident purport and intent. The Court should consider the situation to which the order applied and the purpose sought to be accomplished. *Hicks v. Hicks*, 1966 OK 91, 417 P.2d 830. While the language should be taken in its ordinary legal meaning, the provisions of the Conservatorship Order on which the District Court relied must be considered in connection with the context of the order as a whole, and the circumstances surrounding the making of the judgment. *General Creditors of the Estate of Harris v. Cornett*, 1966 OK 64, 416 P.2d 398.

The Department, in agreeing to the Conservatorship Order, sought to remedy serious securities law violations committed by Appellant Accelerated Benefits Corporation ("ABC") by protecting the insurance policies from which ABC investors might recoup some of their

investment. The alternative was to secure a judgment for restitution against ABC, a judgment that ABC might not have had the ability to satisfy. Protection of the insurance policies required that premium payments be made on all policies. Under the Conservatorship Order, those payments, along with other expenses of the Conservatorship, were to be made by ABC until ownership of most of the policies were transferred to the Conservator.

The context in which the Conservatorship Order was issued and the circumstances surrounding the making of the order were critical to the ABC Investors. In the months prior to the Conservatorship Order, and in every month since the Conservatorship Order was issued, there was a serious shortfall of money available to ensure that premiums could be timely paid.¹ Given this situation, there was a critical need for funding from the inception of the Conservatorship Order. The agreement from Defendants/Appellants, to fund premium payments and expenses during the time the policies were transferred to the Conservator, decreased the risk that policies would lapse before maturity.

Further, the Conservatorship Order provided that the Conservator would be limited to taking "custody, possession and control of the Conservatorship Assets as they are transferred to the Conservator." Thus, the Conservatorship Order did not impose an obligation on the Conservator to pay expenses and premiums for assets not yet transferred to him. Instead, the clear language of the Conservatorship Order imposed this obligation on the Defendants/Appellants until the transfer was substantially effected.

¹ By April, 2001, approximately one month after the District Court issued its Findings of Fact and Conclusions of Law, a premium shortfall crisis existed at ABC. See page 2 of Plaintiff's Application for Emergency Relief attached as Exhibit B to the Response of Oklahoma Department of Securities to Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets and Brief in Support. On April 24, 2001, Defendants/Appellants notified investors that the ABC premium account had been depleted. See Response of Oklahoma Department of Securities to Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets and Brief in Support, Exhibit "B" to Exhibit B.

To believe the argument of Defendants/Appellants that the Conservatorship expenses were not paid because they were not contemplated by the Conservatorship Order is ludicrous. This would only mean that Defendants/Appellants never intended to be responsible for any expenses under the Conservatorship Order from the moment they agreed to its terms and contrary to the evidence provided by their signatures. It is clear from the provisions of the Conservatorship Order itself that this was not so.

Further, the very actions of the Defendants/Appellants indicate that they understood the clarity of the Conservatorship Order. The Defendants/Appellants paid premium shortfalls for a period of time, did not object to the fee applications of the Conservator, did not appeal orders granting such applications, paid \$5,508.05 in Conservator expenses, and initially paid employee salaries, rent, and other office expenses. They did not become concerned until the expenses became greater than they had anticipated.

**C. THE UNAMBIGUOUS LANGUAGE OF THE CONSERVATORSHIP ORDER
REQUIRES PAYMENT OF PREMIUMS BY DEFENDANTS/APPELLANTS**

Defendants/Appellants seek to apply a statutory canon of construction to a provision in the Conservatorship Order that describes the expenses and costs the District Court ordered them to pay to the Conservator. However, the Court in *Commissioners of Land Office v. Butler*, 1987 OK 123, 753 P.2d 1334, found:

“Ejusdem generis is one of many guides to statutory interpretation. Other canons of construction are equally potent. The ejusdem generis doctrine must yield to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language of the statute. If the use of the ejusdem generis rule would hinder or defeat the plain legislative purpose or intent, it may not be applied in statutory construction.

