

No. 115025

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 19 2016

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator,
Plaintiff, Appellee,

MICHAEL S. RICHIE
CLERK

v.

Seabrooke Investments, LLC; Seabrooke Realty LLC; Oakbrooke Homes LLC; Bricktown
Capital LLC; KAT Properties LLC; Cherry Hill LLC; Cherry Hill Apartments; Tom W.
Seabrooke, individually and as trustee of the Tom Seabrooke 2007 Revocable Trust and J
Karyn Seabrooke 2007 Revocable Trust; Judith Karyn Seabrooke, individually and as trustee
of the Tom Seabrooke 2007 Revocable Trust and J Karyn Seabrooke 2007 Revocable Trust,
Defendants,

and

Ryan Leonard,
Court Appointed Receiver, Appellee,

And

Wayne Doyle,
Intervenor, Appellant.

Appeal from the District Court of Oklahoma County
Case No. CJ-2014-4515
Before the Honorable Patricia Parrish

INTERVENOR/APPELLANT'S BRIEF IN CHIEF

Edward O. Lee, OBA #5334
William M. Lewis, OBA#19862
LEE GOODWIN LEE LEWIS & DOBSON
1300 E. 9th, Suite 1
Edmond, OK 73034
(405) 330.0118
(405) 330.0767 (fax)
blewis@edmondlawoffice.com
edlee@edmondlawoffice.com
Attorneys for Appellant, Wayne Doyle

No. 115025

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Oklahoma Department of Securities ex rel. Irving L. Fought, Administrator,
Plaintiff, Appellee,

v.

Seabrooke Investments, LLC; Seabrooke Realty LLC; Oakbrooke Homes LLC; Bricktown
Capital LLC; KAT Properties LLC; Cherry Hill LLC; Cherry Hill Apartments; Tom W.
Seabrooke, individually and as trustee of the Tom Seabrooke 2007 Revocable Trust and J
Karyn Seabrooke 2007 Revocable Trust; Judith Karyn Seabrooke, individually and as trustee
of the Tom Seabrooke 2007 Revocable Trust and J Karyn Seabrooke 2007 Revocable Trust,
Defendants,

and

Ryan Leonard,
Court Appointed Receiver, Appellee,

And

Wayne Doyle,
Intervenor, Appellant.

**Appeal from the District Court of Oklahoma County
Case No. CJ-2014-4515
Before the Honorable Patricia Parrish**

INTERVENOR/APPELLANT'S BRIEF IN CHIEF

Edward O. Lee, OBA #5334
William M. Lewis, OBA#19862
LEE GOODWIN LEE LEWIS & DOBSON
1300 E. 9th, Suite 1
Edmond, OK 73034
(405) 330.0118
(405) 330.0767 (fax)
blewis@edmondlawoffice.com
edlee@edmondlawoffice.com
Attorneys for Appellant, Wayne Doyle

TABLE OF CONTENTS

INTRODUCTION	2
SUMMARY OF RECORD.....	3
RECEIVER’S PROPOSED TREATMENT OF CLAIMS ADOPTED BY COURT FINAL ORDER DATED APRIL 27, 2016	5
ARGUMENT AND AUTHORITIES.....	7
PROPOSITION I: RECEIVERSHIP AN EQUITABLE PROCEEDING AND COURT’S FUNCTION IS TO EQUITABLY DISTRIBUTE ASSETS OF RECEIVERSHIP	8
PROPOSITION II: THE TRIAL COURT’S FINAL ORDER IS UNSUPPORTED BY FACTS OR EVIDENCE PRESENTED TO THE COURT.....	10
PROPOSITION III: COURT IMPROPERLY DETERMINED DOYLE AN INSIDER FOR ENTIRETY OF INVESTMENT.....	12
PROPOSTION IV: TRIAL COURT IMPROPERLY APPLIED EQUITABLE SUBORDINATION PURSUANT TO IN RE: HEDGED-INVESTMENTS ASSOCIATIES WITHOUT DETERMINING AMOUNT OF HARM TO OTHER INVESTORS.....	13
PROPOSITION V: ADDITIONAL AUTHORITY CITED BY TRIAL COURT INAPPLICABLE DUE TO CAPITAL CONTRIBUTORS SHARING IN RECEIVERSHIP ASSETS ON SAME LEVEL AS LENDERS AND OTHER CREDITORS	17
Cases	
<u>Beyer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.),</u> 269 F.3d 726 (6th Cir. 2001).....	14
<u>Camp v. Camp,</u> 1945 OK 234, 163 P.2d 970 (Syllabus)	9
<u>Cleveland Trust Co. v. State ex rel Hunt,</u> 1976 OK 135, 555 P.2d 594.....	8
<u>Harding v. Shelton, Inc. v. Prospective Inv. And Trading Co., Ltd.,</u> 2005 OK CIV APP 88, 123 P.3d 56.....	9
<u>Idaho Development, LLC v. Teton View Golf Estates, LLC,</u> 152 Idaho 401 (Id. 2011).....	17
<u>In re Guardianship of Stanfield,</u> 2012 OK 8, 276 P.3d 989.....	7

