

ORIGINAL

IN THE SUPREME COURT OF OHIO

**RICHARD CORDRAY,
OHIO ATTORNEY GENERAL, et al.,**

Plaintiffs-Appellants,

v.

**THE INTERNATIONAL PREPARATORY,
SCHOOL, et al.,**

Defendants-Appellees.

CASE NO.: 2009-1418

**On Appeal from the
Cuyahoga County Court of Appeals
Eighth Appellate District**

**Court of Appeals Case
No. 91912**

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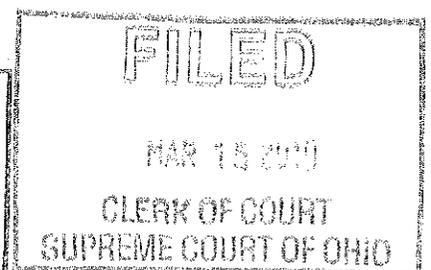
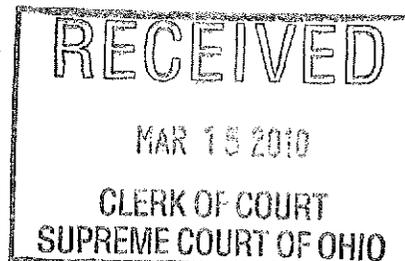
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I. INTRODUCTION

During the course of this litigation, Appellants, Richard Cordray, Ohio Attorney General and the Ohio Department of Education (hereinafter collectively "Appellants") have set forth different theories (which are contradictory) as to who should be liable for alleged overpayments to The International Preparatory School (hereinafter "TIPS"), as well as the basis for liability. In fact, the current theory of liability is at odds with the report of a regular audit of TIPS for the period of July 1, 2004, through October 18, 2005, issued by the Auditor of the State of Ohio (hereinafter the "Audit") which is purportedly the underlying basis for liability in this matter.

Along those lines, it is worth commenting on Appellants' assertion that though they sought recovery against the Estate of Da'ud Malik Abdul Shabazz and his wife, Hasina Shabazz (hereinafter collectively the "Shabazzs") in the proceedings before the trial court and the Court of Appeals of Ohio, Eighth Appellate District (hereinafter the "Court of Appeals"), he has since passed away and thus, they will not address his liability in this appeal. As an initial matter, it must be noted that this is not true as Mr. Shabazz was deceased prior to his estate and his wife being named as party-defendants in the Amended Complaint filed by Appellants. Therefore, it is clear that the reason they have abandoned their claim against the Estate of Mr. Shabazz is not because he is deceased. Rather, it would appear that Appellants have abandoned their claims against the Estate of Mr. Shabazz as they realize their current theory of liability contradicts the legal conclusion in the Audit which provides that Mr. Shabazz is also liable for overpayment of funds to TIPS. As will be discussed further herein, Appellants are now pursuing a theory of liability on the basis that Mrs. Shabazz held the position of treasurer of the school. While Mrs.

Shabazz is not the treasurer, there is no dispute that Mr. Shabazz was not the treasurer of the school. As a result, Appellants would not be able to pursue their claims against the Estate of Mr. Shabazz on the basis of R.C. § 9.39. It would appear that faced with the prospect of admitting that the Audit was legally flawed that they have chosen to abandon their claims against the Estate of Mr. Shabazz. This is significant because it clearly demonstrates that certain legal findings in the Audit cannot be supported by law and raises questions about the validity of the purported legal findings against Mrs. Shabazz. That being said, it will further be demonstrated that liability cannot attach to Mrs. Shabazz for a number of reasons. The most notable being that Mrs. Shabazz was not the treasurer of the school, and that TIPS was not a political subdivision for purposes of R.C. § 9.39. Furthermore, Mrs. Shabazz as a board member of a non-profit corporation is shielded from personal liability for the alleged overpayment of funds to TIPS.

In light of the foregoing, it would be beneficial to briefly review pertinent aspects of the proceedings to date to provide the appropriate context in which to view this matter. This overview, as well as the relevant legal authority will make clear as to why liability cannot attach to Mrs. Shabazz.

