

2000

Gary and Kathleen McFadden v. Russell J. Diefenderfer and Paula Diefenderfer: Brief of Appellee

Utah Court of Appeals

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Russell J. Diefenderfer, Paula Diefenderfer; pro se.

Jay R. Mohlman; Schmutz, Mohlman & Rohbock; attorneys for appellee.

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IN THE COURT OF APPEALS
STATE OF UTAH

GARY and KATHLEEN McFADDEN,

Plaintiffs,

vs.

RUSSELL J. DIEFENDERFER and
PAULA DIEFENDERFER,

Defendants.

Appellate Court No. 20000611

Priority No. 15

BRIEF OF APPELLEES

APPEAL FROM FINAL ORDER OF THE THIRD DISTRICT COURT
FROM THE HONORABLE GLENN K. IWASAKI

Russell J. Diefenderfer
Paula Diefenderfer
P.O. Box 520714
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Pro Se Appellants

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FILED
Utah Court of Appeals

DEC 05 2000

Paulette Stagg
Clerk of the Court

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Table of Contents

Table of Authorities	iii
Cases	iii
Statutes	iii
COMMENT ON APPELLANTS' STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENTS	3
ARGUMENT	4
I. The Defendants failed to meet their burden of proof that all of the money in their bank accounts at the time of the garnishment was derived from wages and, therefore, the trial court properly used its discretion in denying Defendants' objections to garnishment.	4
II. As a matter of law, once funds are deposited into a bank account, even if they were solely from wages, they lose their characteristic as wages or disposable earnings and, therefore, are not subject to the wage exemption.	6
III. Plaintiffs were not required to conduct a supplemental hearing prior to issuing garnishment	10
IV. No evidence exists that the trial court required Defendants to strictly adhere to the rules while not requiring Plaintiffs to do so.	11
CONCLUSION	11
ADDENDUM	A-1

Table of Authorities

Cases

<i>Citronelle-Mobile Gathering, Inc. v. Watkins</i> , 934 F.2d 1180 (11th Cir. 1991)	9
<i>Dunlop v. First National Bank</i> , 399 F.Supp 855 (D. Ariz. 1975)	9
<i>Edwards v. Henry</i> , 293 N.W.2d 756 (Mich. 1980)	9
<i>Funk v. Utah State Tax Com’n</i> , 839 P.2d 818 (Utah 1992)	8
<i>Hertz v. Fischer</i> , 339 So.2d 1148 (Fl. Dist. App., 1st Dist. 1976)	10
<i>John O. Melby & Co. Bank v. Anderson</i> , 276 N.W.2d 274 (Wis. 1979)	9
<i>Kokoszka v. Belford</i> , 417 U.S. 642 (1974)	8
<i>Thatcher v. Dept. of Social & Health Serv.</i> , 908 P.2d 920 (Wash. App. Div. 1 1996) . . .	9
<i>Usury v. First National Bank</i> , 586 F.2d 107 (9th Cir. 1978)	9

Statutes and Rules

Rule 64D of the Utah Rules of Civil Procedure	2, 3, 5, 6, 7, 10, 11
Rule 24 of the Utah Rules of Appellate Procedure	2, 4
Utah Code Ann. § 70C-7-103	3, 7
15 U.S.C. §1673	3, 7, 8

COMMENT ON APPELLANTS' STATEMENT OF ISSUES

Appellants identify four main issues which they claim are before this Court on appeal. Appellees dispute that three of the four issues are issues properly before this Court. Appellees submit that the issue for this Court to decide is whether or not the trial court erred in allowing Appellees to garnish the entire bank account of Appellants in order to partially satisfy their judgment. The evidence presented by the parties at the hearing on Appellants' objection to the garnishment was sufficient to allow the trial court to use its discretion in determining whether or not Appellants met their burden of proof to establish that all of the funds in Appellants' bank account was from wages or otherwise. Additionally, as a matter of law it did not matter or not whether the funds in Appellants' bank account originally derived from wages or not. Therefore, the alleged issues raised by Appellants in their brief concerning the burden of proof placed upon them and the latitude or lack of latitude given to the parties are not viable issues to be determined by this court.

