IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY - 3 2007
MICHAEL S. RICHIE
CLERK

OKLAHOMA DEPARTMENT OF SECURITIES ex rel, IRVING L. FAUGHT, Administrator; and DOUGLAS L. JACKSON, in his capacity as the court appointed receiver for the investors and creditors of Schubert & Associates and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert &Associates,

Plaintiffs/Appellees,

vs.

Case No. 104,161

KENNETH YOUNG, LESLIE YOUNG, K.R. LARUE, DANA LARUE, SCOTT WILCOX, SHERYL MERCER, RODNEY MARTIN, WANDA MARTIN, RAYMOND LAUBACH, DAN JACKSON and CRYSTAL JACKSON,

Defendants/Appellants,

and

Robert W. Mathews; Marvin L. Wilcox; Pamela J. Wilcox; Detria J. Owens; Kathleen Gibson; Shirley Mercer; Frank Ward; Alice Sue Ward; Ben J. Allen; Sharon A. Allen; Michael Rogers; Bob E. Hudson; Janice Fagg; Edward G. Staton; Kenneth LaRue; Ella Carr; Martin W. Mathews; Beth Armer, individually and as Trustee for the Beth Armer Revocable Trust; Shanna Kinslow; Roy E. Landwehr; Vicki L. Landwehr; Scott A. Wilcox; Ryan E. Landwehr; Lindsey Landwehr; John Pumphrey; Carolyn Pumphrey; Justin R. Tarrant; Jeffrey L. Wilcox; Jacquelyn Bounds; Steven R. Espolt; Phillip Yenzer; Glenda Yenzer; Loyd R. Jones; Richard Brandon Schubert; Hillary Michelle Schubert; Garrett Lee Schubert; Jack D. Simpson; Sue J. Simpson; Robert J. Owens; Chad Johnson; Sonny Harmon; Rodney J. Martin; Wanda Martin; K.R. Larue; Dana Larue; Kenneth Young; Leslie A. Young; AlexanderYoung; Dean Cue; Claudette Cue, Theresa Pittman; Danile Jackson; Crystal Jackson; Jerald Wayne Drake; Regina Kraus; Larry E. Berry; Robert E. Proctor, if living, individually, and as Trustee for the Proctor Family Revocable Trust, and

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11.

if deceased, his unknown successors; Bobby Proctor;)
individually and as Trustee for the Proctor Family)
Revocable Trust; Sandra K. Phillips; Elnora Viehaus;)
Chester J. Weems; Becky Drake; Curtis R. Sanders; Paul)
Lee; Danny Gregory; Martha Gregory; Linda K. Jindra;)
Josephine Ward; Kerry Long; Raymond C. Laubach;)
Gary L. Scott; James W. Powell; Billie A. Vincent; Ted A.)
Payne; Joyce E. Payne; Sean Winn; Trey A. Roehrig;)
Angela D. Ewers; Brenda L. Enos; Olin R. Rising; J.M.)
Miller; Willis Luber; Carol A. Lindley; Maudie L.)
Cook; Bill Harris; Rebecca Honeyman; Todd A. Ward;)
William Etheridge; Christopher LaRue; Viola M. Estes;)
Brian Reinhardt; Tony A. Reinhardt; James Wyatt;)
Thelma Wyatt; Arthur Platt; Bette McClure; Phillip)
Matthews; Brad Pollard; Allen Griffith; Linda Elliott;)
Linda Stewart; Chelsea Venable; Gayle Venable;)
Jamie Walker Glover; Richard LeBoeuf; E.E. Tackett;)
Timothy W. Rains; Krista Rains; Michael L. Mallory;)
Renyssa Wines; Mike Bostick; Don Poindexter; Anita)
Tarralbo; Kirsten Allard; Micke Richey; Shawna Allen;)
Timothy Jackson; Julia Jackson; Betty Lamb; Bill)
McCutchen; Brandi Pollard; Craig Simmons; Bill D. Horn;)
Jack McNally; Laura Payne; Manuel Segura; Kenneth R.)
Williams; Bertha L. Copper; West Price; Tricia Price;)
Tawnay A. Merchant; Margaret Hooley; Janet L. Lawhon;)
May Frates; Bob Prestridge Jr.; Gerald D. Knight; Jim)
Copeland; Monte Phillips; Vincent H. Scott; Tracy)
Tarrant; Ellen Clay Benner; Brian Owens; Lloyd Avery;)
Denise Meloy; Gary L. Bounds; Donald D. Hall; Kevin I.)
Carnes; Cecil Williams; Jeffrey Palmer; Mark Richards;)
Melinda Hobbs; Jodi Sharp; and Beverly Kegin,)
)
Defendants.)