II. STATEMENT OF THE CASE AND FACTS

As noted previously, this matter arises from alleged overpayments made to TIPS. TIPS is a privately run non-profit corporation organized pursuant to the laws of the State of Ohio. (See, Defendants' Cross-Motion for Summary Judgment and Memorandum in Opposition to

Plaintiffs' Motion for Summary Judgment (hereinafter the "Cross-Motion") at 1). The board of trustees¹ consisted of six (6) trustees. Id. The board of trustees developed and set policy for the community school and they received no compensation for their services. Id. School administrators managed the day-to-day operations of the community school. Id. School administrators included positions such as a chief executive officer, principal, vice principal, human resource director, financial administrator, and treasurer. Id. The position of treasurer of the school was held by individuals other than Mrs. Shabazz. Id. Other administrative positions of note included, financial administrator which was held by Kenneth Snipes, and bookkeeper which was held by Ernest Weeks. Id. at 6. (See, Plaintiffs' Motion for Summary Judgment, Exhibit "D" at 5).² The community school also hired employees whose duties included the monitoring of student enrollment, and the preparation and submission of monthly attendance reports. (See, Defendants' Reply Brief at 5-6).

The Shabazzs were board members. (See, Cross-Motion at 1). Mrs. Shabazz also served as the treasurer of the board. (See, Answer to First Amended Complaint). All actions that she took in connection with TIPS and/or the community school were in her capacity as a board member and in good faith. (See, Cross-Motion at 1).

TIPS ceased operations on or about October 18, 2005. (See, Verified Amended Complaint at Paragraph 7). Appellants commenced this legal action on or about October 20, 2005. (See, Complaint).

¹ R.C. § 1702.55(K) defines "directors" as persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated.

² In addition, Robert Sustar served as the certified public accountant for TIPS.

On or about January 30, 2007, the Auditor of the State of Ohio issued a Audit. (See, Plaintiffs' Motion for Summary Judgment). The Audit makes the following factual ascertains in support of its finding for recovery against TIPS and the Shabazzs:

- TIPS permanently closed and ceased its operations as a community school in October 2005;
- The Ohio Department of Education (hereinafter the "Department of Education") calculated that the amount overpaid to TIPS for the year ended June 30, 2005, was Three Hundred Sixty-One Thousand Four Hundred Forty-Six Dollars (\$361,446.00);
- The Department of Education calculated that the amount overpaid to TIPS for the year ended June 30, 2006, was One Million Forty-Six Thousand Five Hundred Thirty-Seven Dollars (\$1,046,537.00);
- Thus, between July 1, 2004, and October 18, 2005, TIPS was overfunded by the Department of Education in the amount of One Million Four Hundred Seven Thousand Nine Hundred Eighty-Three Dollars (\$1,407,983.00) which was deposited into TIPS' account; and
- TIPS was not eligible for the foregoing funds. Thus, these funds were due the Department of Education and should have been returned. Id.

The Audit contains finding for recovery against TIPS and the Shabazzs in the amount of One Million Four Hundred Seven Thousand Nine Hundred Eight-Three Dollars (\$1,407,983.00). Id.

The Audit also states that TIPS was subject to R.C. § 1702.15 which pertains to non-profit corporations.³ (See, Plaintiff's Motion for Summary Judgment, Exhibit "A" at 8). It must further be noted, that the Audit makes no factual findings that the Shabazzs were public

³ The fact that the Auditor of the State of Ohio subjected TIPS to R.C. § 1702.15 is a clear indicator that the deemed the entity a non-profit corporation.

officials, or that the actions of the Shabazzs in any way contributed to the alleged overpayment of funds.

After the Audit, the Appellants amended their Complaint to add the Shabazzs as party-defendants. (See, Verified Amended Complaint). The Amended Complaint recognizes that TIPS is a non-profit corporation, and it makes no allegations that the Shabazzs were public officials. *Id.* Appellants and the Shabazzs both moved for summary judgment. At the trial court, Appellants took the position in part that private individuals could be liable for overpayment of public funds. (See, Plaintiffs' Supplemental Memorandum Regarding Summary Judgment). With respect to this issue, Appellants did not assert that the Shabazzs were public officials. *Id.* In fact, Appellants conceded that the Shabazzs were private individuals. *Id.* The Shabazzs took the position that board members could not be personally liable for a corporations obligations such as the alleged overpayment of public funds. (See, Cross-Motion). The trial court found in favor of the Plaintiffs.