<u>In re Hedged-Investments Associates.</u>	
380 F.3d 1292 (10th Cir. 2004).....	13, 14, 15
<u>Little v. Gould.</u>	
103 Okl. 173, 229 P. 616 (1924).....	9
<u>Martin v. Brock.</u>	
2001 OK CIV APP 145, 55 P.3d 1095.....	8
<u>McFarling v. Demco, Inc..</u>	
546 P.2d 625 (1976).....	9
<u>Oklahoma Dept. of Securities ex rel. Faught v. Blair.</u>	
2010 OK 16, 231 P.3d 645.....	8, 18
<u>Smith v. Williamson.</u>	
1953 OK 115, 256 P.2d 174 (Syllabus 5)	9
<u>Smoot v. Barker.</u>	
1944 OK 319, 53 P.2d 227.....	8
<u>Tanzi v. Fiberglass Swimming Pools, Inc..</u>	
414 A.2d 484 (R.I. 1980)	17
<u>Underwood v. Phillips Petroleum Co.,</u>	
155 F.2d 372 (10th Cir. 1946).....	9
Statutes	
11 U.S.C.A. § 507.....	17

COMES NOW, the Intervenor/Appellant, Wayne Doyle (“Doyle”), and hereby submits his Brief in Chief.

INTRODUCTION

Although Appellant asserts that the improprieties of the Trial Court’s Order being appealed are many and varied, this appeal additionally involves a matter of first impression regarding use of the doctrine of equitable subordination in receiverships in Oklahoma and what standards and burdens should accompany the use of the doctrine of equitable subordination. The Trial Court adopted a theory of equitable subordination derived from a 10th Circuit bankruptcy case and other foreign jurisdictions in this case as a method of re-classifying certain claims. However, the Trial Court attempted to use this theory not merely to re-classify Appellant’s claim but rather to completely bar Appellant from any right to participate in distribution of the estate at any level. This despite Appellant being the largest single investor in the entities in receivership.

The Trial Court re-classified Appellant’s claim as a “capital contribution.” This should typically have precluded Appellant from being paid until claims enjoying a higher status were paid. However, even though Appellant’s claim was re-classified as “capital contributions”, he found himself having the same status as a number of other claimants proposed to share in the proceeds of the receivership. Despite this, only Appellant was barred from participating in distributions from the estate. Appellant has been singled out by the Trial Court for unequal treatment; apparently as punishment for challenging the receiver. The effect of the Trial Court’s order is that Appellant alone among all other capital contributors will lose his entire investment pursuant to the Trial Court’s interpretation of equitable subordination. Thus, an

equitable doctrine established to promote fairness and equity in receiverships has been utilized by the Trial Court for punitive purposes.

SUMMARY OF THE RECORD

The underlying action before the Trial Court was commenced on August 11, 2014, by the Oklahoma Department of Securities against Tom Seabrooke, his spouse, and his various business entities (together referred to as “Seabrooke”) for violations of Oklahoma’s securities laws. (Petition at 2-4, 12-14). Thereafter, a receiver (the “Receiver”) was appointed to take control and liquidate the remaining assets, then distribute the proceeds to investors and creditors of Seabrooke. (Counter-Designation of Record, Doc. 2). Mr. Seabrooke apparently fleeced many investors and financial institutions for many millions of dollars. Thirty (30) claims were filed by creditors and investors totaling \$15,275,951.34 in claimed losses. (Report on Claims and Recommendations for Classifications of Same filed on December 22, 2015 (“Receiver’s Report and Classification”) at 3).

Between May of 2009 and December of 2014, Wayne Doyle was one such investor, and in fact was Seabrooke’s largest investor, investing \$2,355,200 with Mr. Seabrooke and his various entities. (Id. at 10-15 and August 21, 2015 Order at 1). Initially, Mr. Doyle invested \$1,100,000 in other ventures before he became aware of another of Mr. Seabrooke’s projects in 2011, a hotel development called Bricktown Capital, LLC (August 21, 2015 Order at 1). Thereafter, his additional investment revolved around the aforementioned hotel project, Bricktown Capital, LLC, of which Doyle ultimately became a member. (Id. at 1-4).

