

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

Plaintiff,)

v.)

Case No. CJ-99-2500-66

ACCELERATED BENEFITS)
CORPORATION, a Florida corporation,)
et al.,)

Defendants,)

CLARENCE KEITH LaMONDA, an)
individual, and JESS LaMONDA, an)
individual,)

Additional Defendants.)

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
APR 11 2003
PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

**RESPONSE TO MOTION FOR ORDER HOLDING INDIVIDUAL
DEFENDANTS PERSONALLY LIABLE FOR DEBT OF DEFENDANT
ACCELERATED BENEFITS CORPORATION AND DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

Defendants, C. Keith LaMonda and Jess LaMonda (hereafter the "LaMondas"),
hereby submit this brief in response to the motion filed by the Department of Securities
("Department") to hold the LaMondas personally liable for certain debts of Defendant Accelerated
Benefits Corporation ("ABC").¹

¹ The Department's motion is actually styled: "Motion to Add Party Defendants, and
for Temporary Restraining Order, Asset Freeze, Accounting, Appointment of a Receiver, and
Temporary Injunction and Brief in Support." However, the LaMondas have already been made
parties to these proceedings and have filed an Answer; and the Court has previously denied the
temporary restraining order and temporary injunction. All that remains is whether the LaMondas
may be held personally liable for certain debts of ABC and whether an asset freeze, accounting and
appointment of a receiver should be instituted. If the Court adopts the LaMondas' position, these

(continued...)

I. INTRODUCTION

The Department seeks to hold the LaMondas personally liable, pursuant to the provisions of Okla. Stat. tit. 68, § 1212(C) (hereafter "Section 1212"), for a judicially-created corporate debt, *i.e.*, a debt which was quantified and imposed on ABC through construction of a prior judgment entered against ABC. The law and facts pertaining to this dispute are, in many respects, straightforward and undisputed. As shown below, the Department's motion should be denied, and the LaMondas' cross motion for summary judgment should be granted.

A. Statement Of Facts.

It is undisputed that ABC was suspended by the Secretary of State on June 9, 2000 from transacting business in the State of Oklahoma. The Department had previously filed suit against ABC and other entities, other than the LaMondas, on April 8, 1999. As this Court is well aware, the Department sought various forms of relief under the Oklahoma Securities Act, and on March 13, 2001, this Court entered judgment against ABC and the remaining defendants in the case, not including the LaMondas. An Order of Permanent Injunction was entered on June 26, 2001, pursuant to the Department's request, which permanently enjoined ABC from conducting any unregistered business in Oklahoma involving the offer or sale of securities. In fact, ABC had ceased doing any business in Oklahoma even before the suspension was instituted.

Several months later, pursuant to personal negotiations between Keith LaMonda and Patricia Labarthe, attorney for the Department, an "Order Appointing Conservator and Transferring

¹ (...continued)

latter requests become moot. Further, given the Department's cursory treatment of these issues in its brief, it is unclear just precisely what kind of "asset freeze," "accounting," or "receivership" the Department is seeking.

Assets" was entered on February 7, 2002 (hereafter the "Conservatorship Order"). The Conservatorship Order was, no doubt, the product of extensive negotiations between Ms. Labarthe and Keith LaMonda personally, but make no mistake, the Conservatorship Order is not a "consent" judgment in any sense. The Department, having the leverage of a multi-million dollar judgment against ABC, and a permanent injunction, was able to and did exact provisions which were (a) objectionable to ABC and Keith LaMonda (such as the provision allowing the Conservator to sell the assets of the Conservatorship), and (b) ultimately subject to interpretations that were never intended by the parties who actually negotiated the terms of the Conservatorship Order.