STATEMENT OF THE CASE

This matter was initially filed as an eviction and unlawful detainer action filed in March 1999. A judgment was rendered in favor of Plaintiffs/Appellees (hereinafter "Plaintiffs") and against Defendants/Appellants (hereinafter "Defendants") on or about November 2, 1999.

A writ of garnishment was issued pursuant to Rule 64D of Utah Rules of Civil Procedure in or about May 2000 on the Defendants' bank account at Key Bank. Defendants filed with the trial court an objection to the garnishment claiming that the funds in the account all came from wages and, therefore, were exempt from garnishment. A hearing was held on Defendants' objections on or about June 28, 2000, at which the Plaintiffs and Defendants appeared before the Court *pro se*. The trial court denied Defendants objections.

Defendants claim in their brief that at the June 28, 2000 hearing they presented to the court bank records supporting their claim. However, Defendants reference to these bank records and corresponding attachment of the alleged bank records to Defendants brief is inappropriate and should not be considered due to Defendants failure to cite to the record and failure to refer to the pages of the record at which the evidence was offered. Rule 24(a)(7) of the Utah Rules of Appellate Procedure provides, in part: "All statements of fact and references to the proceedings below shall be supported by citations to the record . . ." Further, Rule 24(e) of the Utah Rules of Appellant Procedure provides, in part:

If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

Defendants failure to so identify and cite as provided by the Utah Rules of Appellant Procedure should result in this Court not considering those arguments and evidence.

The Defendants assert in the Statement of the Facts contained in the Brief of Appellant (hereinafter “Appellants’ Brief”) that the basis for the Court rejecting the Defendants’ objection to the garnishment was their failure to provide satisfaction that the monies going into the account were coming from direct deposits of payroll as claimed by the Defendants. However, Defendants do not cite to the record any basis for this conclusion. The Order entered by the Court denying Defendants’ objections merely provided that the Defendants’ funds on deposit at the garnishee bank were subject to garnishment and therefore not exempt, and that the \$1,008.22 garnished from Defendants’ bank account was to be immediately released to the Plaintiffs. [R. at 233-234].

SUMMARY OF ARGUMENTS

1. Contrary to Defendants’ assertions, the trial court properly used its discretion in denying Defendants’ objections to the garnishment, for it would be impossible for Defendants to prove that all of the money in their bank accounts at the time of the garnishment was derived from wages.

2. The trial court acted properly in denying Defendants’ objections to the garnishment due to the fact that, as a matter of law, once monies are deposited into a bank account, they lose their characteristic as wages or disposable earnings and, therefore, when monies in bank accounts are not subject to the wage exemption provided for in Rule 64D of the Utah Rules of Civil Procedure, in Utah Code Ann. § 70C-7-103 and in 15 U.S.C. §1673.

3. Defendants claim that the Plaintiffs violated the Defendants' Fifth Amendment rights by seizing the Defendants' entire bank account without first conducting a supplement hearing is without merit. No requirement exists that supplemental hearings need to be held to identify seizable assets prior to garnishing bank accounts.

4. Defendants' arguments that the trial court gave more latitude to Plaintiffs than to Defendants is without merit. No evidence exists that the trial court required Defendants to strictly adhere to the rules while not requiring Plaintiffs to do so. Therefore, Defendants' claims to the contrary are invalid.

ARGUMENT

I.

THE DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROOF THAT ALL OF THE MONEY IN THEIR BANK ACCOUNTS AT THE TIME OF THE GARNISHMENT WAS DERIVED FROM WAGES AND, THEREFORE, THE TRIAL COURT PROPERLY USED ITS DISCRETION IN DENYING DEFENDANTS' OBJECTIONS TO GARNISHMENT.