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SUPREME COURT RULE 1.179 (a)

(1) **Judgment Sought to be Reviewed**:

Defendants/Appellants seek a Writ of Certiorari from the Oklahoma Supreme Court to review the judgment entered on April 13, 2007, by the Court of Civil Appeals of the State of Oklahoma ("COCA"), Division I, which affirmed the trial court's granting of summary

judgment in favor of Appellees. See copy of COCA's opinion in Appendix attached. Appellants have not filed a Petition for Rehearing with the COCA, nor is such a request for rehearing a requirement before petitioning for certiorari, pursuant to Supreme Court Rule 1.178(b)(1).

(2) **Outline of Reasons for Review:**

The COCA has decided a "question of substance not heretofore determined by the Supreme Court" (Sup. Ct. Rule 1.178(a)(1)).

The COCA's judgment recited that the Oklahoma Supreme Court had not "expressly answered" the issues of whether "an action may be maintained under the Oklahoma Uniform Securities Act ("Act") against innocent victims of a Ponzi scheme" and whether the Oklahoma Department of Securities ("ODS") and Douglas L. Jackson ("Receiver") "have a legal or equitable right to third party assets." (App. pp. 8 and 9). The COCA, in this case of first impression, construed 71 O.S. 2001 §1-603 to grant the ODS the authority to sue onon-violators of the Act, innocent investors in a securities fraud scheme. Moreover, the COCA held that under §1-603, a trial court may appoint a receiver and order disgorgement under the Act against innocent investors. (App. p. 10 and 16).

Concerning whether ODS may maintain an action against innocent victims, the COCA's de novo construction of §1-603 ignores certain key portions of this section, particularly subsection A, which provides as follows:

> A. **If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act** or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, **the Administrator** may, prior to, concurrently with, or subsequent to an administrative proceeding, **maintain an action in the district court of Oklahoma County** or the district court of any other county where service can be obtained **to enjoin the act, practice, or course of business and to enforce**

> **compliance with this act** or a rule adopted or order issued under this act. (Emphasis supplied)

The second provision that the COCA fails to consider is the introductory phrase of subsection B, which provides as follows:

> B. **In an action under this section** and on a proper showing, the court may: . . .
>
> 3. Order such other relief as the court considers appropriate. (Emphasis supplied)

Section 1-603 permits or allows the ODS to bring an action against any person that is engaging or has engaged in a violation of the Act. When the ODS brings an action against a violator of the Act then the trial court may fashion such relief as the trial court deems appropriate.

It is a basic canon of statutory construction that statutory subsections cannot be read in isolation, but must be read in context with the entire statute. *State ex rel. Department of Human Services v. Colclazier,* 1997 OK 134, 950 P.2d 824, 827. Accordingly, as §1-603(A) specifically limits enforcement and disgorgement against violators and §1-603(B) only applies to actions brought pursuant to §1-603(A), subsection (B)(3) is necessarily restricted to violators of the Act.

It is undisputed that the Appellants have not violated the Act or a predecessor act. In fact, nowhere in the evidence presented to the lower court does the ODS or the Receiver allege wrongdoing or violations committed by the Appellants. Clearly, neither the ODS nor the Receiver whom the trial court appointed under §1-603, can maintain an action against these Appellants under the provisions of the Act.

The COCA has decided the foregoing question of substance in a way not in accord with applicable decisions of this Court.

Although this Court has never decided the first impression issues of whether the ODS may maintain an action under the Act against innocent victims of a Ponzi scheme and whether the ODS and a Receiver have a legal or equitable right to third party assets, this Court has decided other applicable cases which would indicate that the COCA's judgment is not in accord with those decisions.

For instance, in *Marley v. Cannon,* 1980 OK 147, 618 P.2d 401, 405, the Oklahoma Supreme Court found that the ODS, which was established by statute, may only employ the powers granted by statute and cannot expand those powers by its own authority. The lawsuit maintained by the ODS fails to meet the essential element of showing that the Appellants are violators of the Act which is required to maintain this type of action under the Act. As a result, the ODS is operating outside its statutory authority.

