

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA **FILED**

SUPREME COURT
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES,)
ex rel., IRVING L. FAUGHT, ADMINISTRATOR,)
Plaintiff/Appellee,)

JUN 2 2003

MICHAEL S. RICHIE
CLERK

v.)
ACCELERATED BENEFITS CORPORATION;)
C. KEITH LaMONDA; AMERICAN TITLE)
COMPANY OF ORLANDO; and)
DAVID PIERCEFIELD,)
Defendants/Appellants)

Case No. 98663

Oklahoma County
Case No. CJ-99-2500-66

Honorable Daniel L. Owens

v.)
TOM MORAN,)
Court-Appointed Conservator/
Appellee.)

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUN - 2 2003

PATRICIA PRESLEY, COURT CLERK
BY ~~DEPUTY~~

CONSERVATOR TOM MORAN'S
ANSWER BRIEF

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CONSERVATOR'S ANSWER BRIEF

Defendants/Appellants filed a Petition in Error with this Court on December 20, 2002, challenging two orders that they claimed were interlocutory. *See* Pet. In Error. In fact, this Court's docket indicates that the appeal was "interlocutory." Yet more than four (4) months later Defendants/Appellants state in their Brief-In-Chief that the orders they are appealing are final orders. *See* Appellants' Brief, p.1. This is exactly what Defendants/Appellants have done in the case below; they have changed their minds about how they think the order they negotiated and agreed to should be construed.

INTRODUCTION

The question before this Court is whether the Oklahoma District Court's Order Appointing Conservator and Transferring Assets (the "Conservatorship Order") directs the costs of the subject Conservatorship, including the premium shortfalls on the underlying Viatical policies, to be paid by: (i) Defendants/Appellants who scammed millions from investors across the United States; or (ii) the Conservator using the funds of the investors that were scammed by the Defendants/Appellants. As detailed in the Summary of the Record, the Conservatorship Order was negotiated and approved by Defendants/Appellants following a trial that found them guilty of fraud and selling unregistered securities in Oklahoma.

The judgment roll makes clear that the Defendants/Appellants were responsible for paying the premium shortfalls until the Conservatorship was "funded" as follows: First, the plain language of the Conservatorship Order directs Defendants/Appellants to pay all costs of the Conservatorship until 75% of the Conservatorship Assets are transferred to the Conservator. Second, Counsel for the Department of Securities has stated on the record that Defendants/Appellants agreed to pay those costs, including the premium shortfalls, in

exchange for a release from the obligation to pay restitution to their investors. Finally, and perhaps most revealing, Defendants/Appellants paid the premium shortfalls for more than six (6) months before concocting the theory that the Conservatorship Order does not, in fact, direct them to pay such premium shortfalls.

Defendants/Appellants list seven (7) issues in their Petition in Error. Two of those issues, i.e. "Whether additional assets left with the Conservator at the inception of the Conservatorship, above and beyond insurance policies and premium accounts, may be used or considered to have satisfied ABC's obligations to pay the Conservatorship fees and expenses prior to transfer (sic) 75% of the Conservatorship assets" and "Whether ABC should be reimbursed for premium payments which it advanced both prior and subsequent to the entry of the Conservatorship Order" were not addressed by the trial court in the two Journal Entries dated November 20, 2002 (the "November Journal Entries") that are the subject of this appeal, and may not be decided by this Court.¹

With regard to the remaining issues, this appeal is moot. Defendants/Appellants ask this Court to overturn the trial court's rulings in the November Journal Entries that (i) the Conservatorship Order is clear and unambiguous; (ii) Defendants/Appellants were required to pay premium shortfalls under the Conservatorship Order's plain language until they had transferred 75% of the Conservatorship Assets to the Conservator; and (iii) at the time of the September Hearing 75% of the Conservatorship Assets had not been transferred to the Conservator. Defendants/Appellants did not appeal the Conservatorship Order, and they

¹ Although the November Journal Entries note that Defendants/Appellants may be entitled to reimbursement for certain premium shortfall payments to the extent ATCO possessed but failed to remit investor funds in partial payment of such premiums, the trial court deferred any ruling on that issue until the completion of an ongoing third-party accounting.

actually admit they did not "dispute" the language of that order until they filed the Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets on August 21, 2002 (the "Motion to Construe"). *See* Brief in Chief, p. 7.

Until that time, consistent with the trial court's construction of the plain language of the Conservatorship Order, Defendants/Appellants remitted the Viatical premiums directly to the respective insurance companies without complaint and in accordance with their practices in effect prior to the appointment of the Conservator.² However, in July 2002, the trial court ordered Defendants/Appellants to pay certain fees and expenses of the Conservatorship as provided in the Conservatorship Order. Defendants/Appellants argued that the Conservator had assets in its possession that should be used to satisfy those fees and expenses, and further alleged that the Conservator was improperly holding approximately \$800,000 in investor *pro rata* premium payments that should have been used to partially fund the Viatical premiums.

The Conservator was not, as Defendants/Appellants assert, holding the referenced \$800,000 at the time of the September Hearing, nor had the Conservator refused to permit ATCO to use any such investor funds to pay premiums.³ In fact, the record shows that Defendant/Appellant ATCO had, without the Conservator's knowledge and in direct contravention of his express instructions, intentionally failed to remit funds collected from

² In their Brief-in-Chief Defendants/Appellants argue inconsistently that the Conservator "blackmailed" them into paying the premium shortfalls by refusing to perform his duties, or that they "voluntarily" did so to keep the policies from lapsing. *See* Brief in Chief pp. 9 and 12. Both arguments are fabricated.

