

No. 98,663

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Plaintiffs/Appellees,

v.

ACCELERATED BENEFITS CORPORATION,
C. KEITH LAMONDA, AMERICAN TITLE COMPANY OF
ORLANDO, AND DAVID S. PIERCEFIELD,

Defendants/Appellants,

v.

TOM MORAN,

Court Appointed Conservator/Appellee.

FILED
SUPREME COURT
STATE OF OKLAHOMA

JUN 23 2003

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CLERK

REPLY BRIEF OF DEFENDANTS/APPELLANTS

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DANIEL L. OWENS, JUDGE OF THE DISTRICT COURT
CASE NO. CJ-99-2500-66
ACTION FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

June 23, 2003

Dino E. Viera (OBA #11556)
William H. Whitehill (OBA #12038)
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

Attorneys for Defendants/Appellants,
Accelerated Benefits Corporation, C. Keith
LaMonda, American Title Company of Orlando
and David S. Piercefield

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REPLY BRIEF OF DEFENDANTS/APPELLANTS

Defendants/Appellants, Accelerated Benefits Corporation (“ABC”), American Title Company of Orlando (“ATCO”), C. Keith LaMonda (“LaMonda”) and David Piercefield (“Piercefield”) (collectively “Defendants”), submit this brief in reply to the Answer Briefs filed by Plaintiffs/Appellees, the Oklahoma Department of Securities (the “Department”) and by the court-appointed Conservator, Tom Moran (the “Conservator”) (collectively “Appellees”).¹

I. INTRODUCTION

Appellees’ answer briefs can be aptly described as a perverse contradiction in terms. Both cite settled law that, in construing a judgment, “any controversy over the meaning and effect of that judgment must be resolved *by resorting solely to the face of the judgment roll*,” *Stork v. Stork*, 1995 OK 61 898 P.2d 732, 739; *see also*, Defendants’ Brief-In-Chief at 14-16. Yet, in the same breath, Appellees rely exclusively on extraneous allegations in a feeble attempt to support the district court’s erroneous construction and *de facto* modification of the Conservatorship Order. What is more troublesome is that nearly all of these allegations are not supported by any citation to the appellate record. In fact, the Department’s so-called “Summary of the Record” should be ignored because it does not contain a *single* cite to the record in flagrant violation of Rule 1.11(e) of the Oklahoma Supreme Court Rules. The Conservator’s brief, in many respects, fairs no better. The first

¹Defendants shall use the same identifications previously utilized in their brief-in-chief to describe the “November Orders” and the “Conservatorship Order.” *See* Defendants’ Brief-In-Chief at 1 and 4.

six pages of its brief, which contains a litany of unsupported and untrue allegations regarding the conduct of Defendants, also does not contain any record cites. This Court is not required to search the record for the "proverbial needle in a haystack" to find support for Appellees' baseless contentions. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995). Moreover, because Oklahoma law, *as asserted by Appellees*, forbids consideration of extraneous matters when construing an unambiguous judgment, Appellees' allegations should be given no weight even in the few instances where a record cite is proffered.

The reason for Appellees' tactic is simple. This appeal involves the straightforward construction of a judgment, and as shown in Defendants' brief-in-chief, the specific provisions of the Conservatorship Order which are the subject of this appeal are as plain and clear as the law which governs their construction. Rather than addressing these straightforward issues, both the Department and the Conservator go out of their way to assassinate the character of Defendants in the hope that this Court will overlook the unambiguous language of the Conservatorship Order. Even though the Order expressly directs the Conservator to make "timely payment of all premiums for policies that have not yet matured," Appellees' briefs are bereft of any cogent argument that would support the district court's failure to acknowledge this language. Simply decrying that "Defendants are bad people who deserve what they got," is not a valid basis for, in effect, changing the provisions of an otherwise clear and unambiguous judgment. This appeal must be decided

on the law, and the law requires that the district court's "interpretation" of the Conservatorship Order be reversed.