Doyle, like many of the other investors and claimants, received sporadic repayments from Seabrooke, with Doyle receiving \$681,577.43 in repayments from May of 2009 through

March of 2014. (Id. at 4). The net loss incurred by Doyle constituted his claim in the receivership. (Transcript of February 29, 2016 Hearing, pg. 60, line 15 – pg. 61, line 8 and Supplement to Objection filed February 23, 2016, at 3).

During Doyle's investment in the hotel project, there came a time where he required Bricktown Capital to provide a second mortgage to him securing his investments with the hotel. The Receiver sought to reclassify Doyle's investments from a loan secured by a mortgage to capital contributions. Doyle strenuously objected to this treatment and the invalidation of his mortgage. A two day hearing was held in August of 2015. The Trial Court sided with the Receiver. The Court, by Order dated August 21, 2015, reclassified the entirety of Doyle's investments as capital contributions rather than loans secured by a mortgage, *including* those investments which predated Doyle's investment in Bricktown Capital. (Order and Judgment Approving Receiver's Report on Claims and Authorize Distribution to Creditors dated April 27, 2016 (the "Final Order") at 6-7). Following the sale of the hotel assets, the Receiver was awarded the excess proceeds (approximately \$119,000) which were added the general assets of the receivership to be shared by all approved creditors/claimants. Of particular note for purposes of this appeal, the Trial Court determined that all of Wayne Doyle's investments with Seabrooke were capital contributions and not loans. (August 21, 2015 Order at 5-6 and Final Order at 5).

Subsequently on December 22, 2015, the Receiver filed its Report on Claims and Recommendation for Classification of the Same. The Receiver recommended that all non-commercial claimants be treated identically except for Doyle. The Receiver made no distinction in the treatment or payment of loans or capital contributions.

The Receiver sought to exclude Doyle on the basis of equitable subordination after already having been successful in reclassifying Doyle's various cash infusions as "capital contributions." Doyle objected to being singled out as the sole capital contributor who would not share in the proceeds of the receivership and a hearing was held on February 29, 2016. After taking the matter under advisement, the Trial Court sent a short email to all counsel indicating she was approving the Receiver's recommendations in full and denying Doyle's Objection. Sometime thereafter, the Receiver prepared the Order and Judgment Approving Receiver's Report on Claims and Authorize Distribution to Creditors dated April 27, 2016 (the "Final Order"). Subsequently, the Final Order was submitted to the Trial Court in violation of Local Rule 11(D) and entered by the Trial Court without a hearing or allowing objections to be filed by Doyle.

**RECEIVER'S PROPOSED TREATMENT OF CLAIMS
ADOPTED BY COURT FINAL ORDER DATED APRIL 27, 2016**

The Receiver filed the Receiver's Report and Classification. The Final Order appealed herein was crafted by the Receiver and adopted by the Trial Court in its entirety.

The Receiver's Report and Classification breaks down easily into the three distinct categories of Claimants, which include (a) commercial lenders or suppliers; (b) non-commercial investors whose investments were structured as loans; and (c) non-commercial investors whose investments were structured as capital contributions. The Receiver reported that thirty (30) claims were received. Claims 24 through 30, inclusive, consisted of commercial lenders and suppliers which were resolved without appeal. Claims #23 and #9 were individual claims denied on alternate grounds and Claim #20 was withdrawn. The remaining claims consisted of non-commercial investors whose investments were structured as loans

(occasionally secured with mortgages on receivership property) or investments structured as capital contributions. A few of these claimants had multiple investments that fall into each category, loans and capital contributions.¹

The Claimants which were structured as loans included the following: Claim #1 – Patricia Aldridge; Claim # 2 - Roland Boeni (portion of claim loan); Claim #5 – David Curtis; Claim #6 – David Dennings (portion of claim loan); Claim #9 – Alicia T. Holtslander; Claim #11 – Jack Horcher; Claim #12 – Peggy Johnston/HPJ Family Limited Partnership (portion of claim loan); Claim #13 – Patricia Kramer; Claim #14 – Craig Matthies; Claim #15 – Murray Claytor MacDonald; Claim #16 – Bobby McCants; Claim #17 – Charlotte McGee; Claim #18 – Kendall McGowen (portion of claim loan); Claim #19 – Carolyn Poage; Claim #20 (voluntarily withdrew claim); Claim #21 – Richard Shonts; and Claim #22 – Susan Soesbe.

The Claimants whose investments were structured as capital contributions included the following: Claim #2 – Roland Boeni; Claim #3 – Faith and Kenneth Bristow; Claim #4 – Kelly Burfict; Claim #6 – David Dennings; Claim #7 – Wayne Doyle (reclassified as capital contribution); Claim #8 – Malene Eckhard; Claim #12 – Peggy Johnston/HPJ Family Limited Partnership; Claim #17 – Charlotte McGee; and Claim #18 – Kendall McGowen.