³ Defendants/Appellants assert that "the Conservator's refusal to allow these funds to pay the very premiums for which they were collected" was "improper, or even illegal, under Fla. Stat. § 626.561 (2002)." *See* Brief in Chief, p. 8, fn. 5. That section governs insurance field representatives licensed under Florida law and is wholly inapplicable to the Conservator.

investors for current premiums in partial payment of the Viatical premiums.⁴ According to ATCO's President, David Piercefield, ATCO did not remit investor funds in partial payment of the Viatical premiums because ATCO could not assure that a particular investor's *pro rata* payment would be used solely for premiums on the policy in which that investor held a beneficial interest. At the time this was discovered, Defendant/Appellant ATCO still possessed those investor funds, although ATCO has subsequently transferred those funds to the Conservator.⁵

When the Conservator refused Defendant/Appellant LaMonda's demand to "reimburse him" for that portion of the premiums he had paid while ATCO possessed investor funds for a part of such premiums, or to apply other non-investor Conservatorship Assets against the Conservatorship fees and expenses he had been ordered to pay, he filed the Motion to Construe. In the Motion to Construe, Defendants/Appellants argued for the first time that under the plain language of the Conservatorship Order Defendants/Appellants had never been obligated to fund any part of the premium shortfalls. Despite this argument, Defendants/Appellants had already accepted the benefits of the Conservatorship Order, including relief from the obligation to pay restitution to their investors.

⁴ Following the Conservator's appointment, ATCO continued to be responsible under its escrow agreement with ABC for remitting premium payments to the respective insurance companies. During this period ATCO remained the record owner of the policies, and the Conservator believed that the systems ATCO was using were capable of tracking investor *pro rata* payments with the payment of matched premiums.

⁵ No dispute exists as to ABC's entitlement to be reimbursed for premiums it paid when ATCO was in possession of the investor funds but did not remit those to the insurance companies. The Conservator does, however, assert that before ABC is reimbursed for such premiums ABC must first satisfy the trial court's orders to pay the costs and expenses of the Conservatorship.

On September 27, 2002 (the "September Hearing"), the trial court heard the Motion to Construe and ruled from the bench that the Conservatorship Order was clear and unambiguous; that Defendants/Appellants had been obligated to fund the costs of the Conservatorship including premium shortfalls until 75% of the Conservatorship Assets were transferred to the Conservator; and that Defendants/Appellants had not shown that 75% of the Conservatorship Assets had been transferred. The November Journal Entries memorialized the trial court's rulings and further set forth certain agreements reached by the parties at that hearing, including that: (i) Defendants/Appellants would fund premium shortfalls and remit all premium payments until November 1, 2002; and (ii) the Conservator would fund premium shortfalls and remit all premium payments after November 1, 2002. The November Journal Entries also stated that "[t]he Court will make a future determination of any amounts to be reimbursed to ABC for amounts advanced for payment of premiums for which investor funds have been collected." (emphasis added).

As directed, on November 1, 2002, the Conservator began funding the premium shortfalls and remitting payment of the Viatical premiums to the insurance companies. Thereafter, on December 23, 2003, the trial court entered an order approving the sale of the Conservatorship Assets to a third-party buyer, and on March 18, 2003, the trial court entered an order confirming the closing of that sale.⁶ Following the closing, the buyer assumed liability for funding and paying the Viatical premiums. Defendants/Appellants filed a Motion

⁶ Defendants/Appellants claim that the purchase price equaled one-third of the policies' face value. That is false and misleading. The purchase price represented approximately 42% of the aggregate \$141 million face value of the policies, but approximately 56% of the investors' estimated \$106 million total investment. The buyer also assumed funding of 100% of the premiums.

to Stay the sale which the trial court denied. Defendants/Appellants' appeal of the trial court's order approving the sale is currently pending before this Court, Case No. 98854.

Because Defendants/Appellants paid all premiums directly to the insurance companies and Defendants/Appellants are no longer paying the premium shortfalls, no effective relief can be granted by this Court. Therefore, this appeal should be dismissed as moot, as well as for other reasons stated herein.⁷ Regardless of Defendant/Appellants' argument that the trial court improperly construed the Conservatorship Order, that order does not authorize the Conservator to pay Defendants/Appellants for any premiums "advanced" on the investors' behalf during the Conservatorship. Rather, it clearly states that "any Conservatorship Assets remaining at the conclusion of the Conservatorship shall be transferred to ABC." *See* Conservatorship Order, p. 7 (R. 1-8). "[T]he right to recoup from the proceeds of the Policies all funds advanced by ABC to finance the payment of premiums on the Policies" is defined as a Conservatorship Asset. *See* Conservatorship Order, p. 2 (R. 1-8). Because the Conservatorship is still in existence, any ruling on that issue is not properly the subject of appeal.

SUMMARY OF THE RECORD

A. The November Journal Entries Did Not Modify the Clear Language of the Conservatorship Order.

Defendants/Appellants' Summary of the Record is rife with factual misstatements and red herrings. The record shows that prior to entering the Conservatorship Order the trial court found Defendants/Appellants guilty of securities fraud violations, and for operating what was

⁷ At the September Hearing the trial court ruled that under Oklahoma law the transfer of the policies was not effective until the issuing insurance company acknowledged the transfer. Notwithstanding that ruling, the Conservator agreed to assume funding the premium shortfalls and remitting premium payments as of November 1, 2002.

essentially a Ponzi scheme involving the sale of investment interests in Viatical insurance policies to unsophisticated investors, many of whom were elderly. The trial court entered judgment against Defendants/Appellants directing them pay restitution to those investors that were Oklahoma residents. *See* Conservatorship Order (R. 1-8).⁸