II. ARGUMENT AND AUTHORITIES

A. **The Department's Characterization Of This Appeal Is Erroneous.**

The Department begins its brief by asserting that this appeal should be dismissed because Defendant's Brief-in-Chief was not filed within twenty days of the Notice of Completion of Record as required in appeals from interlocutory orders. *See* Supreme Court Rule 1.55. This contention is erroneous in several respects. First, this is an appeal from an order modifying a previous final judgment of the district court. As such, it constitutes a final order as described by Okla. Stat. tit. 12, §§ 953, 993(A)(7) and Supreme Court Rule 1.20(b)(3), and therefore the time limits applicable to appeals from final judgments or orders, set out in Supreme Court Rule 1.10(a)(1), govern in this appeal. Rule 1.10(a)(1) allows the appellant forty days from notice of completion of record to file its brief-in-chief and twenty days from the filing of the answer brief to submit a reply brief. Accordingly, the Department's claim of untimeliness is incorrect.²

Second, by order dated March 31, 2003, this Court allowed Defendants an extension of time to April 24, 2003 to file their Brief-In-Chief, and Defendants complied

²Defendants inadvertently designated the November Orders as "interlocutory orders appealable by right" in their Petition in Error, instead of designating them as "final" orders. However, Defendants' Petition in Error correctly cited Okla. Stat. tit. 12, § 993(A)(7) as the statutory basis for determining the orders were appealable.

with this deadline. Thus, the Department's assertion that Defendants filed their Brief-In-Chief out of time is without merit for this reason as well.

Third, it rises to the height of hypocrisy for Appellees to contend that the time limits applicable to interlocutory appeals should apply to Defendants but not to the Department or to the Conservator. Assuming *arguendo* that the Department's characterization of this appeal as "interlocutory" is correct, Appellees should have filed their answer briefs ten days after Defendants filed their Brief-In-Chief. See Supreme Court Rule 1.55. Instead, both the Department and the Conservator filed their brief forty days after Defendants filing without even requesting an extension of time. In short, the Department's request to dismiss this appeal is misplaced and should be denied.

B. The Conservatorship Order Expressly Required The Conservator To Begin Making Premium Payments At The Inception Of The Conservatorship.³

Despite the clear and unambiguous language of the Conservatorship Order, which expressly directs the Conservator to make premium payments, Appellees rely on extraneous, irrelevant and incorrect recitations of the circumstances surrounding the entry of the Conservatorship Order in a blatant attempt to have this Court ignore its plain language. Initially, Appellees claim that the Conservatorship Order was entered in lieu of requiring

³Contrary to Appellees' assertion, the standard of review applicable to a trial court's construction of a judgment is *de novo* because it involves a pure question of law. *Jackson v. Jackson*, 2002 OK 25, ¶¶ 2-19, 45 P.3d 418.

Defendants to make restitution to the Oklahoma investors who had purchased viatical settlements from Defendants. While this is true, it does not address any issue in this appeal nor does it support the contention that, *ipso facto*, Defendants were required to make premium payments from the very start even though the Conservatorship Order says otherwise.

The Department also claims that “[t]he restitution amount for Oklahoma investors would have been close to \$2 million.” (Department’s Brief at 5.) There is no record cite for this unsupported assertion; but even if there were, the Department’s assertion overlooks the plain fact that the Conservatorship Order directed ABC and ATCO to make the ultimate sacrifice and transfer all of their viatical business assets to the Conservatorship without relieving Defendants of their potential liability to over 4,500 purchasers or to other state or federal regulatory authorities. This was done at the Department’s request, as evidenced by the order itself, and was part of the deal which Defendants and the Department struck. To now claim that responsibility for premium payments was the *quid pro quo* for restitution smacks of self-serving hindsight that is nowhere reflected in the Order and is directly contrary to the express provision which places such responsibility on the Conservator. It would have been a simple matter *for the only lawyer who drafted the order*, Patricia Labarthe, to have inserted a provision that placed the premium payment obligation on ABC. Because she did not and, in fact, expressly placed the obligation on the Conservator, it must be assumed that is what the Department intended.

The Department also argues that the reason why ABC was allegedly obligated to pay the premiums pending the transfer of 75% of the Conservatorship assets was "that the Conservator would initially have no money with which to fund the substantial premium payments or expenses of the Conservatorship and the insurance policies had to be kept in full force and effect pending the transfer." (Department's Brief at 5.) Again, the Department makes no citation to the record to support this claim. Moreover, aside from its irrelevance to the construction of an unambiguous order, it is also wrong. As soon as the Conservatorship Order was signed, the Conservator seized all assets of ABC and ATCO, including the substantial sums of money contained in ATCO's premium account and other liquid assets in excess of \$200,000. *See* Affidavit of Joy LaMonda, ¶¶ 3 and 4, filed on September 19, 2002. Appellees also admits that purchasers were being billed for premium payments and that funds to pay premiums were being collected on a regular and substantial basis. *See* Transcript of Proceedings had on September 27 at 10-12. In fact, the district court found that ABC should be reimbursed for a large part of the premiums it funded because, over the course of the Conservatorship, the Conservator had collected hundreds of thousands of dollars from the purchasers but refused to allow the funds to be used to pay premiums.

