



**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: April 24, 2006
Decided: May 22, 2006

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Re: *G. William Carlson, et al. v. Charles Hallinan, et al.*,
Civil Action Nos. 19808 and 19466

Dear Counsel:

Plaintiffs have moved for an order clarifying the Court's March 21, 2006 Opinion (the "Opinion")¹ with respect to (1) Plaintiffs' claim for \$5,523.37 in unreimbursed business expenses, (2) whether Defendants shall bear the expense of the Court-ordered accounting, and (3) whether Defendants shall bear the expense of the receivership of nominal defendant CR Services Corp. ("CR"). For the reasons set forth in this Letter Opinion, the Court grants Plaintiffs' motion in part and denies it in part.

In the Opinion, the Court directed Plaintiffs' counsel to submit a form of order embodying the Court's ruling. The parties disagreed on several aspects of Plaintiffs' proposed order and submitted letters setting forth their respective positions. To the extent

¹ *Carlson v. Hallinan*, 2006 WL 771722 (Del. Ch. Mar. 21, 2006).

these disputes merit discussion, it is set forth below. To the extent any issues are not discussed and remain open, they are resolved in the Judgment Order entered concurrently with this Letter Opinion.

I. BACKGROUND

This is a direct and derivative action brought by Plaintiffs G. William Carlson and Contact Results, Inc. (“Contact”) against Defendants Charles Hallinan, Gary Gordon, TC Services Corp., Main Street Services Corp. and others. CR is the nominal defendant in the derivative portion of this action.

After a seven day trial in November 2004 and extensive post-trial briefing and argument, this Court issued the Opinion. As to Plaintiffs’ direct claims, the Court concluded, among other things, that Hallinan breached an oral contract he had with Plaintiffs; as to the derivative claims, the Court concluded, among other things, that Hallinan and Gordon breached fiduciary duties they owed CR.

II. ANALYSIS

Carlson argues that this Court failed to address his claim for unreimbursed business expenses in the amount of \$5,523.37 plus interest. He further argues that Defendants waived their right to address this claim “and, at least tacitly, admitted the validity of [it]” by failing to address it in their post-trial briefs.² Defendants respond by

² Pls.’ Mem. of Law in Support of Mot. for Clarification of the Court’s Op. of Mar. 21, 2006 (“POB”) at 2.

repeating the argument they made at trial, namely, that Carlson is not entitled to reimbursement because he failed to follow CR's expense reimbursement policy.

Carlson contends that it is settled Delaware law that a party waives an argument by not including it in its brief.³ It is less clear, however, that a party tacitly admits the validity of a claim by not briefing it. In fact, in the case cited by Carlson for this proposition, the Delaware Supreme Court noted that the party tacitly conceded the merit of the other party's position "at argument in this case."⁴ Moreover, this Court has found no Delaware case that so holds. The Court also notes that the undiscussed claim at issue here is relatively *de minimis* in the context of the overall litigation. Thus, the Court finds that Defendants have waived their right to argue that Carlson is not entitled to reimbursement of his business expenses because he did not follow company policy, but that Carlson still must prove his claim.

Carlson testified at trial that he incurred all \$5,523.37 of the claimed expenses on behalf of CR.⁵ Defendants did not rebut this testimony. Carlson also moved into

³ POB at 2 (citing *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001)); *see also Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003).

⁴ *Emerald Partners*, 726 A.2d at 1224 ("Emerald Partners has waived any argument it had against Hall Financial by not raising the issues in their opening brief and *at argument in this case tacitly conceded the merit of Hall Financial's position on appeal.*") (emphasis added).

⁵ Tr. at 227. Citations in this form ("Tr.") are to the November 2004 trial transcript and indicate the page and, where it is not clear from the text, the witness testifying.

evidence copies of his receipts for these expenses.⁶ Defendants did not object to the admission of this evidence. Accordingly, the Court concludes that Carlson proved his entitlement to reimbursement of \$5,523.37 in business expenses plus pre-judgment interest from the approximate date he sought reimbursement of these expenses, January 1, 2002.⁷

Plaintiffs next seek clarification as to whether Defendants must pay for the Court-ordered accounting. Plaintiffs argue that corporate fiduciaries have a duty to account for their use of corporate funds and that Hallinan and Gordon, having breached their duties as fiduciaries of CR, should pay for the accounting. Defendants do not seriously dispute that Hallinan and Gordon should pay this expense, but argue that CR should pay for any portion of the accounting that reveals that other Hallinan entities bore the expenses of CR in an amount equal to or greater than that borne by CR for the Hallinan entities.

As fiduciaries of CR, Hallinan and Gordon had “the burden of showing that they dealt properly with corporate funds and other assets entrusted to their care.”⁸ Because they failed to satisfy this burden and were found to have breached their fiduciary duties, Hallinan and Gordon shall bear the expense of the entire accounting. Further, Hallinan

⁶ PX 23.

⁷ Tr. at 726 (Hallinan) (testifying that Carlson sought reimbursement for business expenses after his termination as President of CR). To the extent that there is ambiguity as to this date, the Court has concluded it should be resolved against Carlson based on the attendant circumstances.

⁸ *Carlson*, 2006 WL 771722, at *17 (internal citations omitted).

and Gordon shall bear the expense of the accounting even if it reveals that other Hallinan entities bore more of CR's expenses than the reverse because Hallinan and Gordon failed to satisfy their duty to deal properly with CR's funds in the first instance.

Plaintiffs next move for clarification in the form of an explicit requirement that Defendants shall pay for the receivership of CR. Plaintiffs asked this Court to dissolve CR and appoint a receiver to wind up its affairs; Defendants opposed that request. The parties' disagreement on this issue contributed to the Court's conclusion that dissolution was necessary. In particular, the record showed that these individuals could no longer work together to manage CR.⁹ As such, Hallinan and Gordon are not solely responsible for the Court's decision to dissolve CR and thus should not bear the entire expense of the receivership.

Further, the Court's decision to dissolve CR provides Carlson with a way to monetize his investment in CR that was otherwise unavailable to him. This benefit also inures to Hallinan and Gordon. Carlson, Hallinan and Gordon will benefit from the Court's decision to dissolve CR in proportion to their ownership interests in CR and thus should pay for the cost of the receivership in the same proportions. Thus, the Court denies Plaintiffs' motion to impose the cost of the receivership on Hallinan and Gordon and orders that CR bear the expense.

⁹ *Id.* at *22 (“Carlson, Hallinan and Gordon have demonstrated an inability to work together towards the common good of CR.”).

Finally, Defendants objected to the proposed order's requirement that they pay the judgments against them within ten days, seeking twenty days instead. The Court considers ten days sufficient. The Opinion issued on March 21, 2006. Defendants thus have had two months to marshal their resources. Further, ten days is consistent with the automatic stay provision of Superior Court Civil Rule 62(a). Accordingly, the Judgment Order being entered with this Letter Opinion maintains the ten day requirement.

III. CONCLUSION

For the reasons stated, the Court clarifies its March 21, 2006 Opinion as follows: (1) Plaintiff Carlson is entitled to reimbursement by CR of \$5,523.37 in business expenses plus pre-judgment interest from January 1, 2002; (2) Hallinan and Gordon shall pay for the Court-ordered accounting; and (3) CR shall pay for the receivership of CR. CR shall pay Carlson's expenses to him before its assets are divided up among its shareholders pursuant to the Judgment Order entered simultaneously with this Letter Opinion.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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