Patricia Labarthe, Counsel for the Oklahoma Department of Securities (the "Department"), advised the trial court that following the fraud trial she became concerned that enforcing the Court-ordered restitution of Oklahoma investors could cause Defendants/Appellants to become insolvent and lead to the lapse of unmatured Viatical policies to the detriment of non-Oklahoma investors. *See* Transcript of Proceedings had on the 27th Day of September, 2002 ("Tr."), p. 24, ll. 21-25, p. 25, ll. 1-14 (R. 272). To avoid this possibility, the Department offered Defendant/Appellant LaMonda what was essentially a "plea bargain," i.e. the alternative of transferring the Viatical policies and certain of ABC's other assets to a Court-appointed conservator and paying the premiums until the Conservatorship was funded, in exchange for his release from liability for restitution.⁹ *See* Tr., p. 25, ll. 1-14 (R. 272).

Thereafter, the Department and Defendant/Appellant LaMonda conducted lengthy negotiations regarding the language of the proposed Conservatorship Order. The record

⁸ Defendants/Appellants did not appeal the fraud judgment. However, they assert in their Brief in Chief that the trial court's finding that the sale of interests in Viaticals constitutes the sale of securities was inconsistent with federal law based on dictum found in *SEC v. Life Partners*, 102 F.3d 587 (D.C. Cir. 1996). *See* Brief in Chief, p. 3. The court's reasoning in *Life Partners* was renounced by the Securities and Exchange Commission, which filed a petition for rehearing in that case, and the appellate courts of Arizona, Ohio and Indiana have disagreed with the application of the Howey test in that case. Further, since the holding in *Life Partners* many states have amended their securities laws to expressly provide that interests in Viaticals are securities as a matter of law.

⁹ Other states, including Arizona, California, Idaho, Maryland, Ohio and Virginia, have placed viatical settlement company assets into receiverships under similar circumstances.

reflects that despite the withdrawal of Defendant/Appellant ABC's attorneys, Defendant/Appellant LaMonda represented to the Department that he was "in constant contact" with attorneys who were representing him in other legal matters and who were advising him on the proposed order. The record further reflects that Defendant/Appellant LaMonda also repeatedly told the Department that these attorneys would have to approve any language in a settlement before he could agree to any order, and Defendant/Appellant LaMonda represented to the Department that changes he proposed to the language of the Conservatorship Order were requested on the advice of his counsel. *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 filed September 19, 2002 (the "Department's Response"), p.2 (R. 9-36).

On February 7, 2002, the trial court entered the Conservatorship Order upon the joint application of Defendant/Appellant ABC and the Department and after "having reviewed all of the evidence offered" with full knowledge of the circumstances under which the order had been negotiated. Defendants/Appellants ATCO, LaMonda and Piercefield signed the Conservatorship Order evidencing their agreement to its terms. *See* Conservatorship Order (R. 1-8).

Defendants/Appellants do not claim that the Conservatorship Order is ambiguous; rather, they argue that the following language required the Conservator to fund the Viatical premium payments from the onset of the Conservatorship:

IT IS FURTHER ORDERED that the Conservator is given directions and authority to accomplish the following:

* * *

5. to make such payments and disbursements as may be necessary and advisable for the preservation of the Conservatorship Assets and as may be

necessary and advisable in discharging his duties as Conservator including, but not limited to, the timely payment of all premiums for Policies that have not yet matured.

See Conservatorship Order, p. 2-3 (R. 1-8)(emphasis added). Defendants/Appellants further assert that the following language directing ABC to pay "all costs of the Conservatorship" does not require them to pay policy premiums, but only administrative expenses during the referenced period:

IT IS FURTHER ORDERED that ABC pay and maintain all office expenses, salaries, and other costs of the Conservatorship until at least seventy-five percent (75%) of all Conservatorship Assets have been transferred to the Conservator.

See Conservatorship Order, p. 5 (R. 1-8).

The November Journal Entries did not modify the Conservatorship Order. Rather, each one clearly states:

- (a) The Order Appointing Conservator and Transferring Asset (sic) dated February 6th, 2002 (the "Conservatorship Order") is clear and unambiguous;
- (b) ABC participated in the drafting and agreed to the terms of the Conservatorship Order in lieu of restitution;
- (c) Under the Conservatorship Order, ABC is obligated to pay all costs and expenses of the Conservatorship, including premium shortfalls, Conservator's fees and expenses, and attorney's fees, until seventy-five (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, are transferred to the Conservator;
- (d) To date there has been no determination that seventy-five percent (75%) of the Conservatorship Assets, as defined by the Conservatorship Order, have been transferred to the Conservator . . . ;

See November Journal Entries (R. 335-339; 340-346).

In addition, the November Journal Entries memorialized settlement discussions among Defendants/Appellants, the Department and the Conservator at the September Hearing, including without limitation the following:

- (g) **The parties have agreed** that prior to November 1, 2002, ABC will ensure that all premiums are paid current;
- (h) **The parties have agreed** that Defendants will turn over all funds currently being held in any accounts which contain funds from any investor or policy subject to the Conservatorship Order;
- (i) **The parties have agreed** that beginning November 1, 2002, the Conservator will assume the responsibility to collect, pay and administer the collection and payment of all premiums, and will maintain all records of premium collections, payments, Conservator expenses, billings, etc.;

* * *

- (l) **The parties have agreed** an independent auditor, acceptable to the parties, will be retained at ABC's expense, pursuant to the terms of an engagement letter to be agreed to by the parties; and
- (m) **The Court will make a future determination of any amounts to be reimbursed to ABC for amounts advanced for payment of premiums for which investor funds have been collected.**

See November Journal Entries (R.335-339; 340-346) (emphasis added).