An appeal was perfected to the Court of Appeals. It was only at the proceedings before the Court of Appeals that the Appellants radically changed their theory of liability and asserted that the Shabazzs were public officials. (See, Appellees' Brief at 1-2).⁴ It is worth noting, Appellants initially asserted that the Shabazzs were public officials per R.C. §

⁴ For purposes of clarification, Appellees' Brief before the Court of Appeals was the brief of Richard Cordray, Ohio Attorney General and the Ohio Department of Education.

2921.01(A).⁵ Id. at 8. However, the Court of Appeals correctly noted that this section is explicitly limited as the term is used in sections 2921.01 to 2921.45 which concerns criminal offenses against justice and public administration in general, Cordray v. International Preparatory School, No. 91912 (Ohio App. 8th Dist. May 21, 2009). Thus, Appellants' reliance on this section was misplaced, and it was found not to be relevant to the proceedings. Id. This section also would not have been relevant on factual grounds. In further examining the issue, the Court of Appeals concluded that the Shabazzs were not public officials. Id. Specifically, it found that there was no evidence in the record to find that the Shabazzs possessed the attributes of a public official. Id. Therefore, the Court of Appeals sustained Appellees' appeal to the extent that the trial court erred by granting summary judgment against the Shabazzs. Id. Specifically, it was held that the Audit did not contain specific factual allegations that the Shabazzs were responsible for the community school receiving public funds, which it was deemed ineligible by the Ohio Department of Education. Id. Appellants filed a notice of appeal.⁶

⁵ Interestingly, the Court of Appeals of Ohio, Second Appellate District applying the definition of a public official contained in R.C. § 2921.01(A) recently found that a teacher at a community school was not a public official. State v. Goff, No. 22636 (Montgomery App. April 3, 2009). The definition at issue provided as follows:

“A public official is defined as “any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to legislators, judges, and law enforcement officers.”

Thus, one must conclude that Mrs. Shabazz would not have been a public official under this statute as well.

⁶ Appellants now raise yet another theory of liability in regard to Ms. Shabazz before this Court.

III. LAW AND ARGUMENT

Response to Proposition of Law No. 1

R.C. § 9.39 has no application to Hasina Shabazz. Moreover, R.C. § 1702.55 shields Mrs. Shabazz from personal liability for funds allegedly overpaid to the community school.

Appellants' reliance on R.C. § 9.39 to impose liability on Mrs. Shabazz is misplaced as it has no application to her. As an initial matter, Mrs. Shabazz was the treasurer of the board of directors. She was not the treasurer of the school. This being the case, Mrs. Shabazz was not an officer of the school. Therefore, she was not a public official for purposes of R.C. § 9.39. In addition, Mrs. Shabazz cannot be deemed a public official for purposes of R.C. § 9.39 as TIPS was not a political subdivision per that statute. R.C. § 9.39 is also not applicable as there is no evidence that Mrs. Shabazz or her subordinates received or collected any overpayments to TIPS. Furthermore, R.C. § 3314.04 exempts Mrs. Shabazz from the application of R.C. § 9.39. Finally, R.C. § 1702.55⁷ shields Mrs. Shabazz from personal liability for funds allegedly overpaid to TIPS.

A. Hasina Shabazz was not the Treasurer of the School:

As an initial matter, Mrs. Shabazz was not the treasurer of the school. Mrs. Shabazz served on the board of directors and served as the treasurer of the board of directors. This fact should not be in dispute. Mrs. Shabazz clarified that she was merely the treasurer of the board of directors and not the treasurer of the school in her response to Appellants' Amended Complaint when she stated as follows:

⁷ A copy of R.C. § 1702.55 is attached as Exhibit "A" and incorporated herein by reference.

Defendant, Hasina Shabazz was treasurer of the International Preparatory School Corporate Board . . .⁸

Further, in response to Appellants' interrogatories, Mrs. Shabazz stated in response to a question as to which positions she held with TIPS as follows:

I served as a Member of the Board and as Treasurer of Board . . .⁹

In addition, the evidence in the record reflects that all actions taken by Mrs. Shabazz was in her capacity as a board member and that the position of treasurer of the school was held by other individuals. Moreover, Appellants attempted reliance on alleged findings in the Audit concerning Mrs. Shabazz's role with TIPS is misplaced.¹⁰ It is unclear as to whether the findings in the Audit provide that Mrs. Shabazz was treasurer of the board of directors of TIPS or the treasurer of the school. Thus, Mrs. Shabazz's role as treasurer of the board of directors is consistent with the findings in the Audit which draws no distinction between the two positions.