Concerning the Receiver, the COCA relied upon §1-603 and the court order appointing the Receiver as the authority for the Receiver's standing to seek disgorgement from these innocent investors of a securities fraud. (App. pp. 16 and 17). Essentially, the COCA finds that by the virtue of being appointed Receiver in the Logan County proceeding, the Receiver becomes a creditor of the Estate of Marsha Schubert. Fundamental receivership law does not support this finding. It is axiomatic that a court appoints a receiver to hold property and funds coming into the receiver's possession by the same right and title as those who may hold claims against the estate. The Receiver derives the right to receivership property from the entity which has been placed in receivership. *Farrimond v. State ex rel. Fisher,* 2000 OK 52, 8 P.3d 872, 875. Thus, the Receiver holds the property for only the Estate of Marsha Schubert and cannot hold an antagonistic position as creditor against the Estate.

What the COCA has sanctioned by this opinion is that the Receiver can make his own determination concerning who is made whole and who is required to disgorge any received proceeds among the innocent investors in the fraudulent scheme perpetrated by Marsha Schubert. This is contrary to Oklahoma law. A court-appointed receiver acts in a fiduciary capacity and may not favor one party over another party in litigation. *Witt v. Jones,* 1925 OK 149, 233 P. 722. The Receiver exceeded his authority and breached his fiduciary duty by bringing this action against these innocent investors.

Moreover, the COCA's analysis of *Scholes v. Ames,* 850 F.Supp. 707 (N.D.Ill. 1994) and *Chosnek v. Rolley,* 688 N.E.2d 202 (Ind. App. 1997), is inaccurate as those cases involve a separate legally distinct entity pursuing claims it individually holds, which are not held by the individual wrongdoer that perpetrated the scheme through the use of a legally distinct entity. Therefore, the COCA ignores the distinction between legally distinct entities in receivership and a wrongdoer who is a sole proprietorship, such as Marsha Schubert.

In *Scholes v. Lehmann,* 56 F.3d 750 (7th Cir. 1995), the Court expressly found that because the wrongdoer had operated through *legally distinct entities* from the wrongdoer the Receiver for these *legally distinct entities* could maintain disgorgement actions for the *legally distinct entities.* The Court's rationale was that the appointment of the receiver for these *legally distinct entities* removed the wrongdoer from the premises resulting in the *legally distinct entities* being cleansed from the actions of the wrongdoer. Specifically, in *Scholes* the Court noted that it was unaware of any cases allowing a receiver for a sole proprietorship to recover an alleged fraudulent conveyance. *Id.* at p. 755. This is an important distinction because a sole proprietorship is not a *legally distinct entity* from the wrongdoer/sole proprietor. Here, there is no separate *legally distinct entity* from the wrongdoer, Marsha Schubert. There cannot be a

cleansing by the appointment of a receiver in this case. The trial court appointed the Receiver to marshal and administer the assets of Schubert's Estate. As such, the Receiver stands in the same shoes as Schubert and cannot seek disgorgement from these innocent Appellants.

STATEMENT OF FACT OF MATERIAL MATTERS IN SUPPORT OF ALLOWANCE OF WRIT OF CERTIORARI

The ODS and the Receiver sought disgorgement from the Appellants under a claim of unjust enrichment. Beginning in 2000 and continuing until mid-October 2004, Marsha Schubert ("Schubert") accepted money from investors, and represented to those investors that Schubert would legally invest their money. This statement was substantiated by the fact that Schubert was a registered representative and was employed by a major broker investment firm. Instead, some of the money received from the investors was used to commit Schubert's fraudulent investment scheme.

After an investigation by the ODS, they discovered that Schubert did not provide regular and authentic monthly or quarterly account statements. Schubert did make payments to some investors, however, this money was not from investments but from other investors' money. As is evident, Schubert was perpetuating a fraud on the investors through a Ponzi scheme.

As discussed above, there are no provisions in the Act which authorize the ODS and the Receiver to bring an unjust enrichment action against innocent investors. Additionally, no Oklahoma case law allows such an action against innocent investors. As innocent investors, the Appellants are entitled to protections under the Act rather than persecution. *See, Mayfield v. H.B. Oil & Gas,* 1987 OK 106, 745 P.2d 732, 734.