Although Defendants/Appellants' counsel acknowledged the parties' agreements by signing the November Journal Entries, and Defendants/Appellants accepted the benefits of those orders, they now assert that the trial court did not understand the meaning of the Conservatorship Order and falsely contend that the Department agrees with their construction of the Conservatorship Order. *See* Brief in Chief, p. 6. In direct contradiction of Defendants/Appellants' recitation of the facts, the record shows that the Department has unequivocally stated:

The Department, in agreeing to the Conservatorship Order, sought to remedy the serious securities law violations committed by ABC by protecting the insurance policies in which ABC investors had an interest, rather than by securing a judgment for restitution against ABC that ABC might not have the ability to satisfy. Protection of the insurance policies required that premium payments be made on all policies. **Under the order, those payments, along with other expenses of the Conservatorship, were to be made by ABC until seventy-five percent (75%) of the policies were transferred to the Conservator.**

See Department's Response, p. 6 (R. 58-82) (emphasis added). In addition, Ms. Labarthe stated for the record at the September Hearing:

When we drafted this order, and the way the language reads we -- putting a conservator in, **there was not going to be any money for the conservator initially**. So the idea was and maybe we -- I wrongly, and I will take responsibility, guessed at the amount of time we would need to get these policies transferred over. But as far as **what was intended by the order and what the order of -- the language of the order clearly states is that ABC was going to pay all the expenses until 75 percent of the assets were transferred over to give -- get ABC -- give them the responsibility to get the job done and then let the conservator take over payment of premiums and running the policies.**

See Tr., p. 25, ll. 3-14 (R. 272).

In fact, the trial court's finding and Ms. Labarthe's statements are entirely consistent with the plain language of the Conservatorship Order which begins by stating:

The Court, having reviewed all of the evidence offered, and being advised that the parties agree to the entry of this Conservatorship Order, finds that the following order should be entered in lieu of 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 . . .

Following the foregoing recitals, the trial court directed the Conservator to "accomplish," not to fund, "such payments and disbursements as may be necessary and advisable for the preservation of the Conservatorship Assets . . . including but not limited to, the timely payment of all premiums . . ." The Conservatorship Order's directive to the Conservator to assure that premium payments are made on time is followed by the directive to ABC to pay "all office expenses, salaries, and other costs of the Conservatorship until at least seventy-five percent (75%) of all Conservatorship Assets have been transferred to the Conservator."

B. Defendants/Appellants Paid Premium Shortfalls In Compliance with the Language that They Now Claim the Trial Court Misconstrued.

To avoid their apparent understanding of and compliance with the plain language of the Conservatorship Order, Defendants/Appellants now assert that they were "blackmailed" into paying or voluntarily funded the premiums until August 2002. However, Defendants/Appellants directly paid all premiums to the respective insurance companies in the manner contemplated by and without challenging the validity of the Conservatorship Order until several months had passed. *See* Brief in Chief, p. 7. It was only after the Conservator refused to permit Defendants/Appellants to offset Conservatorship Assets against the fees and expenses that the trial court had ordered them to pay, that Defendants/Appellants concocted the theory that they had never been obligated under the Conservatorship Order to pay the premium shortfalls.

According to the record, prior to the November Journal Entries, all investors mailed their *pro rata* payments directly to an ABC lockbox controlled by the Conservator.¹⁰ *See* Conservator's Response, p. 4 (R. 83-231). The record further shows that the Conservator had issued to ATCO's President, David Piercefield, the following directions to remit those investor funds in payment of premiums on policies "matched" to the respective investor:

All premiums should be paid prior to their due date. However, please provide me with a full accounting of funds used. It was the intent of prior correspondence that no [investor] funds be used for purposes other than premium payment obligations without my prior consent.

* * *

¹⁰ Investor funds collected for current unpaid premiums were transferred from the ABC lockbox to ATCO to be used to pay such premiums; investor payments received after premiums had been remitted for the respective policy were transferred from the ABC lockbox to a Conservatorship account.

In regard to your fax dated July 17, 2002, my memo in no way infers that you can use funds to pay for a policy premium if the premium funds were not received from the investors that are attached to that policy. In other words, premiums received from investors can only be used to pay premiums for the policies for which they were collected.

See Ex. "E" to Conservator's Response (R. 83-231).

At some point prior to the Conservator's appointment, Defendant/Appellant ATCO had started retaining a portion of the investors' *pro rata* payments instead of remitting all such funds to the respective insurance companies. ATCO routinely deposited these investor funds into a separate account allegedly to be used to pay future premiums.¹² Although the record does not clearly indicate whether Defendant/Appellant ABC knew that ATCO was not using all investor funds to pay premiums during that period, Defendant/Appellant ABC was paying all premium shortfalls at that time.

In September 2002, the Conservator learned that since his appointment Defendant/Appellant ATCO had not used **any** investor funds to partially fund premiums in direct contravention to the Conservator's directives. Defendant/Appellant ATCO allegedly stopped remitting the investor funds to the insurance companies because it could not assure that a particular investor's funds would be used solely to pay premiums on policies in which that investor claimed a beneficial interest. *See* Tr., p. 12, ll. 14-19, p. 13, ll. 1-2 and p. 15, ll. 15-16 (R. 272). Those funds, totaling approximately \$800,000 were still in ATCO's account

¹² The cash in that separate account, totaling approximately \$286,000 at the time the Conservator was appointed, was comprised entirely of investor payments and was the only cash that Defendants/Appellants transferred to the Conservator. *See* Conservator's Response, p.3 n.1 (R. 83-231).