Indeed, it goes without saying, that the various events which unfolded subsequent to entry of the Conservatorship Order were never contemplated by anyone, let alone Keith LaMonda or Ms. Labarthe. The facts leading to the negotiation and entry of the Conservatorship Order are relevant here because the parties have vehemently disagreed as to what the Conservatorship Order means, and ABC has argued all along that the Conservatorship Order, as construed by this Court, now imposes obligations on ABC which were never contemplated by the parties — two central facts which eviscerate the requisite knowledge, approval and consent which directors and officers must have before liability may be imposed on them under Section 1212(C).

The Court's subsequent interpretation of the Conservatorship Order, after extensive briefing and argument by all interested parties, resulted in the entry of two orders which, when aggregated, essentially amount to a money judgment against ABC in the amount of \$570,056.36 (hereafter the "Judgment"). ABC has appealed this Court's interpretation and modification of the Conservatorship Order to the Oklahoma Supreme Court. ABC's opening brief is due on April 24,

2003. The results of ABC's appeal will obviously impact the issue of whether the LaMondas are personally liable for the Judgment. ABC has not, nor does it have the funds to, bond the appeal, and for this reason, the Department seeks to enforce the judgment by imposing personal liability against the LaMondas. Also, as the Court is aware, the Conservator has served a garnishment summons on the firm of Fellers, Snider, Blankenship, Bailey & Tippens for any sums being held by the firm in trust for ABC.

B. The Legal Issues.

The Department claims that under the provisions of Section 1212, the LaMondas are personally liable for the Judgment based on the proposition that the debt comprised by the Judgment was incurred during the period in which ABC was suspended from doing business in Oklahoma. Thus, the legal issue to be decided by the Court depends on, to a significant extent, its statutory construction of Section 1212(C). The question is whether, under the terms of Section 1212, the LaMondas are liable for the "debt" of ABC – a debt created by a judgment which ABC vehemently contested and which the LaMondas never anticipated nor approved, *pre* or *post facto*. To this day, the Judgment is being contested before the Oklahoma Supreme Court.

Section 1212(C) provides, in plain English, that a director or officer of a corporation whose right to do business in Oklahoma has been suspended, is personally liable for "all debts of such corporation ... which may be **created or incurred with his knowledge, approval and consent.** . . ." (Emphasis supplied.) The "rub" here lies in the way the parties construe the "knowledge, approval and consent" language. The Department says that the LaMondas gave "prior consent" when they executed the Conservatorship Order on behalf of ABC, long before the "debt" at issue here, *i.e.*,

the Judgment, was ever created or incurred. The simple fact is that the Department's construction of Section 1212(C) is unprecedented and, in fact, unsupported by any case, within or without Oklahoma – it contradicts the plain language of the statute. As shown below, the case law is clear, and under no circumstances, may the LaMondas be held personally liable for the Judgment under Section 1212(C).

II. ARGUMENT AND AUTHORITIES

A. Applicable Rules Of Statutory Interpretation.

When a court is called upon to determine whether a statute applies to a given case, the court must ascertain the legislative intent of the statute. As noted in *George E. Failing Co. v. Watkins*, 14 P.3d 52, 56 (Okla. 2000):

It is presumed that the law-making body has expressed its intent in the language of a statute and that it intended what it there expressed. An enactment should be viewed as aimed to attain that purpose and end. In the process of giving meaning to any statute, the starting point is the plain and ordinary significance of the language employed in the text. Only where the legislative intent cannot be ascertained from the language of the enactment's text — as in instances of ambiguity or conflict with other enactments — are rules of statutory construction to be utilized.

The text of Section 1212 is unambiguous. The intent of the legislature can be readily ascertained from a plain reading of its provisions. Accordingly, “[t]here is no room here for statutory construction.” *Watkins*, 14 P.3d at 56. The words of the statute should be read according to their plain and ordinary sense and consistent with the apparent legislative intent of the statute. *Id.*

C. The Legislative Intent Of Section 1212.

In abbreviated form, Section 1212(C) reads as follows:

Each trustee, director or officer of any ... corporation ... whose right to do business within this State shall be so forfeited, shall, as to any and all debts of such corporation..., **which may be created or incurred with his knowledge, approval and consent**, within this State after such forfeiture and before the reinstatement of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such ... directors, and officers of such corporation ... were partners.