Moreover, to the extent that there is some debate as to the position held by Mrs. Shabazz, it must be construed in her favor as a matter of law as this issue arises in the context of Appellants' motion for summary judgment.¹¹ The party against whom the motion for summary judgment is made, that party is entitled to have the evidence construed most strongly in his favor. Civ. R. 56. At a minimum, it raises an issue of fact which precludes the granting of summary

⁸ See, Answer to First Amended Complaint, Paragraph 8.

⁹ See, Plaintiffs' Motion for Summary Judgment, Exhibit "D" at 5.

¹⁰ To the extent that it is necessary, the alleged finding that Mrs. Shabazz was the treasurer of the school has been rebutted.

¹¹ Appellants seek to have the granting of their motion for summary judgment by the trial court affirmed.

judgment, and the reversal of the Court of Appeal's decision as Appellants' theory of liability is predicated on Mrs. Shabazz being the treasurer of the school.

B. Hasina Shabazz was not a Public Official for Purposes of R.C. § 9.39

Appellants ask us to examine R.C. § 117.01(E) to determine what constitutes a public official for purposes of R.C. § 9.39. R.C. § 117.01(E) provides:

“Public official means any officer, . . . of a public office.”

In the instant matter, it is undisputed that TIPS is a non-profit corporation. Therefore, a review of R.C. § 1702.34(A) which lists the officers of the corporation is necessary. R.C. § 1702.34(A) provides in pertinent part:

“The officers of a corporation shall consist of a president, a secretary, a treasurer . . .”

As noted earlier, Mrs. Shabazz was not the treasurer of the school. Thus, she was not an officer of TIPS and cannot be deemed a public officer per R.C. §§ 117.01 and 9.39. Accordingly, R.C. § 9.39 is not applicable in this matter, and liability cannot attach to Mrs. Shabazz.

C. The International Preparatory School is not a Political Subdivision for Purposes of R.C. § 9.39

Mrs. Shabazz also cannot be considered a public officer because TIPS is not a political subdivision for purposes of R.C. § 9.39. Appellants ask us to examine R.C. § 117.01(D) with respect to the definition of a public office for purposes of R.C. § 9.39. This section provides in pertinent part:

“Public office means any . . . political subdivision . . . established by the law of this state for the exercise for any function of government.”

Notwithstanding, Appellants' assertions to the contrary, the Revised Code makes clear that community schools are established as either non-profit corporations under Chapter 1702 or public benefit corporations under Chapter 1702. R. C. § 3314.03. Accordingly, it is clear that community schools are established as non-profit corporations and not political subdivisions. This is consistent with prior opinions of the Attorney General's office in which it has opined that a non-profit corporation is not an officer, board commission, or political subdivision of the state. 2000 Ohio Att. Gen. Op. 2000-006, 2000 Ohio AG LEXIS 6 (Feb. 14, 2000). A non-profit corporation formed under P.C. Chapter 1702 is neither established by, nor functions as an agency of state and local government. *Id.* A non-profit corporation is a private, non-governmental entity. *Id.* The fact that it performs a public purpose does not distinguish it from other non-profit corporations which are considered private. *Id.*

In their efforts to establish community schools as political subdivisions for purposes of R.C. § 9.39, Appellants attempt to rely on definitions contained in R.C. §§ 2744.01(F) and 4117.01(B). However, Appellants reliance on these definitions is misplaced as those definitions are limited to their use in those particular chapters. R.C. § 2744 pertains to political subdivision tort liability, and R.C. § 4117 pertains to public employees collective bargaining. R.C. § 2744.01 and R.C. § 4117.01. These chapters are not pertinent to the instant matter. Thus, the definition of a political subdivision contained within those chapters is of no relevance. Instead, it is clear that the State legislature only intended community schools to be political subdivisions in limited circumstances such as matters arising under R. C. §§ 2744 and 4117. Therefore, community schools are not deemed to be political subdivisions under other sections of

the Revised Code, such as R.C. § 9.39. It is also worth noting that certain entities can be political subdivisions for some purposes but not others. 2004 Ohio Atty. Gen. Op. 2004-014, 2004 Ohio AG LEXIS 12 (April 15, 2004).

