

FILED
SUPREME COURT
STATE OF OKLAHOMA

JUL 1 2003

MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Plaintiff/Appellee,)

v.)

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

Defendants/Appellants)

v.)

TOM MORAN,)

Court-Appointed Conservator/)
Appellee.)

Case No. 98663

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

Honorable Daniel L. Owens

SURREPLY OF CONSERVATOR TOM MORAN

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CONSERVATOR'S SURREPLY

The Conservator offers the Court this Surreply solely to address Defendants/Appellants' blatant misrepresentations regarding the content of the record before this Court.

A. The District Court Ordered Joy LaMonda's Affidavit Stricken from the Record.

Defendants/Appellants' blatantly misrepresent on page 9 of their Response that the Affidavit of Joy LaMonda "was not 'stricken from the record' that was considered by the district court when it construed and modified the Conservatorship Order." Defendants/Appellants' further claim that the District Court "referred to [the Joy LaMonda Affidavit] favorably" during the September 27, 2002 hearing is also misleading. In fact, the District Court mentioned the Joy LaMonda Affidavit only twice during that hearing. As reflected, on page 3 of the Transcript of the September 27 hearing, the Court stated "I'm not sure where Ms. Joy LaMonda is getting her information. It's a fascinating computer printout we have here," and on page 38 the District Court refers to that same printout stating "I think by Ms. LaMonda that looked like a policy breakdown . . ." *See, Tr.* pages 3 and 38. Nothing in either of the District Court's references to the printout constitutes a "favorable" reference to the Joy LaMonda Affidavit.

In direct contradiction to Defendants/Appellants' statements, on October 18, 2002, the District Court filed a Journal Entry memorializing its prior rulings from the bench. The Journal Entry states:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

- (a) Defendants' Offer of Proof is ordered stricken from the record;
- (b) The Verification of Joy Lamonda In Support of Defendants' Offer of Proof is ordered stricken from the record;

- (c) **Defendants' Affidavit in Support of Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets is ordered stricken from the record; and**
- (d) All documents and pleadings to which the above and foregoing are attached are ordered stricken from the record;

See Journal Entry (R. 289-291) (emphasis added). Joy LaMonda's Affidavit was filed by Defendants/Appellants on September 19, 2002, behind a cover sheet titled "Affidavit in Support of Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets." This is clearly the document stricken by the District Court in subsection (c) referenced above.

B. Conservator's Counsel Did Not Admit That the Conservator Would Not Allow ABC or ATCO to Tap the Premium Collection Accounts.

Defendants/Appellants state that on pages 12-15 of the Transcript of Proceedings of the September 27, 2002 hearing "the Conservator's counsel admitted that it would not allow ABC or ATCO to tap the premium collection account." Counsel made no such statement. In fact, counsel stated on those pages:

It had been [the Conservator's] understanding that ABC and ATCO were using the [investor] funds that we were giving them to pay the premiums and account for, you know, who they were paying them for and then only paying premium shortfalls.

We've recently learned that's that's (sic) not the case. ABC and ATCO -- ABC has been funding all of the premiums and ATCO has been holding the money that we gave them and not using it because they can't account -- they can't do the accounting . . .

So, in fact, ABC has been paying more than we even thought they were paying. And towards that end we would agree that rather than reimbursing the conservator for all of the fees, they have been paying more than we thought they should be paying and therefore ATCO should turn over the \$400,000.00 it has, we should go forward and ABC doesn't need to reimburse us anything.

But we don't believe that the Court -- or that the order is ambiguous at all. It does say that ABC is responsible for paying all conservator fees and expenses. And we believe that the payment of premium shortfalls would be a conservator expense clearly under the order.

The Conservator never advised ATCO to withhold investor funds when paying premiums on the policies in which those investors claimed an interest, nor did Conservator's counsel "admit" that the Conservator gave any such direction.

C. The Record is Devoid of Evidence that Defendants/Appellants Transferred 75% of the Conservatorship Assets to the Conservator.

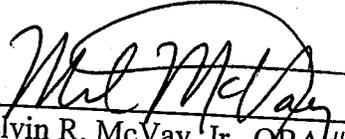
Defendants/Appellants allege that because the District Court rejected their argument that an unmatured life insurance policy is transferred upon mailing of directions to change the beneficiary "it was not necessary for ABC to actually demonstrate when the paperwork was actually accomplished." Clearly the burden of proving that the requisite transfer had occurred was on Defendants/Appellants. Defendants/Appellants have filed no offer of proof in the case below, and have not otherwise referred to anything in the record before this Court that provides credible evidence that they have transferred 75% of the Conservatorship Assets to the Conservator.

D. The Issue of Whether Conservatorship Assets May be Used to Offset Court-Approved Fees and Expenses is Not Subject to Remand.

Defendants/Appellants ask this Court to remand the issue of whether Conservatorship Assets may be used to offset court-approved fees and expenses. Defendants/Appellants did not appeal the Conservatorship Order, and the November Journal Entries do not address this contention because the Conservatorship Order clearly does not provide for such offset. Accordingly, this issue is not appealable and is not subject to remand.

CONCLUSION

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



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Surreply of Conservator Tom Moran was mailed this 1st day of July, 2003, by depositing it in the U.S. Mails, postage prepaid, to:

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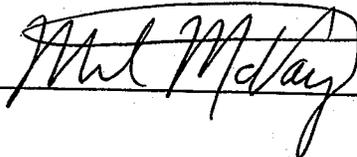
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Attorney for Plaintiff/Appellee
Oklahoma Department of Securities

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 1st day of July, 2003.



A handwritten signature in black ink, appearing to read "Mark McVay", is written over a horizontal line.

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July 1, 2003

Via U.S. Mail

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*Re: Oklahoma Department of Securities v. Accelerated Benefits Corporation, et.
al. v. Tom Moran: Case No. CJ-99-2500-66*

Attention of Patricia A. Labarthe:

Enclosed please find a copy of the surrepley of Conservator Tom Moran filed July 1, 2003, for your file and information.

Sincerely,



Rebecca Allman
Legal Secretary

Enclosures