The key issue to this dispute is whether the officer or director “created or incurred [a corporate debt] with his knowledge, approval and consent. . . .” In the **four** decades since Section 1212 was enacted, not a single court, let alone an Oklahoma court, has held a director or officer personally liable for a judgment that was obtained against the corporation, not only against the will of the corporation, but against the will, approval or consent of the officer and director. Indeed, the very idea is preposterous. How can an officer “consent” or “approve” a debt, embodied in a judgment which neither the officer, his corporation, nor plaintiffs, ever knew that the corporation, through judicial construction of a prior judgment, might be found liable? Until the Judgment was actually entered by this Court, noone knew what the Judgment would be or how much. These simple facts negate any application of Section 1212 to this case, and as shown below, the authorities which have construed Section 1212, and statutes similar to it, reject such a proposition.

D. Judicial Construction Of Section 1212.

Oklahoma’s statute is borrowed from a previous Texas statute (which has since been modified for the purpose of imposing more stringent standards against holding officers and directors liable for the debts of their corporation). *See Midvale Min. & Mfg. Co. v. Dutron Corp.*, 569 P.2d 442, 444 (Okla. 1977) (wherein the Oklahoma Supreme Court noted that the Texas Supreme Court had held that it was “apparent under the statute, after a corporation no longer has the right to do

business, the personal liability of officers and directors for subsequently incurred debts is for those debts of which they have acquired knowledge in the regular course of business of the corporation and have consented to and approved.”), citing *First Nat'l Bank of Boston v. Silberstein*, 398 S.W.2d 914, 916 (Tex. 1966).

Since *Midvale*, the Oklahoma Court of Civil Appeals has cited the Texas Supreme Court decision in *Silberstein* as the appropriate standard by which to determine the “knowledge and consent” of an officer or director of a debt of the corporation. In *Brown Oil Co. v. Shipley*, 706 P.2d 173, 175-76 (Okla. Ct. App. 1984), the court quoted from *Silberstein* at length:

It is further clear under the statute that after a corporation no longer has the right to do business, the personal liability of officers and directors for subsequently incurred corporate debts is limited to those debts of which they have knowledge and, with the opportunity afforded thereby, which they have consented to and approved.... [T]he reasonable construction of the statute to the facts at hand is that personal liability is determined by the acts of [directors and officers] in consenting to and approving the debts of the corporation where knowledge of their creation is shown to have come to them in the regular course of the business of the corporation. This is neither imputed knowledge nor “vicarious” liability as [plaintiffs] suggest; it is liability which results from and is attributable to the acts of [the officers and directors]. **They had only to disapprove and disavow the debts to avoid personal liability....** (Emphasis supplied.)

See also *Dobry v. Wayne*, 737 P.2d 583, 584 (Okla. Ct. App. 1987) (citing *Silberstein*); *Puckett v. Cornelson*, 897 P.2d 1154, 1156 (Okla. Ct. App. 1995) (“**However, §1212 conditions personal liability of a corporate officer and shareholder on such corporate officer or shareholder’s actual knowledge of the debt or approval/condonation thereof.**”). (Emphasis supplied.)

As noted in *Midvale Min. & Mfg. Co. v. Dutron Corp.*, 569 P.2d 442, 443 (Okla. 1977), in speaking of Section 1212, “[s]tatutes imposing liability on corporate directors and officers which are penal in nature are generally to be strictly construed in favor of those sought to be charged.” The precise meaning of “strict construction” can be elusive, but in *Williams v. Adams*, 74 S.W.3d 437, 440 (Tex. App. Corpus Christi 2002). The court, in construing Texas’ counterpart statute, aptly described what “strict construction” means:

The second principle we apply in construing section 171.255 is the rule of strict construction. Section 171.255 is penal in nature, and as such, it should be strictly construed and must not be extended beyond the clear meaning of its language. (Citations omitted). “‘Strict construction of a statute’ is that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute as well as within its spirit or reason, resolving all reasonable doubts against applicability of a statute to a particular case.” (Internal quotations omitted; citations omitted). When interpreting section 171.255, the doctrine of strict construction requires that we construe the statute in a way that favors the officers and directors.