The Court's treatment of each non-commercial class of claimant was to simply subtract the amount of repayments received by each Claimant from their total investment to establish the amount of each claim, ignoring any interest accrued. Each Claimant would then share pro-rata in the funds on hand with the Receiver. Neither the Receiver nor the Trial Court made

¹ Claim #2 – Roland Boeni, Claim #6 – David Dennings; and Claim #18 – Kendall McGowen invested multiple times with Seabrooke under both structures. Certain investments including loans evidenced by promissory notes while others were structures as purchasing interests in a Seabrooke entity.

any distinction in treatment accorded non-commercial investors whose investments were structured as loans versus those investors whose investments were structured as capital contributions. The sole exception to this scheme was Doyle. Although Doyle's various cash infusions were re-classified as "capital contributions, he was precluded from participation in the estate even though all other similar claims were allowed to participate.

Despite the Trial Court's finding that Doyle's investments were capital contributions in the net amount of \$1,673,622.60 (\$2,355,200.00 invested minus \$681,577.43 repayments), the Trial Court barred Doyle's claim; treating him differently than other investors of the same class.

ARGUMENTS AND AUTHORITIES

Doyle recognizes this Court does not undertake to make findings of fact. However, "if the record is sufficient, the Supreme Court will, in an appeal from an equity decision, render that decree which the chancellor should have entered." In re Guardianship of Stanfield, 2012 OK 8, n. 55, 276 P.3d 989.

Doyle requests this Court determine he is entitled to share pro-rata with other members of the same class of creditors, i.e., capital contributors. There is no valid basis for the Trial Court's discriminatory treatment of Doyle. The sole distinguishing characteristic that was identified by the Trial Court was Doyle's attempt to take a mortgage to secure the advances he had made to Seabrooke. The Trial Court's previous reclassification of Doyle's investments and invalidation of the mortgage was the sole "penalty" that the Court could impose in the event that Doyle's attempt at securing his investment was deemed improper.

Put another way, it was the Court's job to equitably distribute the receivership estate.

To the extent Doyle was classified as a “contributor” or equity security holder - he was entitled to be treated in a fashion identical to others similarly classified.

“Where the rights of parties to an action are clearly defined and established by law, equity has no power to change or unsettle those rights. “No court is ever justified in invoking the maxim of equity for the purpose of destroying legal rights or of establishing rights that do not exist.” Martin v. Brock, 2001 OK CIV APP 145, ¶ 10, 55 P.3d 1095, 1098.

PROPOSITION I: RECEIVERSHIP AN EQUITABLE PROCEEDING AND COURT’S FUNCTION IS TO EQUITABLY DISTRIBUTE ASSETS OF RECEIVERSHIP

The Oklahoma Supreme Court described receiverships as “a procedural vehicle to protect the underlying equitable rights possessed by stockholders, partners, joint venturers, and members of an association to funds that have been grossly mismanaged and dissipated by fraud. The protection of those equitable rights includes applying flexible procedural rules to effectuate the protection of equitable substantive rights possessed by those who participated in a business relationship, whether by corporation, business venture, or association.” Oklahoma Dept. of Securities ex rel. Faught v. Blair, 2010 OK 16, ¶ 38, 231 P.3d 645. “While the power to appoint receivers is governed by statute, when deciding non-statutory receivership issues the court must look for guidance to the established usages and customs prevailing in the courts of equity.” Id. at ¶ 37 (citing Smoot v. Barker, 1944 OK 319, 53 P.2d 227, 228).

The Trial Court held that Doyle invested \$2,355,200 with Seabrooke. The Trial Court also determined the amount he was repaid on his investments, establishing Doyle’s loss on his investment as \$1,673,622.60 which is far and away greater than any other investor. It would appear a gross inequity for Doyle to lose his entire investment when all of those similarly situated (e.g. members of the same class of creditors) share pro-rata in the proceeds of the

receivership. In fact, such result is specifically contrary to Oklahoma law. The case of Cleveland Trust Co. v. State ex rel Hunt, 1976 OK 135, 555 P.2d 594 states:

As a class, a group of similarly situated creditors may have rights as against some other groups, but no creditor may exercise rights which will secure to himself a larger percentage of the indebtedness than the percentage of indebtedness due to fellow creditors of the same class. McFarling v. Demco, Inc., Okl., 546 P.2d 625 (1976). Equity requires a pro rata distribution of the assets available for the satisfaction of claims to all members of the class (Little v. Gould, 103 Okl. 173, 229 P. 616 (1924)) and among creditors of the same priority, equality is equity. Underwood v. Phillips Petroleum Co., 155 F.2d 372 (10th Cir. 1946).

