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 & Assoc. and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert & Associates,	]	
Plaintiffs/Appellees,	]	
vs.	]	Case No. CJ-2005-3796 Consolidated with Case No. CJ-2005-3299
ROBERT W. MATHEWS, et al	]	
Defendants,	]	Supreme Court No. 104161
KENNETH YOUNG, LESLIE YOUNG, K.R. LARUE, DANA LARUE, SCOTT WILCOX, SHERYL MERCER, RODNEY MARTIN, WANDA MARTIN, RAYMOND LAUBACH, DAN JACKSON, CRYSTAL JACKSON,	]	
Defendants/Appellants.	]	

APPELLEE RECEIVER'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

COMES NOW Appellee, Douglas L. Jackson, in his capacity as the court-appointed receiver for the benefit of creditors and claimants of Marsha Schubert and Schubert and Associates, and for the assets of Marsha Schubert, individually, and doing business as Schubert and Associates ("Receiver"), and submits his Answer to Appellants' Petition for Writ of Certiorari filed on May 2, 2007.

STATEMENT OF RELEVANT FACTS

This case arises from Marsha Schubert's operation of a Ponzi scheme. Schubert perpetrated this scheme by using funds received from later investors to pay out to earlier

investors as fictitious profits. The Oklahoma Department of Securities ("Department") brought a civil action against Schubert in October 2004, in Logan County, where she resided and conducted her business. The Department sought injunctive relief and the appointment of a receiver for Schubert and her assets.

The District Court of Logan County appointed Mr. Jackson as the receiver over Schubert and her assets. Subsequently, the Court amended the order appointing Receiver wherein it expressly provided that the Receiver shall also serve as "receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates".

The Receiver and Department filed the instant lawsuit in the District Court of Oklahoma County to recover fictitious profits Schubert paid out to Appellants and their co-defendants. Initially, Plaintiffs asserted causes of action for unjust enrichment and to set aside fraudulent transfers pursuant to the Uniform Fraudulent Transfer Act ("UFTA"). Plaintiffs filed several motions for summary judgment against Appellants and their co-defendants. Prior to the hearing on Plaintiffs' Motions for Summary Judgment, Plaintiffs withdrew their cause of action under the UFTA. The trial court granted summary judgment in favor of Plaintiffs on their remaining cause of action for unjust enrichment.

Appellants appealed the trial court's Orders granting summary judgment against them. This Court assigned the cases to the Oklahoma Court of Civil Appeals, Division 1. After hearing oral arguments on March 1, 2007, the Court of Civil Appeals for the State of Oklahoma ("COCA") issued its opinion affirming the trial court's judgment on April 13, 2007.

ARGUMENT AND AUTHORITY

The Appellees, Receiver and Department, have pursued the same causes of action against Appellants in the case below. However, the Receiver and Department are separate entities and

the Receiver's authority relative to the action below stands on a different footing than that of the Department. The COCA recognized the distinction between the Appellees by applying different reasoning and separately addressing the standing of each in its April 13, 2007 opinion. Therefore, the Receiver will not address portions of Appellants' Petition for Certiorari addressed to the COCA's opinion relative to the Department.

Receiver submits that Appellants have failed to identify any special or important reasons that would justify the granting of certiorari as required by Okla.Sup.Ct.R. 1.178(a). Additionally, "the failure to present with accuracy, brevity and clarity matters essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying a petition." Okla.Sup.Ct.R. 1.179(b). Appellants' Petition for Writ of Certiorari does not meet the requirements of these rules and should be denied.

First, Appellants' Petition for Writ of Certiorari fails to identify questions of substance not heretofore determined by this Court. While this Court may not have issued an opinion specifically addressing whether a receiver has standing to recover fictitious profits paid out to investors as part of a Ponzi scheme, this Court and the legislature have repeatedly addressed the underlying legal issues of this case. Specifically, there is significant body of Oklahoma law addressing the standard of review applicable to motions for summary judgment. Likewise, there is extant jurisprudence on the elements of a cause of action for unjust enrichment. Finally, there is considerable case law from this Court pertaining to standing, and a specific Oklahoma statute pertaining to the standing of a receiver to bring claims in his own name. Therefore, Appellants' Petition for Writ of Certiorari fails to identify a question of substance not heretofore determined by this Court and should be denied.

