

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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. )

KENNETH LARUE, ARTHUR PLATT, )  
YVONNE PLATT, MARVIN WILCOX, )  
and PAMELA WILCOX, )

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; Alexander Young; 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 )  
if deceased, his unknown successors; Bobby Proctor; )  
individually and as Trustee for the Proctor Family )

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

MAY - 4 2007

MICHAEL RICHIE  
CLERK

Case No. 104,262  
(Cons. w/104,304)

AMENDED  
DEFENDANTS/APPELLANTS'  
PETITION FOR CERTIORARI

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 Lubber; 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. )

**DEFENDANTS/APPELLANTS' PETITION FOR CERTIORARI**

**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 (7<sup>th</sup> 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.

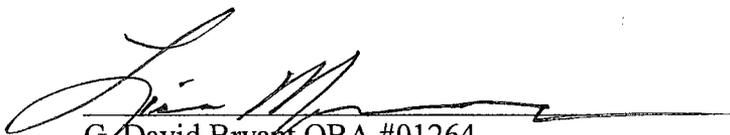
The Receiver was appointed as a receiver for a sole proprietor's estate, in this case, the wrongdoer's estate. As such, he cannot prove an unjust enrichment claim as a matter of law. Pursuant to Oklahoma law, the Receiver stands in the shoes of the debtor, and holds the property

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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Lisa Mueggenborg OBA #18595  
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ATTORNEYS FOR APPELLANTS

**CERTIFICATE OF MAILING**

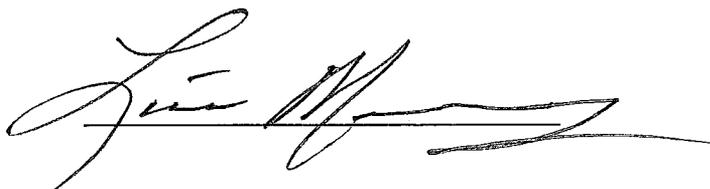
I hereby certify that a true and correct copy of the Amended Petition for Certiorari was mailed this 4 day of May, 2007 by depositing it in the U.S. Mails, postage prepaid to:

Amanda Cornmesser  
Gerri Stuckey/ Melanie Hall  
First National Center, Suite 860  
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Oklahoma City, Oklahoma 73102

Attorneys for Oklahoma Department of  
Securities

Bradley E. Davenport  
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Enid, Oklahoma 73701-1549

Attorney for the Receiver,  
Douglas L. Jackson



msm

NOT FOR OFFICIAL PUBLICATION

**ORIGINAL**

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

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. )

Robert W. Mathews; Detria J. Owens; )  
 Kathleen Gibson; Sheryl Mercer; Frank Ward; )  
 Alice Sue Ward; Ben J. Allen; )  
 Sharon A. Allen; Michael Rogers; )  
 Bob E. Hudson; Janice Fagg; Edward G. Staton; )  
 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 Yenser; Glenda Yenser; )  
 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; Dana Larue; Kenneth )  
 Young; Leslie A. Young; Alexander Young; )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

APR 13 2007

MICHAEL S. RICHIE  
CLERK

Case No. 104,262  
(Cons. w/104,304)

Rec'd (date)	4-13-07
Posted	FE
Mailed	FE
Distrib	FE
Publish	yes <input checked="" type="checkbox"/> no

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 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; 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, )  
 and )  
 )  
 KENNETH LARUE, ARTHUR PLATT, )  
 YVONNE PLATT, MARVIN WILCOX, )  
 and PAMELA WILCOX, )  
 )  
 Defendants/Appellants. )

APPEAL FROM THE DISTRICT COURT OF  
 OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED

Amanda Cornmesser,  
 Gerri Stuckey,  
 Oklahoma City, Oklahoma,

For Plaintiff/Appellee,  
 Department of Securities,

G. David Bryant,  
 Lisa Mueggenborg,  
 KLINE, KLINE, ELLIOTT  
 & BRYANT, P.C.,  
 Oklahoma City, Oklahoma,

For Defendant/Appellant,

Bradley E. Davenport,  
 GUNGOLL, JACKSON, COLLINS,  
 BOX & DEVOLL, P.C.,  
 Enid, Oklahoma,

For Defendant,  
 Douglas L. Jackson.

OPINION BY CAROL M. HANSEN, Presiding Judge:

¶1 In this action seeking recovery on the basis of unjust enrichment, Appellants, who were defendants in the trial court, seek our review of the trial court's summary judgment granted in favor of Appellees, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department) and Douglas L. Jackson (Receiver).<sup>1</sup>

BACKGROUND AND FACTS

¶2 This case arises from a "Ponzi" scheme<sup>2</sup> operated from approximately January 2000 through October 2004 by Marsha Schubert of Crescent, Oklahoma. Schubert was a registered agent of a registered investment broker-dealer, doing business as Schubert and Associates, an unincorporated association. Schubert acted for clients in placing investments in legitimate accounts with recognized national brokerage houses. Independently of those investments, she additionally accepted investments directly as Schubert and Associates, which allegedly were to be invested in "option contracts" or "day trading." Instead, she used funds from later Schubert and Associates investors to pay out to earlier investors as fictitious profits.