In this case, it would appear that Doyle's sole sin, beyond attempting to secure his investment with a mortgage, would be challenging the authority of the Receiver to invalidate said mortgage. If that is the case, the Trial Court's *carte blanche* approval of the Receiver's recommendation towards Doyle's investments is simply punitive in nature.

Should the Trial Court believe Doyle acted improperly by attempting to secure his investments with a mortgage, it should not bar his recovery. The case of Harding v. Shelton, Inc. v. Prospective Inv. And Trading Co., Ltd., 2005 OK CIV APP 88, ¶ 25, 123 P.3d 56, 63, is instructive:

PITCO argues that equity should not aid Operators because they are guilty of inequitable conduct. Indeed, it is the rule that "[e]quity will not lend its aid to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief." Camp v. Camp, 1945 OK 234 ¶ 0, 163 P.2d 970 (Syllabus). The clean hands doctrine certainly applies where equity is concerned, but this case presents the question of whose hands are dirtier. **"The doctrine of 'clean hands' is not rigid, and it does not operate so as to repel all sinners from a court of equity; as [it] is aimed at securing justice and equity."** Smith v. Williamson, 1953 OK 115, ¶ 0, 256 P.2d 174, 176 (Syllabus 5). [emphasis added]

If the Trial Court truly intended to create equity, rather than punish Doyle, equity has been done in this matter by the invalidation of Doyle's mortgage with all excess proceeds from

the hotel sale having been delivered over to the Receiver. The other creditors, including those within the same class as Doyle, will now share in those sale proceeds.

PROPOSTION II: THE TRIAL COURT'S FINAL ORDER IS UNSUPPORTED BY FACTS OR EVIDENCE PRESENTED TO THE COURT

The Trial Court's abdication of its duties to review and craft an order which weighs equities in this matter allowed for a grossly overreaching Final Order which is unsupported by the evidence presented to the Trial Court. In fact, the Final Order contains findings which are exactly the opposite of the August 21, 2015 Findings of Fact and Conclusions of Law. This is most disturbing considering the August 21, 2015 Order *was incorporated in its entirety into the Final Order.*

As an example, the Final Order contained a finding that Doyle was a co-managing partner in the entity known as Bricktown Capital, LLC. However, the Court's August 21, 2015 Order held that Doyle was not a manager of Bricktown Capital, LLC. No additional testimony was presented on this issue at the hearing held February 29, 2016. The Receiver improperly crafted findings out of whole cloth which the Trial Court "rubber stamped" in an attempt to justify the disparate and unfair treatment of Doyle. Ultimately, the Final Order appealed in this matter went far beyond those findings contained in the August 21, 2015 Order or any facts presented at the hearing held on February 29, 2016. Neither the transcript of the hearing nor the August 21, 2015 Order contained any reference to all or a portion of Fact #2, #3, #4, #5 and #7 of the Final Order.

The portions of the Final Order which were completely devoid of evidentiary support are easily identified. The Receiver, no doubt attempting to craft an order more difficult to appeal, cites as support for these Findings the following: (i) unsupported arguments of counsel

contained in previous motions filed in the case, (ii) deposition testimony which was never presented or admitted in Court, and (iii) transcripts from earlier hearings which resulted solely in the August 21, 2015 Order. Despite having limited the results of those earlier hearings with the August 21, 2015 Order, the Receiver sought to re-write and contort those earlier findings into new facts in the Final Order without having presented any additional evidence. It seems incomprehensible that the Trial Court issue the August 21, 2015 Findings of Fact and Conclusions of Law after weighing the evidence presented, then create additional (and sometimes opposite) findings of fact from those same hearings in an effort to support its decision in this matter.

More cogently, there are specific conclusions of law contained in the appealed Final Order which are unsupported by evidence. First, conclusion of law #7 is clearly unsupported by the evidence. It is without dispute that Wayne Doyle, the Receiver and this Court determined that Doyle invested \$1,100,000 with Seabrooke prior to ever becoming aware of, or investing in Bricktown Capital. (August 21, 2015 Order at 1) It cannot be disputed that as to this portion of Doyle's claim, he cannot be considered an "insider." Despite this, Conclusion of Law #7 of the Final Order ignores the Court's earlier finding on this very issue and classifies Doyle as an "insider" for all of his investments with Seabrooke.

