

ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID GOODMAN, DIRECTOR,
OHIO DEPARTMENT OF
COMMERCE,

Plaintiff-Appellant,

v.

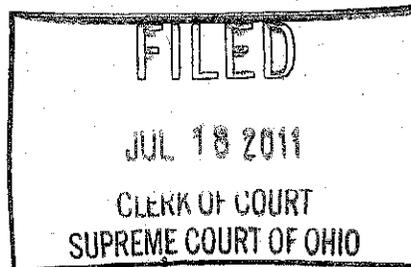
KIMBERLY MAYHEW, ESQ.,
ADMINISTRATOR FOR THE
ESTATE OF ROY DILLABAUGH,
ALICE JANE DILLABAUGH,
LORNE DILLABAUGH and
JOHANNA LONG,

Defendants-Appellees.

Case No. 2010-2159

On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District

Court of Appeals
Case Nos. CA 23834, 23835, 23842



MERIT BRIEF OF DEFENDANT-APPELLEE ALICE JANE DILLABAUGH

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Plaintiff-Appellant the Director, Ohio Department of Commerce (“Director”) filed this action against Defendant-Appellee Ms. Alice Jane Dillabaugh (“Ms. Dillabaugh”) “pursuant to Revised Code Sections 1707.26, 1707.27, and 1707.27,” alleging several violations of Revised Code Chapter 1707 by Ms. Dillabaugh’s deceased husband, Roy Dillabaugh.¹ But the Director has never alleged that Ms. Dillabaugh violated the Securities Act. In fact, in September 2009, at the request of the trial court, the Director filed an Amended Complaint for the purpose of clarifying that the Director was **not** alleging that Ms. Dillabaugh had violated the Securities Act.²

Rather, as the Director admitted in the Amended Complaint, Ms. Dillabaugh was only being named as a defendant because she is “a necessary party under Civ. R. 19.” Presumably, the Director deems her a necessary party because she is in possession of life insurance proceeds from policies on which her deceased husband paid premiums. The Director alleges—but has never proven—that those premiums were paid by Roy Dillabaugh from funds he obtained through securities fraud. Based on that allegation, the Director claims that Chapter 1707 gives him the authority to enjoin Ms. Dillabaugh’s expenditure of her money, even though the Director admits that Ms. Dillabaugh did not violate the Securities Act and even though the Director had obvious alternative legal remedies (i.e., a judgment for money damages). The trial court agreed, ruling that, despite the fact that the Director admitted that Ms. Dillabaugh had not violated the Securities Act, the Director had the statutory authority to proceed with the Securities

¹ Amended Complaint, ¶¶ 32-63.

² Motion for Leave to File Second Amended Verified Complaint, dated September 25, 2009. See also Plaintiff’s Memorandum Contra Defendant Alice Jane Dillabaugh’s Motion for Summary Judgment, dated October 9, 2009, p. 4 (“Ms. Dillabaugh correctly acknowledges that Plaintiff has not alleged that she violated the Securities Act...”)

Act against Ms. Dillabaugh for injunctive relief.³

On appeal, the Second District Court of Appeals correctly reversed the trial court's judgment with respect to the Director's authority under Chapter 1707. Specifically, the Court of Appeals concluded correctly that the Director's right to pursue an injunction under R.C. 1707.26 is limited by the express language of the statute to people who are accused of having violated the Securities Act, and not third parties (such as Ms. Dillabaugh) who are not so accused. App. Op. at 18. The Director then initiated the instant appeal.

Meanwhile, the court-appointed receiver over the estate of Roy G. Dillabaugh and The Dillabaugh Group has initiated a separate case, now proceeding in Montgomery County Common Pleas Court, against Ms. Dillabaugh and a host of others. See *Robert G. Hanseman, Receiver v. Alice Jane Dillabaugh, et al.*, Montgomery County Court of Common Pleas, Case No. 2011 CV 0361. The Director asserts that, now that the Receiver has been appointed and has initiated independent litigation on behalf of the Receivership Estate, there is nothing left for the Director to do, vis a vis Ms. Dillabaugh. (Brief of Appellant, pp. 1, 19.)

