

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 00-61056
)	
RICHLAND HOSPITAL, INC., Debtor.)	CHAPTER 7
)	
)	
JOSIAH L. MASON, TRUSTEE FOR RICHLAND HOSPITAL, INC., Plaintiff,)	ADV. NOS. 02-6050 02-6051 02-6052 02-6053
)	
v.)	JUDGE RUSS KENDIG
)	
MATTHEW PENTZ, M.D., <i>et al.</i> , Defendants/Third- Party Plaintiffs,)	MEMORANDUM OF DECISION
)	
v.)	
)	
BRICKER & ECKLER, LLP, and MICHAEL A. MESS, Third-Party Defendants.)	

This matter is before the court on the Motion for Order Directing Trustee to Pay Defendants' Attorney Fees filed by defendants and third-party plaintiffs Walter Massie, M.D., David Massie, M.D., Rudolfo S. Vocal, M.D., deceased, Edward R. Adams, Mary Jo Pentz, and Joan Smith (collectively the "Board Group"), the responses thereto filed by defendant and cross-claimant Jim Petro, Attorney General ("Attorney General"), and plaintiff Josiah Mason, Chapter 7 trustee ("Mason"), and the memoranda in support filed by all the parties.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a), the general order of reference entered in this district on July 16, 1984 and 28 U.S.C. § 157.

FACTS

Richland Hospital, Inc. (“Debtor”) voluntarily commenced a case under Chapter 11 on April 7, 2000. By October 30, 2000, the Debtor had ceased operating its business and had sold substantially all of its assets. The Debtor’s case was thereafter converted to Chapter 7, and Mason was appointed trustee on November 17, 2000. On April 5, 2002, Mason filed an adversary proceeding against the Board Group for misappropriation of corporate opportunity, unjust enrichment, breach of fiduciary duty and civil conspiracy, and to compel accounting, recover postpetition transfers and pierce the corporate veil.

ARGUMENTS¹

The Board Group requests that Mason advance the attorney fees and expenses, pursuant to O.R.C. § 1702.12(E)(5)(a) and (b),² that they incur in defending against Mason’s complaint in the within action. The Board Group asserts that Ohio’s Nonprofit Corporation Law, § 1702 *et seq.*, addresses a nonprofit corporation’s obligations to advance attorneys fees and expenses to current or former members of a board of directors of the corporation when sued. The Board Group argues that under § 1702.12(E)(5)(a), read in conjunction with § 1702(E)(5)(b), unless three exceptions apply, that are currently inapplicable, a nonprofit corporation must advance the expenses, including attorney fees, incurred by a board member in defending an action brought against the board if two conditions are met. First, the board member must request the advance. Second, the board member must agree to repay the advance if it is ultimately determined that the board member undertook the action with deliberate intent to cause injury to the corporation or with reckless disregard for the best interests of the corporation. The Board Group asserts that the word *may* in subsection (E)(5)(b) refers to a board’s discretion to hold harmless a board member for reimbursement of advanced litigation expenses, if the board member is found not entitled to indemnification, rather than the board’s discretion to advance those expenses as they are incurred. The Board Group argues that its

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The court will focus on the arguments of the Board Group and the Attorney General, inasmuch as they relate directly to the statute discussed herein. Mason advances arguments that the bankruptcy code preempts state law and that the advancement of litigation expenses is not entitled to administrative expense priority status. The language of the statute is dispositive of the issue before the court, *see infra* Analysis section, so Mason’s arguments will not be addressed.

²

All references to code sections in this opinion refer to the Ohio Revised Code, unless otherwise noted.

interpretation of subsections (E)(5)(a) and (E)(5)(b) is giving the subsections their plain meaning and that the legislative history of the 1988 amendments to § 1702.12 supports its argument. The Board Group asserts that it has requested advancement of litigation expenses from Mason but that he has refused to honor its request.

The Attorney General responds by arguing that O.R.C. § 1702.12(E)(5)(b) expressly states that advance payment of litigation expenses is within the discretion of the nonprofit corporation's board. The Attorney General asserts that the last sentence of subsection (E)(5)(a)(i) must be read in conjunction with its specific reference to (E)(5)(b). The Attorney General asserts that subsection (E)(5)(b) provides that a nonprofit corporation *may* pay a board member's litigation expenses in advance *if* the board members *authorize* the advance payment and the board member requesting the advance agrees to undertake to repay the board if it is later determined that the board member is not entitled to indemnification. The Attorney General argues that reading the statute the way in which the Board Group reads it means that subsection (E)(5)(b) would have to be completely ignored, which is contrary to law. The Attorney General argues that because a board would have to authorize a board member's advance litigation expenses, under 11 U.S.C. § 323, Mason would have to authorize the Board Group's request because he is the only representative of the estate and is solely responsible for the estate's property. Mason has refused.

ANALYSIS

Ohio's Nonprofit Corporation Law, which is the subject of this dispute, provides in pertinent part:

(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was a director, officer, employee, or agent of or a volunteer of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, member, manager, or agent of or a volunteer of another domestic or foreign nonprofit corporation or business corporation, a limited liability company, or a partnership, joint venture, trust, or other enterprise against expenses, including attorney's fees, actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation

. . . .