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<sup>1</sup> The appeal is submitted without appellate briefing in accordance with the accelerated procedure under Rule 1.36, Oklahoma Supreme Court Rules, 12 O.S. Supp. 2003, Ch.15, App.

<sup>2</sup> Named for Charles Ponzi, who offered to repay loans at 150% within 90 days, but instead used successive loans to repay earlier lenders until the scheme was discovered. *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621; citing *Cunningham v. Brown*, 265 U.S. 1, 44 S.Ct. 424, 68 L.Ed. 873 (1924).

¶3 Schubert was found criminally liable for this conduct by both state and federal authorities. She was sentenced to imprisonment and to pay restitution to investors who lost money on the scheme. Eighty seven victims were identified in the federal criminal proceeding with an alleged total loss of approximately \$9,100,000.00. Department, alleging securities violations by Schubert, also brought a civil action on October 14, 2004, in Logan County, where Schubert resided and conducted her business. Department asked for injunctive relief and petitioned to have a receiver appointed for Schubert and Schubert and Associates.<sup>3</sup>

¶4 The district court in Logan County appointed Receiver, and later amended the order to direct that he also serve as “receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates”. The amended order expressly authorized Receiver, *inter alia*, to “institute actions ... against paid investors ... that the Receiver deems necessary to recover assets and to protect the interests of and promote equity among the investors.” The amended order defined “assets” to include the “proceeds of the investment program described in the Petition (Schubert Investment Program) by which certain participants were unjustly enriched or received fraudulent transfers.”

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<sup>3</sup> Such action is authorized under 71 O.S. 2001 §406.1 (Oklahoma Securities Act) and its subject matter counterpart section in the replacement Oklahoma Uniform Securities Act of 2004, 71 O.S. Supp. 2004 §1-603, eff. July 1, 2004.

¶5 Receiver joined Department in bringing the present action in Oklahoma County.<sup>4</sup> There were 158 named defendants, five of whom are the Appellants here.<sup>5</sup> The record indicates defendants may have collectively received as much as \$6,000,000.00 from Schubert, paid with Schubert and Associates funds received from other investors. The *Petition* alleged the defendants, who were not themselves charged with securities violations, received investor assets “in excess of any funds they transferred to Marsha Schubert and/or Schubert and Associates” ... “either as purported returns on non-existent investment or as gifts, in the nature of homes, vehicles, personal property, and cash.” The alleged value each defendant gave Schubert, if any, and the circumstances under which they received funds from Schubert, vary.

¶6 The *Petition* asserted claims against the defendants on grounds of unjust enrichment, fraudulent transfer and equitable lien “against all real property and personal property purchased with unearned investor assets” received by the defendants. Eventually, just before argument on Department’s motion for summary judgment, which was joined by Receiver, they proceeded only on the unjust

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<sup>4</sup> The majority of defendants did not reside in Logan County. Venue was contested in the trial court but is not at issue here.

<sup>5</sup> The trial court directed the filing of final judgments in accordance with 12 O.S. §994(A). The trial court has also granted summary judgment against other co-defendants and they have appealed in Appeals No. 104,004 and No. 104,161.

enrichment theory. That is the theory on which the trial court granted summary judgment. Judgment was granted against Appellants individually, with each “ordered to disgorge<sup>6</sup> and/or repay to [Receiver] the amount” the motions for summary judgment alleged each received from commingled Schubert or Schubert and Associates bank accounts.

### ISSUES

¶7 Appellants jointly filed their *Petition in Error* and now seek our review of the trial court’s summary judgments against them. They question [a] whether “an action may be maintained under the Oklahoma Uniform Securities Act<sup>7</sup> against innocent victims of a Ponzi scheme” and [b] whether Department and Receiver “have a legal or equitable right to third party assets.”

### HOLDING

¶8 In Appeal No. 104,004,<sup>8</sup> decided on this date, we affirmatively answered questions identical to those posed by Appellants here and affirmed the trial court’s

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<sup>6</sup> “Disgorgement” generally is equitable relief whereby the court orders one in possession of funds to which they are not legally entitled to “disgorge” themselves of the funds. *See e.g., State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334. “Disgorgement is said to occur when a ‘defendant is made to ‘cough up’ what he got, neither more nor less.” *Warren v. Century Bankcorporation, Inc.*, 1987 OK 14, 741 P.2d 846.

<sup>7</sup> The Oklahoma Uniform Securities Act of 2004, 71 O.S. Supp. 2004 §§ 1-101 *et seq.*, eff. July 1, 2004. The predecessor act, which was in effect during the majority of the time Schubert’s Ponzi scheme was in operation, is the Oklahoma Securities Act, 71 O.S. 2001 §§ 1 *et seq.*

<sup>8</sup> Note 5, *supra*.

grant of summary judgment. While the facts in that appeal differ slightly insofar as each appellant's relationship with Schubert and Schubert and Associates, the differences are immaterial to the outcome of this appeal. Our holding in Appeal No. 104,004 controls here.

¶9 Accordingly, the trial court's judgment is AFFIRMED.

BELL, J., concurs.

BUETTNER, J., dissenting:

I respectfully dissent for the reasons expressed in my dissent in Case No. 104,004.