Conclusion of Law #8 additionally lacks any evidentiary support. No evidence was presented during the hearing on February 29, 2016 nor contained in the August 21, 2015 Order which would support certain Conclusions of Law #8, including specifically, but not limited to, the conclusions that (i) Doyle received preferential payments in return for his capital contributions; (ii) including monies otherwise needed to repair storm damage affecting the

ability of Bricktown Hotel to generate revenues; (iii) Doyle's alleged refusal to identify and communicate with other owners of the Company; (iv) Doyle's alleged agreement to use hotel storm damage insurance proceeds to pay-down bank loan debt for which he was personally liable, (v) finding Doyle used his alleged insider status to structure his capital contributions and prior capital contributions in other entities as a secured loan to Bricktown Capital; and (vi) finding Doyle's conduct resulted in substantial harm to other investors in Bricktown Capital. There was simply no evidence presented at the February 29, 2016 hearing nor contained in the adopted August 21, 2015 Order which supports these conclusions of law.

PROPOSITION III: COURT IMPROPERLY DETERMINED DOYLE AN INSIDER FOR ENTIRETY OF INVESTMENT

In the foreign cases adopted by the Trial Court in the Final Order, different standards are applied to determine equitable subordination of a claim depending on whether the party whose investment is sought to be subordinated is an "insider" or not an "insider" of a company. In the underlying matter, there is no dispute that certain of Doyle's investments with Seabrooke were made prior to him becoming a member of any Seabrooke entity, including Bricktown Capital, LLC. In fact, the August 21, 2015 Order describes and details those investments for which Doyle could not be an insider. Despite the existence of this earlier determination, the Court ruled that the entirety of Doyle's investments were subject to the scrutiny of an "insider" of the Seabrooke entity, Bricktown Capital. Accordingly, the Trial Court utilized an improper legal standard to determine equitable subordination for at least that portion of Doyle's investments with Seabrooke prior to him becoming an "insider" of Bricktown Capital. Even should this Court ultimately adopt the foreign standards relied upon by the Trial Court, the Trial Court utilized a clearly improper standard as to a portion of Doyle's investment.

The August 21, 2015 Order entered by the Trial Court provided that Doyle made the following investments with Seabrooke between May of 2009 and August of 2010: \$200,000 to Oakbrooke Homes, LLC, \$350,000 to Seabrooke Investments, LLC and \$550,000 to Tom Seabrooke (August 21, 2015 Order at 1, ¶ 2). No evidence was presented that Doyle was an insider of any of those entities. Additionally, the August 21, 2015 Order found that Doyle's first transaction, investment or association with Bricktown Capital, LLC did not occur prior to December of 2010 and he became a member of such company in February of 2011. (August 21, 2015 Order at 2, ¶¶ 5, 7-8). It should be recalled that the August 21, 2015 Order was adopted in full by the Final Order being appealed herein.

Despite there being no additional testimony presented at the February 29, 2016 hearing on Receiver's Recommendations and Classification, the Trial Court improperly applied the "insider" standard to all of Doyle's investments with Seabrooke, rather than those that occurred after he arguably became an insider of Bricktown Capital, LLC. (Final Order at 8, ¶ 7). Such misapplication of the incorrect standard in determining whether to equitably subordinate Doyle's investments is clear, reversible error.

PROPOSITION IV: TRIAL COURT IMPROPERLY APPLIED EQUITABLE SUBORDINATION PURSUANT TO *IN RE: HEDGED-INVESTMENTS ASSOCIATES* WITHOUT DETERMINING AMOUNT OF HARM TO OTHER INVESTORS

Due to the dearth of reported cases addressing equitable subordination in Oklahoma receiverships, the Trial Court relied primarily on the case of In re Hedged-Investments Associates, 380 F.3d 1292 (10th Cir. 2004) first in reclassifying all of Doyle's investments as capital contributions, and ultimately applying equitable subordination to deny Doyle's claim in its entirety. However, to equitably subordinate Doyle's claim, the Court was required to

determine the amount of injury inflicted upon other investors by Doyle's inequitable conduct. Then, and only then, is subordination appropriate up to the amount of injury suffered by other investors. The Trial Court was neither presented evidence nor determined an amount in which other investors in Bricktown Capital were injured. The Final Order simply recited that other investors were "substantially harmed." Such generic finding, does not satisfy the standards set forth in In re Hedged-Investments Associates, *supra.*, and is insufficient to establish equitable subordination of Doyle's claim.

The pertinent language contained in In Re Hedged-Investments Associates, comes within the Court's discussion of the differences between reclassification of a claim and equitable subordination. The Court stated:

We begin our analysis by reiterating the important distinction between the two remedies of recharacterization and equitable subordination.