at the time of the September Hearing, but were thereafter transferred to a Conservatorship account pursuant to the trial court's order.¹³

C. Defendants/Appellants Never Established That They Transferred 75% of the Conservatorship Assets To the Conservator.

Defendants/Appellants argue in the alternative that the trial court erred in holding that the Viatical policies were not legally transferred to the Conservator until the respective insurance companies confirmed such transfer. Defendants/Appellants assert that their obligation to fund such premium shortfalls was complete because at some unidentified date they had transferred to the Conservator 75% of the Viatical policies subject to the Conservatorship Order. *See* Motion to Construe (R. 9-36). The responsibility for funding premiums under the Conservatorship Order was not, however, dependent solely upon Defendants/Appellants' transfer of the policies; it was conditioned upon Defendants/Appellants' transfer of 75% of all of the Conservatorship Assets to the Conservator. The Conservatorship Order defines the term "Conservatorship Assets" to include:

1. all life insurance policies owned or held beneficially, directly or indirectly, by or for the benefit of ABC and/or the ABC Investors, that were purchased from the date of inception of ABC through September 30, 2000;
2. all assets of ABC necessary to accomplish the objectives of the Conservatorship . . . below including, but not limited to, computer hardware, databases, software, ABC Investor and viator files relating to the Policies, accounting and financial records pertaining to premium payments and receipt and distribution of proceeds on the Policies, any

¹³ After determining that ABC had paid approximately \$400,000 of premiums as a result of ATCO's refusal to use investor payments, the Conservator offered to "credit" that amount to the outstanding fees and expenses the Court had previously approved. *See* Tr., p. 12, ll. 20-25, p. 13, ll. 1-2 (R. 272). The trial court did not order such credit, but deferred its decision on the propriety of any reimbursement to Defendants/Appellants until the third-party accounting is completed. *See* Tr., p. 37, ll. 22-25; p. 38, l. 1 (R. 272) and November Journal Entries, p. 4 (R. 340-346). That accounting is ongoing.

deposit of cash, bond or guarantee, filing cabinets, office supplies, the lease to office space . . . and telephone systems;

3. all premium reserve accounts and bank accounts into which ABC Investor funds or proceeds from Policies have been deposited; and
4. the right to recoup from proceeds of the Policies all funds advanced by ABC to finance the premiums on the Policies.

See Conservatorship Order, p. 2 (R. 1-8).

Despite Defendants/Appellants' argument that the policies were legally "transferred" to the Conservator when they completed the paperwork instructing the insurance companies to change the beneficiary, many policies clearly provide that no transfer would be deemed complete until the issuing insurance confirmed such change. *See* Conservator's Response Ex. "C" (R. 83-231). In addition, some insurance companies have refused to recognize the Conservator as the policy beneficiary upon receipt of such instructions, and other insurance companies notified the Conservator that the referenced policy: (i) was never purchased; (ii) had lapsed; or (iii) had been reduced in value prior to the appointment of the Conservator. *See* Conservator's Response Exs. "D" and "E" (R. 83-231). The facts also show that Defendant LaMonda attempted to retain at least two substantial policies comprising a part of the Conservatorship Assets. *See* Conservator's Response, p. 4 (R. 83-231). Clearly none of these policies were transferred to the Conservator by virtue of Defendants/Appellants' letters of instruction, revealing the failed logic of their argument.

Notwithstanding the status of the policy transfers, Defendants/Appellants' own premium reserve formula reflects that they either still have or misused approximately \$1 million in premium reserves. *See* Conservator's Response (R. 83-231). Because Defendants/Appellants never provided evidence that they had transferred 75% of the Conservatorship Assets to the

Conservator, whether they had transferred the policies themselves was not determinative. *See* Conservator's Response, p. 7 (R. 83-231).

D. Defendants/Appellants Never Appealed the Trial Court's Orders Approving the Costs of the Conservatorship.

Defendants/Appellants complain that the Conservator and its attorneys have "paid themselves" an aggregate \$747,187.54 in fees and expenses. In fact, most of the fees and expenses incurred by the Conservator and its attorneys resulted directly from Defendants/Appellants' interference with the Conservatorship. All of the Conservatorship fees and expenses were reviewed and approved by the trial court after notice to all parties in interest and a hearing. Defendants/Appellants did not appeal any of these orders, did not exercise their rights to move for evidentiary hearings in connection with such fee applications, and in some cases did not appear at the hearings on such applications. Notwithstanding the foregoing, these orders are not in issue, and Defendants/Appellants' arguments relating to the Conservatorship's court-approved fees and expenses are irrelevant.

E. Joy LaMonda's Affidavit Was Stricken from the Record and Cannot be Considered.

Defendants/Appellants offer an affidavit that was stricken from the record below in support of their argument that "the Conservator did not perform most of his assigned duties, primarily because neither he nor his staff knew how." By Journal Entry filed October 18, 2002, the trial court struck the proffered affidavit from the record. *See* Journal Entry (R. 289-291). Despite notice, Defendants/Appellants did not appear at the hearing on the Conservator's Motion to Strike the Affidavit of Joy LaMonda, and they did not appeal the trial court's order striking the affidavit. Accordingly, such affidavit is not properly a part of the record before this Court and must be disregarded.

F. The Conservatorship Order Does Not Permit the Use of Conservatorship Assets to Offset the Conservator's Fees and Expenses.