Second, Appellants' Petition for Writ of Certiorari fails to identify a question of substance that the COCA decided in a way not in accord with applicable decisions of this Court. The trial court orders that Appellants have appealed grant summary judgment in favor of Plaintiffs on their cause of action for unjust enrichment. As noted in the COCA opinion, that Court applied the well-established standard of review applicable to motions for summary judgment. Specifically, the COCA noted on page 8 of its opinion the standard of review applicable to a grant of summary judgment and cited this Court's opinion in Cranford v. Bartlett, 2001 OK 47, 25 P.3d 918 in support of the standard. The COCA stated that it reviews a grant of summary judgment *de novo* to determine whether a party is entitled to judgment as a matter of law, which includes examination of the pleadings and evidentiary materials to determine if there is a substantial controversy as to any material fact with inferences and conclusions arising from the evidentiary materials viewed in a light most favorable to the non-moving party. The COCA also properly noted that in reviewing a grant of summary judgment neither the COCA nor the trial court may weigh the evidence. See the COCA Opinion, at pg. 8. The recitation of the standard of review applicable to a grant of summary judgment is based on well-established Oklahoma law and was applied correctly by the COCA.

Similarly, the Appellants fail to demonstrate how the COCA supposedly deviated from applicable decisions of this Court relative to an unjust enrichment cause of action. Unjust enrichment is a right of recovery which is essentially equitable, "its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another". See McBride v. Bridges, 202 Okla. 508, 215 P.2d 830(1950); N.C. Corff Partnership, Ltd., et al. v. Oxy USA, Inc., 1996 OK CIV APP 92, 929 P.2d 288. Before a party will be entitled to recover for unjust enrichment, however, there must be

enrichment to another coupled with resulting injustice. See Teel v. Public Serv. Co., 767 P.2d 391, 398 (Okla. 1985) (superceded by statute on other grounds).

Appellants have shown no authority that any additional element(s) is required for a successful cause of action for unjust enrichment. Unlike a legal claim for fraud, an equitable cause of action for unjust enrichment contains no requirement that a defendant have engaged in some form of "wrongdoing". Based upon the above-cited authority and facts, Appellants have failed to show any reason why the COCA's affirmation of the trial court's judgment based on unjust enrichment presents a question of substance not heretofore determined by this Court or that the COCA applied well-established law pertaining to unjust enrichment in a way not in accord with applicable decisions of this Court.

In addition, Appellants fail to identify a question of substance that has not previously been decided by this Court relative to the issue of standing. First, this Court has established binding precedent through a number of case opinions on the issue of standing. See e.g., Toxic Waste Impact Group, Inc. v. Leavitt, 1994 OK 148, 890 P.2d 906; Missouri-Kansas-Texas Railroad Co. v. State, 1985 OK 108, 712 P.2d 1985. Therefore, the basic legal issue of standing is not an issue of first impression.

Second, contrary to Appellants' mischaracterization of the COCA opinion, the COCA did not determine that the Receiver's standing was based upon or controlled by the Oklahoma Uniform Securities Act of 2004, 71 O.S. Supp. 2004, §1-101 et. seq. ("the Act") The COCA opinion is set out in several distinct sections, including a section relative to the Department's standing, a separate section on the Receiver's standing, and a third section addressing the propriety of summary judgment on the unjust enrichment cause of action. In its section on the standing and claims of the Receiver, the COCA notes that "our conclusions as to Receiver's

ability to maintain this action, under the facts here, are the same as for Department, **but for different reasons**." See the COCA opinion, at pg. 16 (emphasis added).