The court remarked:

Well, I believe what the Court would have to say, if ABC has advanced some premiums, and it's determined later those premiums were, in fact, sitting with ATCO available for use to pay those premiums, it would be unwise of the Court to require double payment of the premiums

We're not going to have [ABC] pay the premium payments and have that premium payment sitting there and then not get it back.

I don't believe the [Conservatorship] Order entered by this Court is in any way ambiguous as to the obligations of [ABC]. Those premium payments, if [ABC] has advanced those and those premium payments are available to ATCO to pay for the very policies advanced, [ABC] will be reimbursed for those pursuant to the Order at the end of this litigation

It was never the intent of the Court to have [ABC] pay the premiums while the money is sitting there to be paid via someone else. I don't know how you want to put that in an order but we're not here to double whammy somebody. In fact, the Order wasn't a punitive order. The order was just to gather the assets and make sure we protected everybody.

Transcript of Proceedings had on September 27 at 37-39.

All that the Conservator had to do was to direct the payment of premiums from the premium accounts, and he would have fulfilled his obligations. Instead, the Conservator took nine months to assume the obligations that were imposed by the Conservatorship Order and forced ABC to make the payments out of its own pocket. *See* Transcript of Proceedings had on September 27 at 12-13; Affidavit of Joy LaMonda, ¶¶ 3 and 4, filed on September 19, 2002. In short, Appellees' contention that the Conservator "had no money" to pay premiums at the inception of and subsequent to the creation of the Conservatorship is not only irrelevant to the interpretation of the Order, it also constitutes an abject prevarication.

Related to this argument is the Department's contention that there was a "premium shortfall crisis." (Department's Brief at 5.) Again, the Department cites no record support for this assertion; it is, in any event, irrelevant to the issues on appeal; and once again, the Department is incorrect. Indeed, if there truly was such a crisis, why did the Department and the Conservator wait nine months to tap into the substantial reserves that continued to accumulate during that entire period of time and make ABC fund all the premium payments? There was no "crisis"; rather, the Department and the Conservator knew full well that ABC would never have refused to make premium payments and allow the policies to lapse. In fact, throughout this litigation, ABC has always been willing to assume premium payment responsibility, including covering shortfalls in premium collections, because of the potential liability it faces if any of the policies lapse. *See* Defendants' Response to Conservator's Motion to Settle Journal Entries at 7, filed on November 8, 2002 and Transcript of Proceedings had on September 27 at 5. Only a few policies of the over 1,500 policies transferred to the Conservatorship have lapsed, and ABC has continued its efforts to reinstate those policies. *See* Conservator's Response to Defendants' Motion to Construe Conservatorship Order, Exhibit "D" attached thereto, filed on September 19, 2002.

It is also ludicrous for Appellees to contend that the premium payments were funded by ABC "voluntarily" and that ABC "accepted the benefits" of the Conservatorship Order. Nothing could be further from the truth. Indeed, in open court, the Conservator's

counsel admitted that it would not allow ABC or ATCO to tap the premium collection account. *See* Transcript of Proceedings had on September 27 at 12-15. This is precisely why the district court ordered that ABC should be reimbursed for premium payments that were made by purchasers. As the court stated, the Conservatorship Order was not meant to be "punitive." *See* Transcript of Proceedings had on September 27 at 39. Further, a dispute as to who should pay premium payments, and from what accounts the funds should come, arose early on in the Conservatorship. Throughout that period of time, the Conservator made it impossible for either ABC or ATCO to access any of the funds that it had collected from purchasers to pay premiums, and by these actions, he, in effect, blackmailed ABC into funding the premiums. *See* Transcript of Proceedings had on September 27 at 12-15. The district court recognized the inequity of such conduct when it ordered the audit and instructed the Conservator to reimburse ABC for premium payments which had also been paid by the purchasers. *See* Transcript of Proceedings had on September 27 at 37-39.