In Appellants' Brief, at pp. 7-14, Defendants attempt to convince this Court that the trial court abused its discretion because Defendants presented sufficient evidence to support their claim that the money in their bank at the time of the garnishment was all from direct payroll deposit. Plaintiffs submit that this Court should not consider Defendants argument and evidence for the reasons identified in the Statement of the Case above (i.e. failure to comply with URAP Rule 24). However, even if this Court

does consider the argument and evidence, Defendants argument still fails.

Rule 64D(h)(iii) of the Utah Rules of Civil Procedure provides, in part:

If a request for hearing is filed by or on behalf of the defendant or by any other person, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties and claimants by first class mail. If the court determines at the hearing that . . . any assets garnished are exempt from or are not subject to garnishment, the court shall immediately issue an order to the garnishee releasing such assets or portion thereof from the writ of garnishment. If the court finds that the assets or a portion thereof are subject to garnishment and not exempt, it shall issue an order to pay the Property Subject to Garnishment directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court

The above language makes it clear that it is the party objecting to the garnishment who has the burden of proving that the exemption or other objection to the garnishment is valid. Defendants' claim that they provided such proof by submitting to the trial court at the hearing records of all transactions from their checking account "between April 21, 2000 and June 14, 2000." [Appellants' Brief, p. 9] [see also Exhibit "A" attached to Appellants' Brief]. The critical flaw in Defendants' argument is that producing a two and a half month history of their checking account does not establish or meet the burden of proof that all the funds in the account were from wages. The question obviously in the trial court's mind, that resulted in the trial court properly rejecting Defendants' objection, was 'what about funds deposited in the account prior to that time period'? Once the wages are intermingled in an account with non-wages, how is it determined which of those funds are wages and which are not?

The only possible way Defendants could have met their burden of proof to the trial court would have been to provide uncontroverted evidence at the hearing that every deposit ever made into the account was from direct deposit. Such was not, and in fact could not have been, done. In fact, a review of Defendants' account statement, as attached hereto in the Addendum to Appellee's Brief, reveals that the statement prior the records submitted by Defendants to the trial court show that at least four deposits were made into Defendants' account, totaling over \$5,000, which were from deposits other than direct deposits. The records reveal that on March 20, 2000, Defendants made an ATM deposit for \$967.02, that on March 20, 2000, Defendants deposited a counter deposit in the amount of \$1,300.00, that on April 6, 2000, Defendants deposited a customer deposit in the amount of \$1,3000.00, and that on April 11, 2000, Defendants made a customer deposit in the amount of \$1,700.00.

Given the above, Defendants clearly failed to meet their burden of proof in order to establish that the deposited funds were all from wages. Therefore, the trial court properly denied Defendants' objections.

II.

**AS A MATTER OF LAW, ONCE FUNDS ARE DEPOSITED INTO A BANK ACCOUNT,
EVEN IF THEY WERE SOLELY FROM WAGES, THEY LOSE THEIR CHARACTERISTIC
AS WAGES OR DISPOSABLE EARNINGS AND, THEREFORE,
ARE NOT SUBJECT TO THE WAGE EXEMPTION.**

Defendants claim that the trial court erred in denying Defendants' objections to the garnishment on the basis that the funds garnished were all from wages must fail because, as a matter of law, the wage exemption is intended only to apply when wages

are in the employer's hand, and the funds lose their characteristic as wages once they are deposited into an account. Rule 64D of the Utah Rules of Civil Procedure, Utah Code Ann. § 70C-7-103 and 15 U.S.C. §1673(a) all provide that the maximum portion of a person's "disposable earnings" which can be garnished is 25% of those disposable earnings. However, a review of the language in each of those rules and statutes make it clear that the intent is to apply funds held by the employer. For example, Rule 64D(d)(vii) defines disposable earnings as "that part of a defendant's earnings remaining after the deduction of all amounts required by law to be withheld."

Subsection (vi) of Rule 64D provides:

A writ of garnishment attaching earnings for personal services shall attach only that portion of the defendant's accrued and unpaid disposable earnings hereinafter specified. The writ shall so advise the garnishee and shall direct the garnishee to withhold from the defendant's accrued disposable earnings only the amount attached pursuant to the writ. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrued.