Appellants also cite to certain legal authority to support the proposition that community schools are political subdivision for purposes of R.C. § 9.39. However, it must be noted that none of the cited legal authority address where the community schools are political subdivisions for purposes of R.C. § 9.39. This being the case, the holdings in those matters are not persuasive, and it must be concluded that TIPS is not a political subdivision for purposes of R.C. § 9.39. Accordingly, Mrs. Shabazz is not a public officer, and liability cannot attach to her.

D. Hasina Shabazz did not Receive or Collect any Alleged Overpayments to the International Preparatory School

In order to establish liability under R.C. § 9.39, it needs to be proven that Mrs. Shabazz or her subordinates received or collected the alleged overpayments to TIPS. R.C. § 9.39 provides in pertinent part as follows:

“All public officials are liable for all public money received or collected by them or by their subordinates under color of office . . .”

In the instant matter, the record is devoid of any evidence that Mrs. Shabazz or her subordinates received or collected any of the alleged overpayments to TIPS. This being the case, R. C. § 9.39 has no application to the instant matter, and liability cannot attach to Mrs. Shabazz.

E. The International Preparatory and Hasina Shabazz are Exempt from R.C. § 9.39

Community schools are exempt from R.C. § 9.39. R.C. § 3314.04¹² provides as follows:

“Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents.”

In the instant matter, Chapter 3314 does not specify R.C. § 9.39 is to have any application to community schools, such as TIPS. This being the case, liability cannot attach to Mrs. Shabazz per R.C. § 9.39. This special or local provision makes clear that it was the intent of the state legislature to exempt community schools from more general provisions, such as R.C. § 9.39, unless specifically noted otherwise.

Further, a review of Chapter 3314 also makes clear that there is no need to apply R.C. § 9.39 to community schools as community school regulatory scheme is already in place. Community schools are monitored by their sponsors, as well as the Department of Education. For example, it is the sponsor’s responsibility to be the primary monitor and enforcer of a community school’s compliance with all applicable laws and the contract, as well as monitor and evaluate the fiscal performances of the community school. R.C. § 3314.03(D).

¹² Appellants mischaracterize R.C. § 3314.04 in their brief. They mistake that R.C. § 3314.04 only exempt community schools from education specific laws. This is not correct.

F. **R.C. § 1702.55 Shields Hasina Shabazz from Personal Liability for Funds Allegedly Overpaid to the Community School.**

As noted previously, community schools are state funded, but each community school is run by a private corporation. Ohio Congress of Parents v. State Bd. of Edn., 111 Ohio St.3d 568, 569, (2006). In fact, Ohio law mandates that community schools be established as non-profit corporations under Chapter 1702 of the Ohio Revised Code. R.C. 3314.03(A)(1).

Directors and officers of a corporation generally are not liable for a corporation's obligations. Soter v. Soter, No. 20403 (Montgomery App. April 1, 2005) citing Falkiewicz v. Blackburn, 155 Ohio App.3d 562, 565 (2003). Furthermore, R.C. § 1702.55(A) provides that directors of a corporation shall have no personal liability for any obligations of the corporation. It provides in pertinent part:

“The members, the directors, and the officers of a corporation shall not be personally liable for any obligation of the corporation.”

In Bishop v. Oakstone Academy, 477 F. Supp.2d 876, 889 (S.D. Ohio 2007), the United States District Court held that the board of directors and each director of a non-profit corporation that operated a school which received public funding could not be personally liable for actions taken through the corporation.

The instant matter is analogous to Bishop in that Appellants are attempting to impose personal liability on a board member of a non-profit corporation that operated a school which received public funding. The only factual basis for recovery contained in the Audit is that there was an overpayment of funds to the community school. It is undisputed that the Mrs. Shabazz was a board member of a non-profit corporation. In fact, all actions that she took in connection

with TIPS was in her capacity as a board member and in good faith. Accordingly, she cannot be held personally liable for certain funds that were allegedly overpaid to the community school.¹³ It should also be noted that the Appellants have put forth no evidence that Mrs. Shabazz has engaged in any wrongdoing that resulted in the overpayment of funds. As noted earlier, Mrs. Shabazz was not the individual whose duties included monitoring enrollment and preparing monthly attendance reports to the Department of Education.