The real crux of Defendants/Appellants' discontent is the Conservator's refusal to use Conservatorship Assets that are not comprised of investor funds to offset Defendants/Appellants' obligation to pay Court-approved fees and expenses. Defendants/Appellants have provided no evidentiary foundation to the trial court to support their allegation that they transferred to the Conservator approximately \$1.6 million that could have been used to pay the costs of the Conservatorship. Rather, all that Defendants/Appellants transferred to the Conservator was \$286,000 in cash from ATCO's accounts, certain illiquid contingent contract rights that have no immediate cash value, and ABC's office equipment. *See* Conservator's Response (R. 83-231). Defendants/Appellants never remitted to the Conservator a penny of the funds allegedly escrowed for the payment of premiums, and to this day have not accounted to the trial court for the cash they allegedly escrowed from investor funds for the payment of those premiums.

In fact, this issue is not properly before this Court because it is not the subject of either a final or interlocutory order. The Conservatorship Order does not address the use of Conservatorship Assets to offset the costs of the Conservatorship and the November Journal Entries do not include a ruling on that issue.

II. ARGUMENT AND AUTHORITIES.

A. This Appeal is Moot.

The Oklahoma Supreme Court has consistently held that "where the issues have become moot, and no practicable relief will be afforded by reversal, the case will be dismissed." *Sanders v. City of Tulsa*, 1922 OK 320, ¶4, 210 P. 724. "When an act which is sought to be

enjoined has been already performed, or can never be performed, the appeal is moot." *Westinghouse Electric Corp. v. Grand River Dam Auth.*, 1986 OK 20, ¶24, 720 P.2d 713, 721. Further, litigants who voluntarily accept the fruits of a judgment cannot bring an appeal to reverse it, because acceptance of the benefits of a part of the judgment favorable to an appellant waives the right to appeal its detrimental parts. *Adams v. Unterkircher*, 1985 OK 96, ¶7, 714 P.2d 193, 196; *Tara Oil Co. v. Kennedy & Mitchell, Inc.*, 1981 OK 33, ¶12, 622 P.2d 1076, 1077-78.

Defendants/Appellants' self-serving contention that the Conservatorship Order relieved them of financial responsibility for funding the Viatical premiums BEFORE the Conservator held legal or beneficial title to the policies and BEFORE they accounted for and transferred to the Conservator any assets including the investor funds they had allegedly escrowed for the payment of such premiums, is nonsensical, inequitable, unsupported by the language of the Conservatorship Order, and directly contradicted by the Department's Response and Ms. Labarthe's statements on the record.¹⁴

Defendants/Appellants accepted the benefit of relief from the obligation for restitution under the Conservatorship Order, and without appealing that order remitted the challenged premiums directly to the various insurance companies that issued the Viatical policies. Defendants/Appellants further accepted relief under the November Journal Entries by

¹⁴ It also contradicts the following statement by Judge Owens regarding the trial court's intention that Defendants/Appellants' pay the premium shortfalls to assure their cooperation pending the completion of the transfer of the Conservatorship Assets:

I don't believe the order is ambiguous. I think it was designed for the very purpose until all this stuff is transferred Mr. LaMonda was on the hook for it. Otherwise there's no force behind the Court's order.

See Tr., p. 27, ll. 19-24, (R. 272).

transferring complete responsibility for all costs of the Conservatorship to the Conservator as of November 1, 2002, prior to any showing the Defendants/Appellants had transferred 75% of the Conservatorship Assets to the Conservator. The Conservator does not hold any part of Defendants/Appellants' premium payments, and to the Conservator's knowledge Defendants/Appellants have never sought any refund of such premiums from the respective insurance companies. The Viatical policies were sold to a third-party on March 18, 2003, and that party is now paying the premiums. Accordingly, the issue of whether the trial court properly construed the Conservatorship Order was waived by Defendants/Appellants' payment of premiums prior to November 1, 2002, and is now moot because they are no longer paying such premiums and no practicable relief can be afforded by reversal of the November Journal Entries.

B. The Judgment Roll Confirms that the Trial Court's Judgment is Clearly Not Against the Weight of the Evidence.

It is well-settled that the judgment of a trial court in an action of equitable cognizance will not be disturbed on appeal unless it is clearly against the weight of the evidence. *Carpenter v. Carpenter*, 1982 OK 38, ¶10, 645 P.2d 467, 480; *O'Laughlin v. City of Fort Gibson*, 1964 OK 31, ¶12, 389 P.2d 506, 509; *Priddy v. Shires*, 1951 OK 145, ¶7, 233 P.2d 298, 299. Appellate courts must presume that the ruling of the trial court is correct, and cannot presume that the court in entering a judgment proposed an action beyond its powers. *See U.C. Leasing, Inc. v. State ex rel. State Board of Public Affairs*, 1987 OK 43, ¶9, 737 P.2d 1191, 1194; *Chandler v. Denton*, 1987 OK 38, ¶10, 741 P.2d 855, 862, fn 11; *Knight v. Armstrong*, 1956 OK 268, ¶14, 303 P.2d 421, 424.

To the extent this appeal is not moot, this Court must presume that the trial court correctly found that the language of the Conservatorship Order is clear and unambiguous when

determining whether the rulings in the November Journal Entries were clearly against the weight of the evidence. Without question those rulings are not clearly against the weight of the evidence.

This Court has repeatedly held that a judgment that is not ambiguous is to be construed by looking at the judgment roll. *See, Jackson v. Jackson*, 2202 OK 25, ¶18, 45 P.3d 418, 428; *Stork v. Stork*, 1995 OK 61, ¶15, 898 P.2d 732, 739; *Fent v. Oklahoma Natural Gas Co.*, 1994 OK 108, ¶11, 898 P.2d 126, 132. The judgment roll consists of the petition, process, return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. *Fent*, 1994 OK 108 at ¶11, 898 P.2d at 132.