Similarly, Utah Code Ann. § 70-C-103(1) defines disposable earnings as "that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld." Utah Code Ann. § 70-C-103(2) then

provides, in part:

The maximum part of the aggregate disposable earnings of an individual for any pay period which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit agreement may not exceed the lesser of:

- (a) 25% of his disposal earnings for that pay period; or
- (b) the amount by which his disposable earnings for that pay period exceed 30 hours per week multiplied by the federal minimum hourly wage. . . .”

Finally, 15 U.S.C. §1673(a) provides, in part:

[T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

- (1) 25 per centum of his disposable earnings for that week, or
- (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage. . . .”

While the Utah appellate courts have not addressed the exact issue of whether monies in bank accounts can be subject to the wage exemption, the Utah Supreme Court has given some direction in the case of *Funk v. Utah State Tax Com’n*, 839 P.2d 818 (Utah 1992). In *Funk*, the judgment debtor claimed it was improper for a judgment creditor to obtain all of its tax refund through garnishment because, obviously, the amounts of the tax refund were all generated from wages and, therefore, subject to the wage exemption. “Plaintiff argues that her tax refund constitutes disposable earnings because the source of the refund is wages and the refund is not subject to reduction for taxes.” *Id.* at 821. The Utah Supreme Court rejected the judgment debtor’s argument and determined that the entire amount of the tax refund was subject to garnishment by

the judgment creditor. “Since a state tax refund does not constitute disposable earnings for purposes of the CCPA [Consumer Credit Practices Act] and Rule 64D, it is not subject to the limitations on garnishment contained in those provisions.” *Id.*

Similarly, this court should find that the 25% wage exemption does not apply to amounts deposited in bank accounts because such amounts do not constitute “disposable earnings”. In the *Funk* case, the Utah Supreme Court referred to and relied on the United States Supreme Court case *Kokoszka v. Belford*, 417 U.S. 642 (1974). The United States Supreme Court determined in *Kokoszka* that the protections of the Consumer Credit Protection Act do not extend to federal income tax refunds “because of the nonperiodic nature of tax returns.” *Id.* At 651. Just as tax returns are of a nonperiodic nature, amounts in a bank account have absolutely no periodic nature. Funds can be deposited and withdrawn at any time and are not governed by any periodic standards of deposit or withdrawal. Therefore, the reasoning in *Funk* which resulted in the Utah Supreme Court determining that tax refunds are not subject to the 25% wage exemption apply with equal, if not greater, weight to funds held in a bank account.

While the Utah appellate courts have never directly addressed the issue of whether the wage exemption applies to funds held in bank accounts, appellate courts in other jurisdictions have addressed this direct issue. The courts which have considered this issue have uniformly held that the exemption does not apply to amounts held in

bank accounts. *Thatcher v. Dept. of Social & Health Serv.*, 908 P.2d 920, 921 (Wash. App. Div. 1 1996). “We find, however, that the earnings exemption applies only to funds still in an employer’s hands. Once funds enter the employee’s possession, they become former earnings, subject to complete seizure. . . .”

See also Usury v. First National Bank, 586 F.2d 107, 110 (9th Cir. 1978); *Dunlop v. First National Bank*, 399 F.Supp 855, 857 (D. Ariz. 1975); *Edwards v. Henry*, 293 N.W.2d 756, 757-58 (Mich. 1980); *John O. Melby & Co. Bank v. Anderson*, 276 N.W.2d 274, 276-77 (Wis. 1979); *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1191 (11th Cir. 1991); *Hertz v. Fischer*, 339 So.2d 1148, 1149 (Fl. Dist. App., 1st Dist. 1976).

To determine that amounts in a bank account are subject to the wage exemption subjects a party who has properly obtained a judgment and is attempting to collect that judgment against a judgment debtor to a “parade of horrors”. It can be reasonably presumed that every asset obtained by an individual is obtained from wages. A person’s home, automobiles and all other assets are undoubtedly paid for with wages obtained from the individual’s employment. Should the wage exemption apply to the execution by a judgment creditor upon a judgment debtor’s real property, automobiles, and other assets? If Defendant’s argument prevails, judgment creditor’s garnishment and execution on any assets will be put into question. Clearly, this is not the intent of the wage exemption.