G. Public Policy Mandates that Board of Directors not be Liable for Corporate Obligations

In enacting community school legislation, the state legislature declared its purpose included providing parents a choice of academic environments for their children. Ohio Congress of Parents, at 569. As discussed, these community schools are governed most typically by board of directors comprised of private citizens who receive nominal or no compensation for their services. R.C. § 3314.025. If these private citizens are to be strictly and personally liable for the alleged overpayment of funds, it would likely have a “chilling effect” as many individuals would be reluctant to serve on the board of directors of community schools. This would have a detrimental impact on community schools, and the students who desire their services. Public policy requires that this obstacle not be placed in front of community schools who strive to educate children in the State of Ohio.

¹³ Mrs. Shabazz disagrees with the findings contained in the audit conducted of TIPS by the State of Ohio Auditor. Nevertheless, she did not address these findings as the interests of the community school were represented by the receiver who retained his own legal counsel.

CONCLUSION

ACCORDINGLY, IT IS RESPECTFULLY REQUESTED that this Honorable Court issue an Order, affirming the decision of the Court of Appeals of Ohio, Eighth Appellate District for the reasons set forth herein.

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CERTIFICATE OF SERVICE

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1702.55 Liability of members, directors and officers of corporation.

(A) The members, the directors, and the officers of a corporation shall not be personally liable for any obligation of the corporation.

(B) Directors who vote for or assent to:

(1) A distribution of assets to members contrary to law or the articles;

(2) A distribution of assets to persons other than creditors during the winding up of the affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation, or without making adequate provision therefor;

(3) The making of loans, other than in the usual conduct of its affairs or in accordance with provisions therefor in the articles, to an officer, director, or member of the corporation; shall be jointly and severally liable to the corporation as follows: in cases under division (B)(1) of this section up to the amount of such distribution in excess of the amount that could have been distributed without violation of law or the articles, but not in excess of the amount that would inure to the benefit of the creditors of the corporation if it was insolvent at the time of the distribution or there was reasonable ground to believe that by such action it would be rendered insolvent, or to the benefit of the members other than members of the class in respect of which the distribution was made; and in cases under division (B)(2) of this section, to the extent that such obligations (not otherwise barred by statute) are not paid, or for the payment of which adequate provision has not been made; and in cases under division (B)(3) of this section, for the amount of the loan with interest thereon at the rate of six per cent per annum until such amount has been paid, except that a director shall not be liable under division (B)(1) or (2) of this section if in determining the amount available for any such distribution, the director in good faith relied on a financial statement of the corporation prepared by an officer or employee of the corporation in charge of its accounts or certified by a public accountant or firm of public accountants, or in good faith the director considered the assets to be of their book value, or the director followed what the director believed to be sound accounting and business practice.

(C) A director who is present at a meeting of the directors or a committee thereof at which action on any matter is authorized or taken and who has not voted for or against such action shall be presumed to have voted for the action unless the director's written dissent therefrom is filed either during the meeting or within a reasonable time after the adjournment thereof, with the person acting as secretary of the meeting or with the secretary of the corporation.

(D) A member who knowingly receives any distribution made contrary to law or the articles shall be liable to the corporation for the amount received by the member that is in excess of the amount that could have been distributed without violation of law or the articles.

(E) A director against whom a claim is asserted under or pursuant to this section and who is held liable thereon shall be entitled to contribution, on equitable principles, from other directors who also are liable; and in addition, any director against whom a claim is asserted under or pursuant to this section or who is held liable shall have a right of contribution from the members who knowingly received any distribution made contrary to law or the articles, and such members as among themselves shall also be entitled to contribution in proportion to the amounts received by them respectively.

**Exhibit
"A"**

(F) No action shall be brought by or on behalf of a corporation upon any cause of action arising under division (B)(1) or (2) of this section at any time after two years from the day on which the violation occurs.

(G) Nothing contained in this section shall preclude any creditor whose claim is unpaid from exercising such rights as the creditor otherwise would have by law to enforce the creditor's claim against assets of the corporation distributed to members or other persons.

Effective Date: 04-10-2001