This Court should grant *certiorari* to answer the first impression issues of whether ODS may maintain an action under the Act against innocent victims of a Ponzi scheme and whether

the ODS and the Receiver have a legal or equitable right to third party assets. The COCA's judgment, if allowed to stand, is in direct opposition to the basic public purpose of the ODS - to protect all innocent investors. *See, Mayfield v. H.B. Oil & Gas, id.*

Further, COCA's judgment, if allowed to stand, would in effect give carte blanc to the ODS to expand its authority beyond its enacted statutory scheme and bring any type of action the ODS deems furthers its public purpose. Pursuant to 71 O.S. Supp. 2003 §1-601, the ODS is an administrative agency that was created by statute and as such is limited in its powers to those expressly granted by the Legislature. Administrative agencies may only exercise powers particularly granted to that agency by statute and the agency cannot unilaterally enlarge those powers. *Matador Pipelines, Inc. v. Oklahoma Water Resources Board,* 1987 OK 65, 742 P.2d 15, 17. To give a state agency such unfettered discretion not only violates the law and the spirit of the law - but also leads to arbitrary and oppressive acts – to the point of an abuse of power by a state entity created for the very purpose of protecting innocent investors from fraudulent securities schemes. The Legislature has not charged the ODS with the responsibility of determining which innocent investors should be made whole and which innocent investors should be made to disgorge. Rather, the Legislature has charged the ODS with the duty to bring actions against violators of the Act.

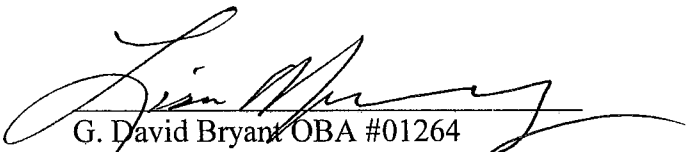
To maintain an unjust enrichment claim, ODS and the Receiver had to demonstrate that they had a legal or equitable right to the property they were seeking to recover before equity may be invoked to recover on their unjust enrichment claim. *Consolidated Cut Stone Co. v. Seidenbach,* 1941 OK 173, 114 P.2d 480, 485. The property which the Receiver and ODS are attempting to recover does not belong to the Estate of Marsha Schubert. Rather, the property belongs to third-party investors which include the Appellants.

The Receiver was appointed as a receiver for a sole proprietor's estate, in this case, the wrongdoer's estate. As such, he cannot prove an unjust enrichment claim as a matter of law. Pursuant to Oklahoma law, the Receiver stands in the shoes of the debtor, and holds the property only by the same right and title as the person for whose property he is the receiver. *Wilkins v. Gannon,* 1935 OK 783, 49 P.2d 78. Therefore, the Receiver cannot in equity make a claim of unjust enrichment against these Appellants.

CONCLUSION

The Legislature's enactment of securities legislation had a twofold purpose, which was to prevent stockbrokers and promoters from perpetrating frauds on unsuspecting investors and to protect those unsuspecting investors who are too inexperienced to protect themselves. *Brock v. Hines,* 1924 OK 133, 223 P. 654, 655. To carry out this legislation, ODS was created to protect inexperienced investors and not to bring actions against innocent investors. Appellants respectfully request this Court to accept certiorari to construe the law and determine whether, in this instance, ODS and the Receiver have the authority to bring a disgorgement action against these Appellants, innocent investors to a Ponzi scheme.

Respectfully submitted,



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CERTIFICATE OF MAILING

3rd I hereby certify that a true and correct copy of the Petition for Certiorari was mailed this day of May, 2007 by depositing it in the U.S. Mails, postage prepaid to:

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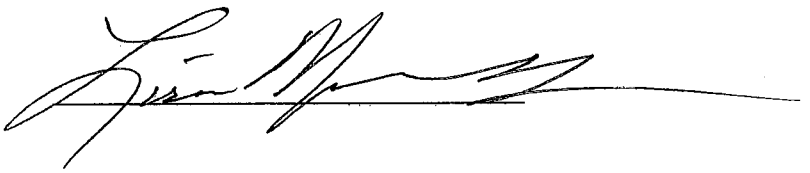
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