Ms. Dillabaugh agrees. Because the Director has apparently abandoned the action that it filed against her under R.C. 1707.26 et seq., there exists no live controversy between Ms. Dillabaugh and the Director. For this reason, Ms. Dillabaugh chose not to respond to the Director's petition for jurisdiction to this Court and at this point will waive appearance at oral argument should the Court schedule one. There is simply

³ Decision and Entry, dated November 12, 2009, p. 7.

nothing that this Court can decide that will impact the proceedings that are ongoing concerning Ms. Dillabaugh and the estate of her late husband.

The Director is not a party to the Receiver's case against Ms. Dillabaugh, the Director has not moved to join those proceedings as a party and the Director has not requested a stay of those proceedings pending review by this Court. Although the Director did not specify so in the Second Amended Complaint (which contained broad requests for relief), apparently the Director intended thus to seek only preliminary relief against Defendants under R.C. 1707.26—though that intention was never made apparent to the court of appeals or to Ms. Dillabaugh. In any event, Ms. Dillabaugh agrees with the Director that any opinion that this Court would render now regarding the meaning of R.C. 1707.26 would be strictly advisory and would not impact the current proceedings to which the Director is not a party.

Whether the court of appeals opinion itself remains viable appears to come down to either whether the case is now moot (solely due to actions of the Director, in which case that opinion should stand), or whether the court of appeals lacked jurisdiction over the Director's original appeal and pendant cross-appeals (in which case the opinion ought to be vacated). At the time of the appeal, based on the nature of the state's broad legal action, requests for relief, and other factors, Ms. Dillabaugh had a good faith belief in the jurisdiction of the appellate court over her cross appeal.⁴ And regardless, the

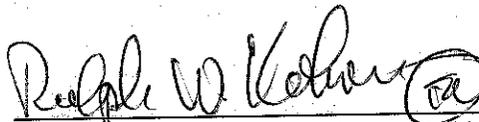
⁴ The Director is also incorrect when he asserts that "nothing in the Final Order imposed any relief upon the Recipients" Brief, p. 14. In fact, the Final Order still impacts Ms. Dillabaugh in specific ways. For example, the Final Order expressly prohibits Defendant Hartford from making any payment to Ms. Dillabaugh pending further order of the Court. Hartford and Ms. Dillabaugh have reached agreement on the amount to be paid to Ms. Dillabaugh (the beneficiary of a policy Hartford issued on Mr. Dillabaugh's life), but the Final Order precludes the parties from consummating that agreement.

Second District Court of Appeals was correct in its analysis of Chapter 1707. The Director's enforcement authority is no greater than that given by the clear and unambiguous language of the Securities Act, and the Securities Act clearly and unambiguously does not authorize the Director to seek injunctive relief (temporary or otherwise) against people the Director admits have not violated its provisions.

But the answers to those questions simply do not matter to Ms. Dillabaugh at this stage of the case, given the Director's current concession that any decision by this Court would be academic. A Receiver has been appointed and is pursuing litigation against Ms. Dillabaugh in a separate case. Indeed, in the absence of any existing dispute between the Director and Ms. Dillabaugh, it is the Director that is seeking an advisory opinion from this Court – i.e., that the Second District's decision was an advisory opinion. No decision by this Court will affect any issues in any case between the parties. See *Schwab v. Lattimore*, 166 Ohio App.3d 12, 848 N.E.2d 912, 2006-Ohio-1372, ¶ 10 (stating that “[t]he duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case”). While the Director's motivation for prosecuting the appeal to this Court may be an interest in expanding his authority for future cases, that cannot serve as the basis for this Court's exercise of its reviewing authority in the absence of an existing case or controversy. In short, even if the Director is correct that the Second District should not

have decided Ms. Dillabaugh's cross-appeal because there was no live controversy, that is equally true of the instant appeal.

Respectfully submitted,

Handwritten signature of Ralph W. Kohnen in cursive, with a circled 'TA' at the end.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellee Alice Jane

Dillabaugh was served by U.S. mail on July 18, 2011 upon the following counsel:

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