

FILED
 SUPREME COURT
 STATE OF OKLAHOMA
 MAR - 4 2011
 MICHAEL S. FICHEL
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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)
)
 Plaintiffs/Appellees,)
)
 vs.)
)
 MARVIN LEE WILCOX and PAMELA)
 JEAN WILCOX,)
)
 Defendants/Appellants.)

Supreme Court No. 109111
 District Court Case No. CJ-2005-3796

APPELLEES' REPLY
TO APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS

Appellees, incorporate by reference their previously filed Motion to Dismiss and reply as follows to Appellants' response. Notably, Appellants' response fails to address the substance of the Motion to Dismiss - that the issues raised on appeal were never presented to the trial court. Rather, Appellants' response ignores the Motion to Dismiss and presents arguments on the substantive issues of the appeal. Since this is an accelerated appeal under Sup. Ct. Rule 1.36, Appellees request that this Court consider this reply or, in the alternative, set the case on a briefing schedule.

Background

In May 2006, Appellees filed a Petition against Appellants and other relief defendants who had been unjustly enriched by receipt of funds from a Ponzi scheme. In October of 2006, the Appellees filed the first motion for summary judgment against Appellants (First Summary Motion). In the First Summary Motion, Appellees showed that Appellants provided signed blank checks to Marsha Schubert that she frequently used as part of a check exchange between her bank accounts and those of Appellants over a period of many months. In their response to the First Summary Motion, Appellants admitted these facts. In December 2006, the trial court,

specifically acknowledging the First Summary Motion and Appellants' response thereto, granted summary judgment to Appellees, and found Appellants to have been unjustly enriched by the receipt of funds in connection with the Ponzi scheme (First Judgment).

Appellants, along with twenty-one other individuals against whom the Appellees had obtained judgments, appealed and those appeals were consolidated. In February 2010, this Court issued its opinion in *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶¶2-4, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010). This Court found that Appellees had standing to seek recovery of Ponzi scheme funds under their theory of unjust enrichment, but reversed and remanded to the trial court to determine the liability of the Appellants under a new standard for recovery established by the Court in its opinion.

On remand, Appellees filed a second motion for summary judgment addressing the standard of recovery created in *Blair* and describing in greater detail the facts shown in the First Summary Motion as to Appellants' conduct (Second Summary Motion). Appellants argued that Appellants did not contract for a rate of return, but merely hoped to share in the profits of the enterprise of which there were none. As such, it would be inappropriate, if not impossible, for the trial court to restructure the investment agreement and arbitrarily establish a "reasonable dividend." Based on the absence of any contracted-for rate of return and Appellants' conduct, Appellees argued that any amount of "profit" was unreasonable. On October 2010, the trial court granted partial summary judgment again finding that Appellants had been unjustly enriched, but denied Appellants' motion relative to the amount of unjust enrichment due to a dispute over that issue.

Appellees filed a third motion for summary judgment on the issue of the amount of unjust enrichment, to which Appellants failed to respond or appear at the hearing thereon (Third

Summary Motion). In December 2010, the trial court ruled in Appellees' favor (Second Judgment) and this appeal ensued.

The trial court did not exceed the mandate of the Supreme Court in *Blair*.

To determine whether the trial court exceeded the mandate of a higher court by failing to apply the "law of the case", the court must "first determine exactly what the first appellate decision determined expressly or impliedly." *Tibbetts v. Sight 'N Sound Appliance Centers*, 2003 OK 72, ¶ 10. Specifically, this Court held in *Blair* that the Department and the Receiver, under the theory of unjust enrichment, may "seek relief against Ponzi investors who received profits that are artificially high dividends", but may not seek relief against "innocent Ponzi-scheme investors who received their investment with a reasonable interest thereon." *Blair*, ¶30. This Court did not establish parameters as to what constitutes an "artificially high dividend" or a "reasonable interest". This Court reversed and remanded the original judgments to the trial court to determine the liability of the Appellants and other appealing relief defendants under this new standard.