(5)(a)(i) [T]he expenses incurred by the director or volunteer in defending the action, suit, or proceeding, including attorney's fees, shall be paid by the corporation. *Upon the request of the director or volunteer and in accordance with division (E)(5)(b) of this section, those expenses shall be paid as they are incurred,* in advance of the final disposition of the action, suit, or proceeding.

(ii) [T]he expenses incurred by a director or volunteer in defending an action, suit, or proceeding referred to in division . . . (2) of this section, including attorney's fees, shall not be paid by the corporation upon the final disposition of the action, suit, or proceeding, or, if paid in advance of the final disposition of the action, suit, or proceeding, shall be repaid to the corporation by the director or volunteer, if it is proved, by clear and convincing evidence, in a court with jurisdiction that the act or omission of the director or volunteer was one undertaken with a deliberate intent to cause injury to the corporation or was one undertaken with a reckless disregard for the best interests of the corporation.

(b) *Expenses, including attorney's fees,* incurred by a director, officer, employee, member, manager, agent, or volunteer in defending any action, suit, or proceeding referred to in division . . . (2) of this section *may be paid by the corporation as they are incurred,* in advance of the final disposition of the action, suit, or proceeding, *as authorized by the directors in the specific case,* upon receipt of an undertaking by or on behalf of the director, officer, employee, member, manager, agent, or volunteer to repay the amount if it ultimately is determined that the person is not entitled to be indemnified by the corporation.

O.R.C. § 1702.12(E).

The parties' argument basically boils down to differing interpretations of subsection (E)(5)(b). The Board Group argues that the permissive nature of subsection (E)(5)(b) applies to a board's discretion to forgive a board member's repayment of advanced litigation expenses if the board member is found not entitled to indemnity whereas the Attorney General argues that the word "may" refers to the board's discretion to authorize or withhold the advance payment of expenses. Neither party provides any case law interpreting the statute's language as no opinion has been published on the subject. This is a matter of first impression to the best knowledge of all involved, however, there is a plethora of case law establishing the parameters for interpreting the language of a statute.

The Ohio Supreme Court stated that “[t]he primary goal in statutory interpretation is to give effect to the intent of the legislature.” Bailey v. Republic Eng’rd Steels, Inc., 91 Ohio St.3d 38, 39 (2001) (citing Christe v. GMS Mgmt. Co., Inc., 88 Ohio St.3d 376, 377 (2000)). To accomplish this, a court must “first look[] to the language of the statute.” Id. (citing Provident Bank v. Wood, 36 Ohio St.2d 101, 105 (1973)); accord State ex rel. Burrows v. Industrial Comm’n, 78 Ohio St.3d 78, 81 (1997) (to determine legislative intent, a court should “first look to the plain language” of a statute). “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ., 74 Ohio St.3d 543, 545 (1996) (citing State ex rel. Herman v. Klopfleisch, 72 Ohio St.3d 581, 584 (1995)). Ambiguity only exists when a statute can be interpreted in more than one reasonable way. State ex rel. Toledo Edison Co. v. Clyde, 76 Ohio St.3d 508, 513-14 (1996).

In the case at hand, subsection (E)(5)(a)(i) provides that expenses incurred by a board member in defense of a suit against the board shall be paid as they are incurred if the board member so requests, subject to the constraints set forth in subsection (E)(5)(b). The reference to subsection (E)(5)(b) cannot be ignored. State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ., 69 Ohio St.3d 217, 220 (1994) (when looking to the language of a statute, a court must “give effect to the words used”). Subsection (E)(5)(b) provides litigation expenses “may be paid . . . as they are incurred, in advance of the final disposition of the . . . proceeding, *as authorized by the directors in the specific case.*” O.R.C. § 1702.12(E)(5)(b) (emphasis added). The phrase “as authorized by the directors” modifies the previous phrase “in advance of the final disposition . . .,” which modifies “as they are incurred.” Reading these three phrases, together, in succession, the subsequent modifying the previous, leads to the only reasonable interpretation that advance payment of litigation expenses, as they are incurred, is up to a board’s discretion. “It is a basic tenet of statutory construction that ‘the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.’” State v. Wilson, 77 Ohio St.3d 334, 336 (1997) (quoting State ex rel. Cleveland Elec. Illum. Co. v. Euclid, 169 Ohio St. 476, 479 (1959)). “In looking to the face of a statute . . . to determine legislative intent, significance and effect should be accorded every word, phrase, sentence and part thereof, if possible.” Id. (citing Wachendorf v. Shaver, 149 Ohio St. 231, ¶ 5 of syllabus (1948) and O.R.C. § 1.47(B)). Mason is the legal successor to the rights of the board of directors. In re Peck Foods, 196 B.R. 434, 438 (Bankr. E.D. Wis. 1996) (citing Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 352-53 (1985)). He is unwilling to pay his opponent’s legal fees and expenses. The Board Group’s motion must fail.

An order in accordance with this memorandum of decision shall enter forthwith.

Judge Russ Kendig
U.S. Bankruptcy Judge

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FOR RICHLAND HOSPITAL,)	02-6052
INC.,)	02-6053
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(collectively the “Board Group”), the responses thereto filed by defendant and cross-claimant Jim Petro, Attorney General, and plaintiff Josiah Mason, Chapter 7 trustee, and the memoranda in support filed by all the parties.

For the reasons set forth in the accompanying memorandum of decision, the Board Group’s motion is hereby **DENIED**.

It is so ordered.

Judge Russ Kendig
U.S. Bankruptcy Judge