In *Panhandle Cooperative Royalty Co. v. Cunningham*, 495 P.2d 108 (1972), the court held that:

'Ejusdem generis' is not a rule of property but a rule of construction useful in ascertaining the meaning of words of doubtful import. Merely because this rule of construction is used with other rules of construction to interpret words of doubtful meaning does not render the application of the rule dictum. This rule of construction is a useful part of our law. See *Cronkhite v. Falkenstein*, 1960 OK 118, 352 P. 2d 396, 398.

In *Cronkhite*, supra, the court stated:

In construing contracts or conveyances, primary purpose is to give effect to mutual intention of parties as it existed at time of contracting. 15 O.S.1951 § 152.

The statement of Defendants/Appellants that the "rule" of ejusdem generis "requires" a particular finding is incorrect. See Brief-in-Chief of Defendants/Appellants, page 19. The rule is only one of many guides that can be used if ambiguity exists. The District Court found that the Conservatorship Order was unambiguous. See November Orders. If there was a need to look beyond the findings of these November Orders, a reading of the stated purpose of the Conservatorship Order would resolve any question of intent as to the Defendants/Appellants' obligations under the order, that is, "in lieu of a judgment for restitution and in order to prevent potential irreparable loss, damage or injury to purchasers of interests in the right to receive the proceeds from the viatical and/or life settlement policies effectuated by ABC Purchase Request Agreements." See Conservatorship Order. In order to satisfy the stated purpose of the Conservatorship Order, Defendants/Appellants were the only source of the funds necessary to pay premiums to ensure that the investors did not suffer "irreparable loss, damage or injury" due to the lapse of the insurance policies.

D. THE CONSERVATORSHIP ORDER REQUIRED DEFENDANTS/APPELLANTS TO PAY ALL BILLS

Defendants/Appellants state that the "Conservatorship Order was not meant to be punitive." However, the District Court more generally discussed the purpose of the

Conservatorship Order in the Transcript of Proceedings dated September 27, 2002, at page 13, and stated:

“The underlying essence and purpose of that order is to make sure there was no dilatory activity on the part of the folks involved in this operation in getting the assets transferred so we could gather all these assets. That’s the reason for the 75 percent cutoff. And that was the reason, I think sort of a punishment type factor, to require until you do you’re going to have to take care of the bills.”

Beginning on February 6, 2002, and continuing until at least 75% of the assets were transferred to the Conservator, Defendants/Appellants were required to “take care of the bills.” *See* Transcript of Proceedings dated September 27, 2002, page 13.

The reality of the situation was that on February 6, 2002, the Conservator had no assets. The Conservator did not have access to the assets until they were transferred to him. *See* Conservatorship Order, page 4. He did not have records on which to determine what premiums had to be paid and in what amounts until the assets and records were transferred to him. *See* Conservatorship Order, page 4. The ninety (90) day period was the time within which the Conservatorship Order stated those duties could be accomplished. *See* Conservatorship Order, page 4. After the substantial transfer of the assets (75%), the Conservator would assume those expenses. *See* Conservatorship Order, pages 4-5.

Before the Conservator could direct the payment of premiums from the premium accounts, it was necessary to obtain an accounting from Defendants/Appellants to tell him whose money he was directing to be paid. At the October hearing, the District Court discussed the need for such an accounting to determine what happened to investor funds that were paid to Defendants/Appellants, what premiums had been paid and with whose money, and the premium due dates. *See* Transcript of Proceedings dated October 30, 2002, pages 31,

32, 36. The District Court, in considering the money deposited in the accounts of Defendants/Appellants stated:

The Court: No. I think the larger issue in my mind is where did it go and what did it go for?

Mr. Manning: Exactly.

The Court: I don't care who sent it in. That's easy. Usually the problem the courts have and anyone dealing with these is, yes, I got the money from Peter but I gave it to Paul and I didn't pay Peter's premium. That's the question I'm asking.