III.

PLAINTIFFS WERE NOT REQUIRED TO CONDUCT A SUPPLEMENTAL HEARING PRIOR TO ISSUING GARNISHMENT

Defendants argue at Point #2 of their brief, pages 14-18, that Plaintiffs violated Defendants' Fifth Amendment rights by seizing the Defendants' bank account without first having a supplemental hearing. However, no requirement exists that a supplemental hearing be held prior to issuance of garnishment, and Defendants have not cited any statutory or other authority. Rule 64D(a)(ii) of the Utah Rules of Civil Procedure provides: "A writ of garnishment is available in aid of execution to satisfy a money judgment or other order requiring the payment of money."

Rule 64D(a)(iii) provides: "The property subject to garnishment that a writ may be used to levy upon or affect is all the accrued credits, chattels, goods, affects, debts, choses in action, money and other personal property and rights to property of the defendant in the possession of a third person ... [emphasis added]."

Nothing in Rule 64D requires that supplemental hearings be held prior to issuing of garnishment. In fact, clearly the Defendants funds deposited in a bank account constitute "money. . . of the Defendant in the possession of a third person. . . ." Therefore, Plaintiffs were legally entitled to issue garnishment on Defendants' funds in their bank account and in doing so did not violate any Fifth Amendment rights of the Defendants.

IV.

NO EVIDENCE EXISTS THAT THE TRIAL COURT REQUIRED DEFENDANTS TO STRICTLY ADHERE TO THE RULES WHILE NOT REQUIRING PLAINTIFFS TO DO SO.

At Point #4 of Appellants' Brief, pp. 22-23, Defendants claim that the trial court required them to strictly adhere to the rules while allowing Plaintiffs greater latitude. However, Defendants do not cite to the record any evidence that the trial court required them to strictly adhere to the rules while allowing Plaintiffs latitude regarding the rules, and none exist. Therefore, Defendants' assertion must fail.

CONCLUSION

For the reasons provided above, Plaintiffs request that this Court sustain the ruling of the trial court which denied Defendants' objection to the garnishment of the \$1,008.22 in Defendants bank account.


Dated this 5th day of December, 2000.


Jay R. Mohlman
SCHMUTZ, ROHBOCK & MOHLMAN, P.C.
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2000, I did cause two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed, United States mails, postage prepaid, addressed to the following:

Russell J. Diefenderfer
Paula Diefenderfer
P.O. Box 520714
Salt Lake City, UT 84152-0714
Defendants Pro Se



ADDENDUM

Key Choice Checking Statement

April 19, 2000

651737561

B 00650001R 53 B1
RUSSELL J DIEFENDERFER
PAULA DIEFENDERFER
P O BOX 520714
SALT LAKE CITY UT 84152-0714

Questions about your account?
Call 24 hours a day:
1-800-KEY2YOU (1-800-539-2968)

Or, write us:
KeyBank National Association
P.O. Box 30815
Salt Lake City, UT 84130-0815

Key Choice Checking

Account number: 651737561

Title: RUSSELL J DIEFENDERFER
PAULA DIEFENDERFER

Balance on Mar 17, 2000	\$501.57
Additions	
Deposits	6,617.09
Deductions	
Withdrawals	1,670.60
Checks paid	3,038.86
Service fees and charges	9.50
Balance on Apr 19, 2000	\$2,399.70

KeyNotes

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Key Choice Checking Statement

April 19, 2000

651737561

Deposits

Date	Description	Amount
3-20	ATM Key 2299 Highland Dr Salt Lake UT	\$967.02
3-20	Counter Deposit	1,300.00
4-6	Customer Deposit	1,300.00
4-11	Customer Deposit	1,700.00
4-19	Direct Deposit, Callware Technolpayroll	1,350.07
Total		\$6,617.09