When a putative loan to a corporation is recharacterized, the courts effectively ignore the label attached to the transaction at issue and instead recognize its true substance. The funds advanced are no longer considered a loan which must be repaid in bankruptcy proceedings as corporate debt, but are instead treated as a capital contribution...

Not only do recharacterization and equitable subordination serve different functions, but the extent to which a claim is subordinated under each process may be different.... Recharacterization cases turn on whether a debt actually exists, not on whether the claim should be equitably subordinated. In a recharacterization analysis, if the court determines that the advance of money is equity and not debt, the claim is recharacterized and the effect is subordination of the claim as a proprietary interest because the corporation repays capital contributions only after satisfying all other obligations of the corporation. In an equitable subordination analysis, the court is reviewing whether a legitimate creditor engaged in inequitable conduct, **in which case the remedy is subordination of the creditor's claim to that of another creditor only to the extent necessary to offset injury or damage suffered by the creditor in whose favor the equitable doctrine may be effective.**

[emphasis added] *Id.* at 1297; citing Beyer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics,

Inc.), 269 F.3d 726, 748-49 (6th Cir. 2001).

The Trial Court previously determined that all of Doyle's investments be treated as capital contributions. To find equitable subordination of any portion of Doyle's investments, the Receiver was required to show that Doyle's inequitable conduct caused "injury or damage" to another creditor of Bricktown Capital, LLC. Then, and only then, would Doyle's claim be subordinated to the extent necessary to offset another creditor's injury. See In re Hedged-Investments Associates, Inc. at 1297.

The Trial Court never determined, nor was any evidence presented, how other investors were injured and to what extent they were injured. The Trial Court simply included a statement that other investors in Bricktown Capital were "substantially harmed." However, such a conclusion cannot be utilized to determine the portion of Doyle's claim which could be subordinated. Without a specific finding of the amount in which each other investor was harmed, the Trial Court had no basis to subordinate the entirety of Doyle's claim. It certainly had no basis to subordinate the entirety of his \$1,673,622.60 claim.

The aggregate amount of all other investments in Bricktown Capital totaled \$797,706.48, all of which occurred before Doyle became an insider or invested any money with Seabrooke. (Receiver's Report and Classification, at 8-9, 14-15, 19-22, 25-27). Those claimants whose investments, or a portion of which, were capital contributions in Bricktown Capital, LLC, and the date of their investment were:

<u>Claim #</u>	<u>Name</u>	<u>Date</u>	<u>Amount</u>
3	Faith Bristow	2006	\$33,500
4	Kelly Burfict	2006	\$33,500

8	Malene Eckhard	2007	\$67,000
12	Peggy Johnston/HPJ	2007	\$507,958.48
18	Kendall McGowen	2009	\$155,748

Even assuming all of the other investors in Bricktown Capital were harmed by Doyle to an extent that caused a complete loss of their investment, only \$797,706.48 of Doyle's \$1,673,622.60 claim could be subordinated under any theory of equitable subordination. It is rather preposterous to believe that Doyle's alleged improprieties (loaning Bricktown Capital funds and attempting to take a mortgage on those funds), caused further injury to those earlier investors with Seabrooke and Bricktown Capital, LLC. In either event, even if the Court could somehow find that Doyle's actions of providing additional funding to Bricktown Capital caused these earlier investors harm, it certainly could not injure them beyond the amount of their investment. Therefore, subordinating Doyle's entire claim is in error.

Relating this back to Doyle's complained of conduct, the primary conduct the Court disfavored was Doyle's attempt at securing all of his investments with Seabrooke by filing a mortgage against the sole asset (a hotel) of Bricktown Capital, LLC. This mortgage would have allowed Doyle to receive any excess proceeds from the sale of the hotel following paying off prior mortgages and lienholders. The excess proceeds following the sale of the hotel consisted of approximately \$119,000. Assuming the Trial Court was correct and Doyle's conduct was in equitable to other investors, the sole injury to other investors would have been Doyle's receipt of the \$119,000. Therefore, the maximum amount of injury any other investor in Bricktown Capital, LLC would have been harmed would equal \$119,000. However, Doyle's

mortgage was invalidated by the Trial Court ordered the \$119,000 be delivered over to the Receiver and added to the general assets of the receivership. Accordingly, under any suggested theory of equitable subordination, the exact amount of injury caused by Doyle's inequitable conduct has already been recouped by the Receiver and no further penalty can be imposed upon Doyle. Having no additional evidentiary basis to indicate additional harm to the other investors, the Trail Court was without authority to impose additional penalties on Doyle under any theory of equitable subordination.