Transcript of Proceedings dated October 18, 2002, page 37.

E. NOVEMBER ORDERS ARE CONSISTENT WITH EVIDENCE

While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence. *Carpenter v. Carpenter*, 1982 OK 38, 645 P.2d 476. The November Orders simply confirm the clear language of the Conservatorship Order in which Defendants/Appellants voluntarily undertook the obligation to pay expenses of the Conservatorship until the policies substantially transferred to the Conservator. From the face of the Conservatorship Order that Defendants/Appellants complied with for a period of time, the District Court ruling is not against the clear weight of the evidence.

Any controversy over meaning and effect of a judgment that has become final for want of appeal, or in consequence of the appellate court's decision, must be resolved by resort solely to the face of the judgment roll; the meaning of the judgment is divined from terms expressed in the instrument as construed with other parts of the judgment roll. *Chandler v. Denton*, 1987 OK 38, 741 P.2d 855. Defendants/Appellants never filed an appeal of the Conservatorship Order but, in fact, consented to its terms. In looking at the judgment roll, it is clear that the Department's Petition alleged that ABC and its agents

perpetrated serious violations of the Oklahoma Securities Act for which Findings and an Order of Permanent Injunction issued from the District Court. It is also clear from the judgment roll that Defendants/Appellants consented to the Conservatorship Order to escape liability for restitution and to prevent potential irreparable loss, damage or injury to investors through the lapse of ABC policies. The judgment roll also makes clear that applications for the expenses of the Conservatorship were approved by the District Court in compliance with the Conservatorship Order and that no appeals of the orders granting the applications were ever filed by Defendants/Appellants.

Recitals in a journal entry of judgment are taken as true and correct and are prima facie proof of the facts stated therein where not impeached or contradicted by the record. *Jackson v. Jackson*, 2002 OK 25, 45 P.3d 418, 428. The recitals in the Conservatorship Order definitively show that Defendants/Appellants acknowledged that the order was a substitute for the restitution to investors to which the Department was entitled after prevailing in the trial on the merits of the securities fraud case. While Defendants/Appellants may find the payment of expenses distasteful or in a larger amount than they had anticipated, there is no support for their argument in the judgment roll.

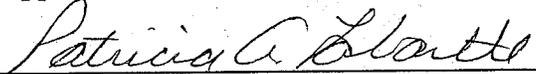
F. NOVEMBER ORDERS DO NOT ADDRESS WHETHER CONSERVATORSHIP ASSETS SHOULD OFFSET OBLIGATIONS OF DEFENDANTS/APPELLANTS UNDER CONSERVATORSHIP ORDER

The Conservatorship Order does not address whether assets other than insurance policies and premium accounts, left with the Conservator at the inception of the Conservatorship, may be used or considered to have satisfied Defendants/Appellants' obligations to pay the Conservatorship fees and expenses prior to transfer of 75% of the Conservatorship assets. Likewise, the November Orders do not address this issue. However,

Defendants/Appellants once again argue in this appeal that the District Court erred in its construction of the Conservatorship Order, and in fact, modified that order, by not ordering an offset. This Court correctly concluded that modification of the Conservatorship Order would have occurred had the District Court ordered any type of offset. As determined by this Court, the District Court merely reiterated the Defendants/Appellants' obligation to pay the expenses of the conservatorship pursuant to the Conservatorship Order. Because the District Court did not modify the Conservatorship Order in its November Orders, no misconstruction of the Conservatorship Order occurred. This basis for the Defendants/Appellants' argument that they are not required to pay the conservatorship expenses is wholly without merit.

CONCLUSION

For the reasons set forth above, the Department respectfully requests this Court deny the Petition for Rehearing of Defendants/Appellants.


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CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. Mail, with postage prepaid thereon, this 2nd day of September, 2004, to the following:

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I further certify that a copy of the foregoing was mailed to, or filed in, the office of the Oklahoma County Court Clerk this 2nd day of September, 2004.

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