The district court based its reimbursement ruling in part on evidence establishing the assets of the Conservatorship which were detailed in an affidavit submitted by Joy LaMonda. Affidavit of Joy LaMonda, ¶¶ 3 and 4, filed on September 19, 2002. Contrary to Appellees' contention, the affidavit was not "stricken from the record" that was considered by the district court when it construed and modified the Conservatorship Order. Indeed, the district court referred to it favorably because it was the only information submitted to the court which detailed what assets were in the possession of the

Conservatorship. See Transcript of Proceedings had on September 27 at 38. The Conservator did not dispute the information nor could it have. The only basis for the Conservator's contention that the affidavit should be struck was that part of the affidavit referred to an offer of proof that was made in writing in response to a previous application for costs and attorneys. See Conservator's Motion to Strike Verification of Joy LaMonda in Support of Defendants' Offer of Proof, filed on September 20, 2002. In any event, several weeks after the affidavit was supposedly stricken from the record, it was presented to and considered once again by the district court *before* the November Orders were entered. See Defendants' Motion to Construe Conservatorship Order [hereafter "Defendants' Motion"], filed August 21, 2002; Affidavit of Joy LaMonda, filed on September 19, 2002 in support of Defendants' Motion; and Defendants' Response to Conservator's Motion to Settle Journal Entries, filed on November 8, 2002, at 3, expressly incorporating by reference Defendants' Motion. Defendants, in response to the Conservator's motion to settle the journal entries, expressly incorporated by reference their previous filings, which included the affidavit. *Id.*

The Conservator did not object in either a subsequent filing or at the hearing at which the November Orders were actually rendered. Regardless, even though the Department and the Conservator know full well that the affidavit contains accurate and correct information, which the district court relied on, it was offered simply to rebut the false assertion that the Conservator did not have sufficient funds to pay premiums, which, as discussed above, is irrelevant to the construction of an unambiguous judgment. The Conservator also never

offered any valid evidentiary reason for rejecting the affidavit or having it stricken from the record.

In sum, the Conservatorship Order clearly and unambiguously placed the burden of paying premiums on the Conservator and not on ABC or on any other Defendant. The district court's ruling to the contrary should be reversed.

C. The Language On Which Appellees Rely For Payment Of Premiums Does Not Address Premiums Nor Does It Direct ABC To Pay Such Premiums.

The only clause on which Appellees rely in support of their contention that ABC was responsible for payment of premiums until 75% of the Conservatorship assets (mostly insurance policies) were transferred to the Conservatorship, is the phrase which states: "ABC [will] pay and maintain all office expenses, salaries, and other costs of the Conservatorship" (Conservatorship Order at 5.) Defendants previously pointed out that this language in now way references the funding or payment of premiums. (Defendants' Brief-In-Chief at 18.) It is clearly limited to administrative expenses of the Conservatorship. Appellees also demonstrated in their brief-in-chief that the specific terms of an order control over its general terms and therefore the clause which specifically states that the Conservator is responsible for payment of premiums controls. (Defendants' Brief-In-Chief at 19.) Neither the Department nor the Conservator addresses this critical issue in their briefs.

The Conservator and the Department also ignore the rule of *ejusdem generis* which provides that when specific words are followed by general words, the specific terms restrict the meaning of the general terms. *State ex rel. Commissioners of Land Office v. Butler*, 1987 OK 123, 753 P.2d 1334, 1336; *see also* Defendants' Brief-In-Chief at 19-20. Because the words "other costs" is clearly a general provision followed by the more specific terms "office expenses" and "salaries," the rule of *ejusdem generis* restricts the meaning of "other costs" to administrative costs only and not to premiums, which have nothing to do with office expenses or salaries. Here too, not a word of Appellees' answer briefs addresses this issue.

For these reasons, this Court should reject Appellees' contention that "other costs" encompasses premiums payments and should summarily reverse the district court's November Orders.

D. The District Court Erred In Holding That A Transfer Of An Insurance Policy Is Not Effective Until The Insurance Company Acknowledges Receipt.