The trial court's order was not a contract, and Defendants/Appellants reliance on cases relating to the construction of contracts is misplaced. For decades this Court has held that in construing the judgment of a court, **effect must be given to every word and part thereof, including the effects and consequences that follow the necessary legal implication of its terms although not expressed.** *See In the Matter of Schrader*, 1983 OK 19, ¶5, 660 P.2d 135, 136; *Tilley v. Allied Materials Corp.*, 1953 OK 85, ¶32, 256 P.2d 1110, 1115; *McNeal v. Baker*, 1929 OK 741, ¶6, 274 P. 655, 656. In addition, recitals in a journal entry of judgment are taken as true and correct and are prima facie proof of the facts stated therein where they are not impeached or contradicted by the record. *Jackson*, 2202 OK 25 at ¶16, 45 P.3d at 427.

The recitals in the Conservatorship Order make clear that Defendants/Appellants were relieved of the requirement to pay restitution because they agreed to transfer the defined Conservatorship Assets to the Conservator, and to pay all costs of the Conservatorship until at least seventy-five percent (75%) of the Conservatorship Assets were transferred. Those

recitals are supported by the judgment roll which includes Ms. Labarthe's representations to the trial court that Defendants/Appellants agreed to pay the premium shortfalls in exchange for giving up the remedy of restitution and because at the inception of the Conservatorship the Conservator would have nothing with which to pay the premium shortfalls. Defendants/Appellants did not present the trial court with any evidence, in the form of an affidavit or otherwise, regarding the negotiation of the Conservatorship Order or their agreements with the Department.

The recitals in the November Journal Entries further state that the parties agreed at the September Hearing that ABC would pay the premiums until November 1, 2002, and that thereafter the Conservator would pay the premiums. Defendants/Appellants point to nothing in the record that contradicts those recitals, therefore they must be taken as true. In fact, ABC paid the premiums prior to such date and the Conservator thereafter took over payment of the premiums.

ABC's payment of the Viatical policy premiums from February 2002 to November 2002 clearly shows that Defendants/Appellants understood the plain language of the Conservatorship Order consistent with the Department's testimony and the trial court's interpretation of the Conservatorship Order.

C. The Effects and Consequences of the Conservatorship Order Prove that ABC was to Pay the Premiums Prior to the Funding of the Conservatorship.

If, however, this Court determines that the trial court erred in finding the Conservatorship Order clear and unambiguous in the November Journal Entries, the Conservatorship Order will remain valid unless its terms cannot be construed to conform to law. *See Jackson*, 2202 OK 25 at ¶18, 45 P.3d at 428. "An unclear judgment should be construed so as to carry out

its evident purport and intent, rather than defeat it, and a court should consider the situation to which it applied and the purpose sought to be accomplished." *Id.* See also *Ridley v. Phillips Petroleum Company*, 427 F.2d 19, 23 (10th Cir. (Okla.) 1970) ("[T]he purpose of construing ambiguous provisions in a judgment is to give effect to what is already latently in the judgment Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt the one which renders it more reasonable, effective and conclusive in the light of the facts and the law of the case [A]n ambiguous judgment must be construed so as to give effect to all of its parts.") (internal citations omitted); *State of Oklahoma v. State of Texas*, 272 U.S. 21, 43-44, 47 S.Ct. 9, 16 (1926) ("The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and which it was intended to decide."); *Hicks v. Hicks*, 1966 OK 91, ¶16, 417 P.2d 830, 832 (in construing the judgment of a court, effect should be given to every word and part thereof); *Lemons v. Lemons*, 1951 OK 300, ¶15, 238 P.2d 790, 793; *McNeal*, 1928 OK 741 at ¶6, 274 P. at 656 (considering the intention of the trial court in entering the order); *Estate of Harris v. Cornett*, 1966 OK 64, ¶17, 416 P.2d 398, 400 (the interpretation of the parties should be given great weight and the circumstances surrounding the making of the judgment may be considered).

The record clearly shows that the trial court entered the Conservatorship Order in lieu of enforcing its prior judgment for restitution and after careful consideration of its terms and conditions. The parties to the Conservatorship Order were the Department and Defendant/Appellant ABC. The Department's lawyer has stated on the record that she approached Defendant/Appellant Keith LaMonda with the idea of substituting the

Conservatorship for the penalty of restitution under the fraud order. This is confirmed by the recitals in the Conservatorship Order that make clear that it was entered as a substitute for restitution to the Oklahoma investors. Ms. Labarthe further advised the trial court that in agreeing to the entry of the Conservatorship Order the Department intended for ABC to pay the premiums until the requisite percentage of assets had been transferred, because **at the time the Conservatorship Order was entered the Conservator was not the owner or beneficiary of any of the Viatical policies and had no funds with which to pay premiums.** Likewise, at the hearing on the Motion to Construe, Judge Owens stated that his intent in entering the agreed Conservatorship Order was to substitute the obligation to pay such premiums for the penalty of restitution under the fraud judgment:

I don't believe the order is ambiguous. I think it was designed for the very purpose until all this stuff is transferred Mr. LaMonda is on the hook for it. That's the purpose of drafting the order that way. Otherwise there's no force behind the Court's order.

See Tr., p. 27, ll.19-24 (R. 272).

The words of the Conservatorship Order, considered in context of the circumstances surrounding its entry, unequivocally show that Defendants/Appellants exchanged their obligation to provide restitution to the investors by agreeing to pay premium shortfalls until the Conservatorship had the wherewithal to take over those payments. In fact, the judgment roll also shows that ABC made such payments until a disagreement arose over Defendants/Appellants' payment of the Conservatorship's other fees and expenses. Accordingly, the trial court's holdings memorialized in the November Journal Entries are not against the great weight of the evidence and must be affirmed.