In short, the key to liability under Section 1212 is actual knowledge of the incurrence of the debt or, after the fact, consent and approval of its incurrence. It is undisputed, as a matter of law, that the LaMondas never had, in any form, the requisite knowledge and intent of how this Court would construe the Conservatorship Order, let alone the liability that was imposed upon ABC as a result of the Court’s construction. Neither of the LaMondas ever envisioned that this Court’s interpretation of the Conservatorship Order would require ABC to pay well over \$1 million in premiums and expenses, and neither ever thought or came close to approving these obligations.

Moreover, because the statute’s use of the conjunctive “and” within the phrase “which may be created or incurred with his knowledge, approval and consent,” it is obvious that all three are

essential elements to liability under Section 1212. It is also clear that the LaMondas had no idea of the liability they were potentially exposed to when they executed the Conservatorship Order on behalf of ABC – hence no knowledge – and when they found out, they never approved nor consented to the Judgment. The Conservatorship Order was not a blank check to be drawn against ABC with the amount to be filled in by the Department or the Conservatorship, yet that is exactly what the Department is asking this Court to do through Section 1212.

The Department's only evidence in support of the requisite elements is that, because the LaMondas executed the Conservatorship Order on behalf of ABC, they had "prior" knowledge of the debt created by the Judgment and gave "prior" consent to its entry and amount. This contention is ludicrous. It is the same as a man and a woman engaging in a discourse that leads to an all too familiar, yet sad conclusion. At one point in their relationship, the woman says: "I love you and want to have your child." Then, upon learning a short time later that her partner is a demented miscreant, she refuses his advances, only to be raped and rendered pregnant. Would anyone, in their right mind, say that the woman gave "prior" consent to having a child by a man she grew to hate and, in fact, forcefully rebuffed his attempts to impregnate her by force? By the same token, the LaMondas could never have given prior consent or approval to the Judgment, let alone ratified the obligations imposed by the Judgment. There is no credible argument in the law that "prior" consent or ratification is possible when the extent of liability is unknown, and once known, is instantly and properly rejected by the officers and directors of the corporation. The Department cites no such authority.

Moreover, there is no Oklahoma case which sanctions the imposition of personal liability against a director or officer of a corporation for a judicially-created debt where that debt arises not from a business transaction, but from the court's construction of a prior order or judgment of the court. Every Oklahoma case interpreting Section 1212 involves debts **incurred in the ordinary course of business**. See, e.g., *K.J. McNitt Constr., Inc. v. Economopoulos*, 23 P.3d 983, 984 (Okla. Civ. App. 2001) (construction contract); *State Ins. Fund v. Orior, Inc.*, 689 P.2d 316 (Okla. Ct. App. 1984) (insurance policy); *Kearney v. Williams*, 946 P.2d 273 (Okla. Civ. App. 1997) (promissory note); *State Ins. Fund v. AAA Eng'g & Drafting*, 863 P.2d 1218 (Okla. 1993) (insurance contract); *Midvale Min. & Mfg. Co. v. Dutron Corp.*, 569 P.2d 442 (Okla. 1977) (sales contract); *Puckett v. Cornelson*, 897 P.2d 1154, 1155 (Okla. Ct. App. 1995) (consulting contract).