Appellants argue that the trial court exceeded its mandate by considering Appellants' wrongful conduct because they believe that this Court in *Blair* had already established that they did not violate the securities laws. This Court accurately notes that the Appellees did not allege violations of the securities laws against the Appellants or any of the other appealing relief defendants. *Blair* at 10, fn.10. Just because Appellees concede that the relief defendants, including Appellants, were not charged with violations of the securities law, however, does not mean that Appellants are "innocent" investors. It also does not mean that Appellants' conduct with regard to the check kite was irrelevant to the trial court's determination on the issue of Appellants' unjust enrichment.

In the First Summary Motion, Appellees clearly showed Appellants' conduct supporting the Ponzi scheme, Appellants admitted those facts, and the trial court incorporated those facts by reference into the First Judgment. On remand, the Appellees did not attempt to prove that Appellants committed securities fraud, only that Appellants' conduct was a factor in determining their lack of "innocence" as investors.

Appellants' wrongful conduct was an appropriate factor for the trial court to consider.

The nature of the transactions between Appellants and Marsha Schubert is consequential. This Court determined in *Blair* that a restitution action by the Department against an innocent investor serves a public purpose "if the nature of the transaction between the Ponzi operator and innocent investor is *inequitable* and the innocent investor's right to the funds becomes merely possessory." (Emphasis added.) *Blair*, ¶ 30. This Court also recognized that a constructive trust, to avoid unjust enrichment, could be imposed against one who obtains property by some active wrongdoing including "by any form of unconscionable conduct, artifice, concealment, or questionable means, or ... in any way against equity and good conscience." *Blair*, ¶ 23.

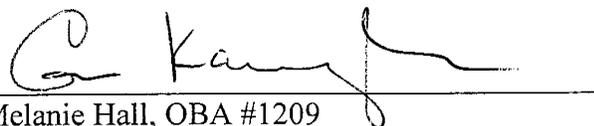
In this matter, there were hundreds of transactions that involved nothing more than the receipt of fictitious profits by Appellants through a check kite between the bank accounts of Marsha Schubert and the Appellants. Such wrongful conduct by the Appellants must be considered. In discussing the ramifications of forcing the restitution of profits from "innocent" investors, the Court cites only to relief defendants who earned their fictitious profits "innocently" or received the fictitious profits in good faith. *Blair*, ¶ 27. As set forth in the First Summary Motion and in greater detail in the Second and Third Summary Motions, Appellants cannot be said to have earned their fictitious profits innocently or in good faith.

This Court stated that “[i]nnocent investors ignorant of the Ponzi scheme may not hide behind their ignorance when unreasonably high dividends are paid to them and then claim that their high dividends are insulated from equity.” *Blair*, ¶ 56. If an unknowing investor cannot benefit from his receipt of unreasonably high dividends, it would necessarily follow that any “dividend” or “profit” received by an investor who knowingly participated in an extensive check kite cannot be insulated from equity. Under the facts of this case, particularly with regard to Appellants’ participation in the check kite and the absence of a contracted-for rate of return, any amount of “profit” was unreasonable.

Conclusion

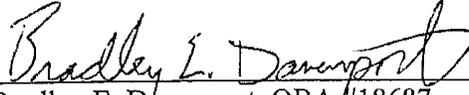
The ruling by the trial court on the Third Summary Motion is justified and did not exceed the scope of this Court’s mandate. Finally, as stated more thoroughly in the Appellees’ Motion to Dismiss, Appellants failed to raise any of these issues at the trial court, and therefore, they waived their right to present them on appeal. Furthermore, there are no questions of fact because Appellants never denied participating in the check exchange scheme. Appellees respectfully request that this appeal be dismissed.

Respectfully submitted,



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CERTIFICATE OF MAILING TO ALL PARTIES

I certify that a true and correct copy of Appellees' Reply was mailed this 4th day of March, 2011, to:

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by depositing it in the U.S. Mails, postage pre-paid.

Gen Kayle