Defendants/Appellants argue that the trial court's ruling does not comport with the general rules of contract construction because the direction to pay "all costs of the

Conservatorship" follows the direction to pay salaries and office expenses. However, this Court has held that one part of a judgment may be modified or explained by another part of a judgment. *Russell v. Freeman*, 1949 OK 257, ¶15, 214 P.2d 439, 442. It is obvious from reading every part of the Conservatorship Order that Defendants/Appellants were ordered to pay all of the costs of the Conservatorship, including the premium shortfalls, until the Conservatorship held the assets necessary to assume such payments, in exchange for their relief from liability for restitution.

D. The Trial Court Did not Err in Determining that a Transfer of a Policy Is Not Complete Until Confirmed by the Insurance Company.

Defendants/Appellants alternately claim that the trial court erred in finding that the Viatical policies were not transferred until the respective insurance companies confirmed the change in beneficiary. In fact, the trial court's holding is completely consistent with this Court's unequivocal holding that "a change in beneficiary on a life insurance policy can only be effected by following the procedure prescribed by that policy." *Shaw v. Loeffler*, 1990 OK 81, ¶5, 796 P.2d 633, 635 (citations omitted). **An exception to rule of strict compliance exists where an insured dies before the change is effected. *Id.*** (emphasis added). In such circumstances a court "may" recognize the insured's intent to change the beneficiary if the insured has done everything in its power to effect the change prior to its death. *Id.*

Without question, the exception referenced in *Shaw* is inapplicable to the current situation. The Defendants/Appellants, and not the insured, requested the change of beneficiary; the insured may or may not be dead; and the beneficiary is not claiming an interest in the policy proceeds. Therefore, the general rule must apply and the change of

beneficiary will not be complete until the policy provisions applicable to the respective Viatical policy were strictly complied with.¹⁵

This case involves more than 1,500 policies. The record shows that many of those policies clearly provide that a change of beneficiary is not effective until the insurance company confirms the change. *See* Ex. I to Conservator's Response (R. 83-231). Accordingly, the trial court did not err in its holding.

Further, despite these allegations, Defendants/Appellants accepted the benefits of the November Journal Entries when they stopped paying the premiums shortfalls and remitting premium payments on November 1, 2002. Defendants/Appellants may not, having accepted the benefits of both the Conservatorship Order and the November Journal Entries now challenge their detrimental parts. *See Adams*, 1985 OK 96 at ¶7, 714 P.2d at 196, *supra*.

Defendants/Appellants' further argument that the Conservator should have been recognized as the owner of the Viaticals at the inception of the Conservatorship because the Court ordered ABC and ATCO to pay the Viatical premiums on behalf of the Conservator is simply not true. The Conservatorship Order does not direct Defendants/Appellants to pay premiums "on behalf of the Conservator," and Defendants/Appellants' arguments based on cases relating to the recognition of a change of ownership in the event of the payment of premiums by a new owner are inapplicable.¹⁶

¹⁵ Defendants/Appellants' argument is further betrayed by their own conduct. When purchasing the Viaticals from the viators Defendants/Appellants refused to pay the viators until the insurance company recognized ABC as the beneficiary of the Viatical. *See* Ex. "J" to the Conservator's Response (R. 83 - 231).

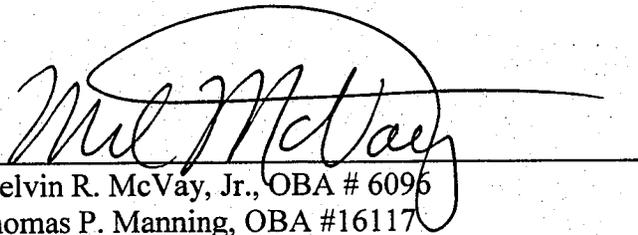
¹⁶ Defendants/Appellants further state "[i]t requires no recitation of authority to establish that title to real or personal property passes upon execution of a deed or bill of sale, and not upon the recording of these instruments or upon the recipient's confirmation of receipt. The same principles should apply here." Argument in a brief unsupported by

E. The Issue of Whether Conservatorship Assets May be Used to Offset Court-Approved Fees and Expenses is Not Before this Court.

The Conservatorship Order does not provide that Conservatorship Assets may be used to offset court-approved fees and expenses for which Defendants/Appellants are liable. Defendants/Appellants did not appeal the Conservatorship Order, and the November Journal Entries do not address this contention. Accordingly, this issue is not before this Court.

CONCLUSION

For the reasons stated herein, the Conservator respectfully requests this Court affirm the November Orders and deny all relief requested by the Defendants/Appellants.



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citations to legal authority will not be considered for appeal. Sup. Ct. R. 1.11 (k)(1). *See also First Nat'l Bank v. Mann*, 1965 OK 127, ¶31, 410 P.2d 74, 83. Accordingly, the foregoing argument must be disregarded. In any event, under Oklahoma law a deed takes effect upon its delivery, not upon its execution. *May v. Archer*, 1956 OK 144, ¶16, 302 P.2d 768, 771; *Dowell v. McNeil*, 1955 OK 210, ¶17, 285 P.2d 856, 859.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of Conservator Tom Moran's Response Brief mailed this 2nd day of June, 2003, by depositing it in the U.S. Mails, postage prepaid, to:

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With a copy hand delivered to
the Honorable Daniel L. Owens

I further certify that a copy of the foregoing was mailed to, or filed in, the Office of the Court Clerk of the Oklahoma County, Oklahoma City, Oklahoma 73105, on the 2nd day of June, 2003.

A handwritten signature in cursive script, appearing to read "Mel McLaughlin", is written over a horizontal line.