As noted in *Midvale Min. & Mfg. Co. v. Dutron Corp.*, 569 P.2d 442, 444 (Okla. 1977), it is "apparent under the statute, after a corporation no longer has the right to do business, the personal liability of officers and directors for subsequently incurred debts **is for those debts of which they have acquired knowledge in the regular course of business of the corporation and have consented to and approved.**" (Emphasis supplied.) There is simply no credible argument (and the Department has not made one) that the judicial construction of a prior judgment which results in a money judgment is a debt created in the regular course of business. The statute is designed to keep a corporation, and its officers and directors, from conducting business (*i.e.*, incurring debts) after being suspended from doing business. The entry of the Judgment herein cannot plausibly be viewed as conducting the business of any type by ABC. For this reason as well, the Department's motion should be denied, and the LaMondas' cross motion should be granted.

C. Adopting The Department's Construction Of Section 1212 Would Require This Court To Improperly Resolve Issues Of Fact At This Stage Of The Proceedings.

The Department seeks, in essence, a summary adjudication against the LaMondas for the purpose of imposing a personal judgment against them for the amount of the Judgment. Even if the Court were inclined to adopt the Department's construction of Section 1212, it would have to improperly resolve questions of fact in violation of Rule 13 of the Rules for the District Courts of Oklahoma. See *Chimney Rock Ltd. P'ship v. Hongkong Bank of Can.*, 857 P.2d 84, 87 (Okla. Ct. App. 1993); *Flanders v. Crane Co.*, 693 P.2d 602, 605 (Okla. 1984); *Crockett v. McKenzie*, 867 P.2d 463, 464 (Okla. 1994); *Dart Indus., Inc. v. Plunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 497-98 (10th Cir. 1983); *Cinco Enters. v. Benso*, 890 P.2d 866, 871 (Okla. 1994).

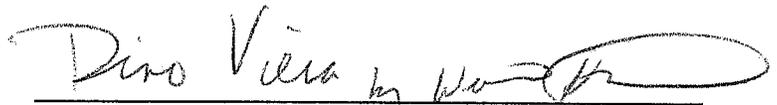
For example, if the Court decides that either Keith or Jess LaMonda was aware of, approved of, or consented to the Judgment, it would necessarily be deciding numerous questions of fact such as: (a) whether Keith LaMonda, in negotiating the terms of the Conservatorship Order, understood that ABC's liability under the Conservatorship Order would include payment of premiums until 75% of the policies have been transferred; (b) that Ms. Labarthe, when negotiating the terms of the Conservatorship Order, was also of the view that ABC would be liable for monthly premiums exceeding \$1 million until 75% of the policies were transferred; (c) that both Keith LaMonda and Ms. Labarthe were aware and agreed that a policy would not be deemed to be transferred until the insurance company confirmed the transfer as opposed to when ABC or American Title Company of Orlando actually executed the change of beneficiary documents; (d) that Keith LaMonda and Ms. Labarthe contemplated and agreed that the payment of "premiums" was included within the term "expenses" even though the express subject of premiums is discussed and dealt with in other parts of the Conservatorship Order; and (e) that premium payments would be

included within the term "expenses" in that part of the Conservatorship Order which was clearly designed to cover only the Conservator's administrative expenses, including his attorney fees, office expenses, salaries and other similarly related business expenses.

Assuming the Department's "prior consent" argument is even remotely correct (it is not), resolving the foregoing fact issues is the only way this Court can competently determine the instant motion in favor of the Department. Because these are genuine issues of fact as to whether the debt created by the Judgment was "created or incurred with [LaMonda's] knowledge, approval and consent," under the Department's "prior consent" theory, summary judgment would nevertheless be improper.

CONCLUSION

In sum, the claims asserted against the LaMondas by the Department should be dismissed and judgment should be entered in favor of the LaMondas pursuant to their cross-motion for summary judgment.



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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 11th day of April, 2003, a true and correct copy of the foregoing was mailed by first class U.S. Mail, postage prepaid thereon, to the following:

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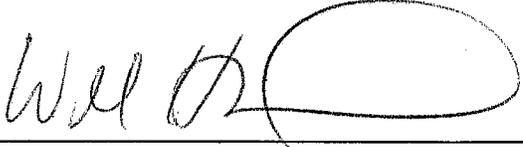
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