PROPOSITION V: ADDITIONAL AUTHORITY CITED BY TRIAL COURT INAPPLICABLE DUE TO CAPITAL CONTRIBUTORS SHARING IN RECEIVERSHIP ASSETS ON SAME LEVEL AS LENDERS AND OTHER CREDITORS

The Trial Court cites to various authority for the proposition that a subordinated debt or reclassified debt is subordinated to general creditors of the estate. See Idaho Development, LLC v. Teton View Golf Estates, LLC, 152 Idaho 401 (Id. 2011) and Tanzi v. Fiberglass Swimming Pools, Inc., 414 A.2d 484 (R.I. 1980). However, those cases simply have no applicability to this particularly receivership because the Trial Court approved of classifying all capital contributors (owners) and general creditors (lenders) identically, with each class of creditors sharing pro-rata in the assets of the receivership.

In a typical bankruptcy proceeding or receivership, classes of creditors are established, with a distinction in treatment between lenders to the defunct organization and capital contributors or owners of the defunct organization. Normally, all lenders would be paid back first, with any excess proceeds to be split between capital contributors of the defunct entity. See 11 U.S.C.A. § 507. In those cases, simply reclassifying a debt from a loan to a capital contribution has the effect of subordinating said debt to the general creditors of the estate. The

cases of Idaho Development and Tanzi, *supra.*, address factually similar situations wherein capital contributors were only paid after all lenders and other general creditors were paid. However, such cases are dissimilar to the class treatment approved by the Court in this Receivership.

The Trial Court approved the Receiver's recommendation to pay all capital contributors on an equal basis with lenders, with each sharing pro-rata in the general assets of the Receivership. The Trial Court made no distinction between investors, whether their investment took the form of a capital contribution or a loan, except in the case of Doyle. Doyle's investment, although being the largest investor and classified as a capital contribution, was singled out from claims of the same class for denial.

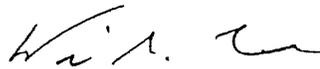
The controlling law in this case is Dept. of Securities ex rel. Faught v. Blair, 2010 OK 16, ¶ 38, which opined that a Receivership is intended to protect the rights of all persons or entities who participated in a business relationship with Defendants, whether by corporation, business venture or association. It is not intended nor permissible for the Court to pick and choose which creditors, from an identical class of creditors, receive preferential treatment to the detriment of other creditors in the same class of creditors. See also, Cleveland Trust Co., v. State ex rel. Hunt, *supra.* (Equity requires a pro rata distribution of the assets available for the satisfaction of claims to all members of the class and among creditors of the same priority, equality is equity [internal citations omitted])

Should the appellate courts determined it appropriate for Oklahoma to adopt the doctrine of equitable subordination and establish standards for its use, it must also determine the appropriateness of its use as a punitive measure such as in this case. This Court should

determine if the theory can be used to single out one member of a class for disparate and discriminatory treatment from other members of that class, when no injury to the members of that class were established as a result of the inequitable conduct.

CONCLUSION

Ultimately, the Trial Court abdicated its duty to oversee the proper application of Oklahoma law and equitable principals when it “rubber stamped” the Receiver’s recommendations and entered the Final Order crafted by the Receiver. Having done so, the primary principle espoused by the Trial Court appears to be that if a claimant challenges a Court appointed Receiver the Claimant will receive nothing. Such a principle is clearly inequitable in all cases, but particularly in Doyle’s situation. Doyle no doubt will lose more money to Seabrooke’s schemes than any other investor, and now stands in a position to lose his entire investment due to the Trial Court’s discriminatory and inequitable Final Order.



Edward O. Lee, OBA #5334
William M. Lewis, OBA#19862
LEE GOODWIN LEE LEWIS & DOBSON
1300 E. 9th, Suite 1
Edmond, OK 73034
(405) 330.0118
(405) 330.0767 (fax)
blewis@edmondlawoffice.com
edlee@edmondlawoffice.com
Attorneys for Appellant, Wayne Doyle

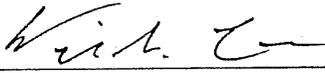
CERTIFICATE OF MAILING TO PARTIES AND COURT CLERK

I certify that a true and correct copy of the Brief in Chief was mailed this 19th day of December, 2016, by depositing it in the U.S. Mail, postage prepaid or by electronic mail to:

Patricia A.Labarthe

Jennifer Shaw
Oklahoma Department of Securities
204 North Robinson, Suite 400
Oklahoma City, OK 73102
Attorney for Co-Appellee, ODS

Robert D. Edinger,
Robert Edinger PLLC
100 Park Avenue, Suite 500
Oklahoma City, OK 73102
Attorney for Co-Appellee, Receiver



WILLIAM M. LEWIS