Withdrawals

Date	Description	Amount
3-20	POS Mac Smith'S #40023 Salt Lake UT	\$57.61
3-20	POS Mac Smith'S #40023 Salt Lake UT	8.17
3-20	Savecoin Overland Park Ks	171.89
3-20	Shopko 110 Salt Lake Cit UT	33.97
3-20	Virtu Vites Thornton CO	30.85
3-20	Book Warehouse #5049 Draper UT	28.71
3-20	V F Factory Outlet 09 Draper UT	22.33
3-20	Home Depot 4403 Salt Lake Cit UT	21.05
3-22	Direct Withdrawal, Lincoln Benefit CK4Inspymt	17.00
3-22	Direct Withdrawal, Lincoln Benefit CK4Inspymt	16.66
3-23	POS Mac Harmons-Bricky Salt Lake UT	26.73
3-24	POS Mac Blockbuste Salt Lk Ci UT	36.89
3-24	Cross-Tec Corporation TEL5613916560 FL	211.00
3-27	POS Mac Smith'S #40023 Salt Lake UT	33.55
3-27	POS Mac Albertson'S #3 Salt Lake UT	8.53
3-27	Ebc Computers Salt Lake Cit UT	185.12
3-27	Amoco Oil 07887300 Salt Lake Cit UT	19.05
3-28	Wild Oats Markets #92 Salt Lake Cty UT	55.28
3-29	POS Mac Smith'S #40023 Salt Lake UT	16.18
3-30	Ups-Pr Store #117 Salt Lake Cit UT	71.95
3-31	POS Mac Blockbuste Salt Lk Ci UT	4.98
4-3	POS Mac Smith'S #40023 Salt Lake UT	45.72
4-3	POS Mac Harmons-Bricky Salt Lake UT	39.68
4-3	V F Factory Outlet 09 Draper UT	23.93
4-3	Corning Revere #210 Draper UT	23.38
4-3	Software Etc #1362 Sandy UT	15.94
4-3	The Paper Factory #825 Draper UT	9.51
4-5	POS Mac Smith'S #40083 Salt Lake UT	9.86
4-7	POS Mac Harmons-Bricky Salt Lake UT	44.39
4-10	POS Cir 7250 So Union Park Midvale UT	29.76
4-10	POS Mac Smith'S #40023 Salt Lake UT	23.13
4-10	Daves Health & Nutriti Salt Lake Ci UT	93.55
4-10	Home Depot 4402 Salt Lake Cit UT	46.74
4-11	Higher Power 208-658-9351 ID	42.89
4-12	Moms Enterprizes Willghby Hill OH	47.98
4-14	POS Mac Harmons-Bricky Salt Lake UT	16.47
4-14	POS Mac Smith'S #40023 Salt Lake UT	15.89
4-17	Eagle Crafts** Ogden UT	39.20
4-18	POS Mac Smith'S #40083 Salt Lake UT	25.08
Total		\$1,670.60

Checks paid

* Indicates a break in numeric sequence

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
	4-6	\$85.00	2241	3-27	50.00	2244	3-28	92.00
*2239	3-22	200.00	2242	3-24	50.00	2245	4-6	500.00
2240	3-20	50.00	2243	3-23	75.00	2246	3-23	600.00

Key Choice Checking Statement

April 19, 2000

651737561

Checks paid (continued* Indicates a break in numeric
sequence)

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
2247	4-10	11.26	2251	4-12	100.00	2256	4-18	75.00
2248	4-6	300.00	2252	4-17	400.00	2257	4-18	50.00
2249	4-11	50.00	2253	4-17	50.00	Total		\$3,038.86
2250	4-12	200.00	*2255	4-19	100.60			

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You can avoid the Maintenance Service Charge by maintaining a minimum Ledger Balance of \$750 in this account.

Date	Service	Charge	Amount
4-19	Enclose Items With Statement Charge	1 @ \$1.50	\$1.50
4-19	Maintenance Service Charge	1 @ \$8.00	8.00
Total			\$9.50