Defendants also demonstrated in their Brief-In-Chief that, even if this Court were to find "other costs" encompasses premium payments, ABC was obligated to make such premium payments only until such time as 75% of the insurance policies were transferred to the Conservator. (Defendants' Brief-In-Chief at 20.) ABC argued below that the transfers were, under Oklahoma law, deemed complete upon the execution and delivery of the change

of beneficiary forms to the various insurance companies. (Defendants' Brief-In-Chief at 20-21.)

Here again, the Department and the Conservator completely ignore the vast body of case law that holds that a change of beneficiary is deemed complete upon execution and delivery of the necessary documentation to the insurance company. Appellees also ignore settled Oklahoma law that, when construing an order or contract, the extant law of Oklahoma is deemed, by operation of law, to be part of the contract or order. (Defendants' Brief-In-Chief at 21.)

The Department argues that ABC failed to demonstrate when 75% of the assets were transferred. This contention is a classic "red herring" argument. ABC argued that the "transfer" terminology of the Conservatorship Order should be construed in a manner consistent with Oklahoma law. The district court rejected this proposition; thus it was not necessary for ABC to actually demonstrate when the paperwork was actually accomplished and delivered. In any event, it was clearly accomplished months before the Conservator received acknowledgment of the change of beneficiaries from the insurance companies. Appellees seem to forget that Defendants appealed the district court's construction of the Conservatorship Order and not factual findings that the district court never attempted to make because of its erroneous interpretation of the Order.

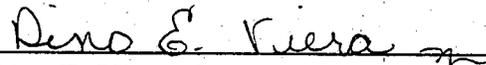
In sum, the district court's finding that an insurance policy is deemed transferred only until such time as the insurance company acknowledges the change of beneficiary should be reversed. If court's determination is reversed, the matter should be remanded to district court to ascertain when the change of beneficiary forms were completed and mailed by ABC. Once that determination is made, ABC's premium payment obligations can be definitively decided. Of course, this inquiry need only be made if this Court were to affirm the district court's finding that "other costs" includes premium payment obligations and that such obligations fell upon ABC at the inception of the Conservatorship.

E. ABC's Expense Obligations, However Interpreted, Should Be Offset By The Unencumbered Assets It Transferred To The Conservator At the Inception Of The Conservatorship.

Defendants argued in their Brief-In-Chief that a substantial amount of assets, outside of premium accounts, were transferred to the Conservator at the inception of the Conservatorship and that these assets should have been used to offset ABC's premium payment and expense obligations. Defendants raised the issue before the district court, but as admitted by Appellees, the district court did not rule on this issue. Accordingly, this matter should be remanded to the district court for its determination. *See* Defendants' Motion to Construe Conservatorship Order.

III. CONCLUSION

For the reasons set forth above, the November Orders should be set aside, and this Court should construe the Orders in accordance with their plain and unambiguous language. The November Orders imposed on the Conservator the duty to pay premiums at the inception of the Conservatorship. Even if the Conservatorship Order is deemed to have placed this obligation on ABC, the November Orders should nevertheless be reversed because they erroneously hold that transference of a policy does not occur until the insurance company has acknowledged that the change of beneficiary is complete. Assuming this Court agrees with that interpretation, this matter should be remanded to the district court for determination of when precisely the change of beneficiary forms were completed by ABC so that an accurate determination of ABC's premium and expense obligations can be determined.



Dino E. Viera, OBA No. 11556
William H. Whitehill, Jr., OBA No. 12038
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS, P.C.
100 N. Broadway Avenue, Suite 1700
Oklahoma City, OK 73102-8820
Telephone: (405) 232-0621
Facsimile: (405) 232-9659

Attorneys for Defendants/Appellants,
Accelerated Benefits Corporation, C. Keith
LaMonda, American Title Company of Orlando
and David S. Piercefield

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply Brief of Defendants/Appellants was mailed this 23rd day of June, 2003, to:

Patricia A. Labarthe, Esq.
Oklahoma Department of Securities
First National Center, Suite 860
120 North Robinson
Oklahoma City, OK 73102

Attorney for Plaintiff

Thomas P. Manning, Esq.
Phillips McFall McCaffrey McVay
& Murrah, P.C.
One Leadership Square, 12th Floor
211 North Robinson Avenue
Oklahoma City, OK 73102

Attorneys for Conservator

by depositing it in the U.S. Mails, postage prepaid.

Dino E. Viera
Dino E. Viera

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