While the COCA does note that the Department sought appointment of Receiver pursuant to §1-603 of the Act, it never states in its opinion that the Receiver is subject to the control of the Department or the Act. In fact, Oklahoma law has long observed that once a receiver is appointed, he or she is an officer of the court. See Eckles, et.al. v. Busey, 1941 OK 409, 132 P.2d 344, 346. In other words, the Receiver is not the employee or agent of the individual or entity who sought his or her appointment. See Hardman v. Whitney, 1936 OK 183, 52 P.2d 1065, 1066 (noting that a receiver derives his authority from the act of the court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed). Contrary to Appellants' mischaracterization of the COCA opinion, the COCA expressly observes that besides authorizing appointment of a receiver or conservator, "the Securities Act does not further define nor delimit the authority of a receiver appointed under the Act". See COCA opinion, at pg. 16. In the absence of a specific statement of the powers of a receiver appointed pursuant to statute, "we look to the general powers granted to receivers pursuant to 12 O.S. 2001 §1554." The COCA then quoted that statutory section, which provides in pertinent part as follows:

> The receiver has, under the control of the court, power to bring actions in his own name, as receiver; to take and keep possession of the property,... to collect debts,... and generally to do such acts respecting the property as the courts may authorize. See 12 O.S. § 1554.

As the COCA observed, the District Court of Logan County amended its order so that the receiver would continue to serve as receiver for the defendants in that case (Schubert and Schubert and Associates) and over their assets. The District Court of Logan County defined assets to include "the proceeds of the investment program described in the Petition by which

certain participants were unjustly enriched or received fraudulent transfers". Most significantly, the District Court of Logan County's amended order provided that the Receiver would also serve as "receiver for the benefit of claimants and creditors of Schubert and Schubert and Associates." Therefore, based upon the standing granted to a receiver by statute and the language in the order of the Logan County Court appointing the Receiver, the COCA correctly determined that the Receiver had standing to bring a claim for unjust enrichment against Appellants.

Appellants further argue, incorrectly, that the COCA misapplied a general principle of law pertaining to receivers. Specifically, Appellants cite the general principle that a receiver derives the right to receivership property or claims from the entity that has been placed in receivership. See Farrimond v. State ex. rel. Fisher, 2000 OK 52, 8 P.3d 872, 875; Miller v. Thompson Petropol, 1923 OK 426, 216 P. 641. While the recitation of this general principal of law is accurate, Appellants' argument is flawed because it fails to acknowledge the key fact that the District Court of Logan County expressly appointed the Receiver as receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates. This express appointment means that the Receiver's action in bringing the instant lawsuit on behalf of the creditors and claimants is in accord with the referenced general principal of law. Therefore, the COCA's application of this general principle of law to the facts in this case was in conformity with applicable decisions of this Court.

Finally, with respect to the issue of Receiver's standing, there is one additional fact that Appellants intentionally omit and that is not expressly addressed in the COCA opinion, which is the assignment of claims against Appellants to the Receiver. Specifically, the record on appeal contains *Plaintiff Receiver's Response and Objection to Defendants' Motion for Summary Judgment* filed on July 14, 2006. Attached to that brief are four affidavits from individuals who

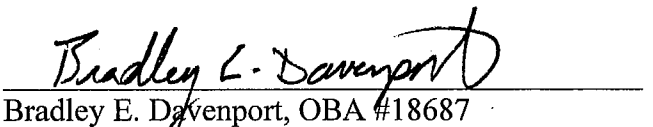
lost substantial sums of money through Schubert's operation of a Ponzi scheme. Through these affidavits, each of these individuals assigned their right of action against the Appellants in the case below to the Receiver. The combined amount of funds lost by the individuals assigning their claims to the Receiver is $4.3 million, which is greatly in excess of the sums received by these Appellants from Schubert. Therefore, the assignments provide the Receiver a totally separate yet equally valid basis of standing to bring a cause of action for unjust enrichment and seek disgorgement from the Appellants.

CONCLUSION

Appellants have failed to identify any special and important reasons that would justify issuance of a Writ of Certiorari by this Court to review the opinion of the COCA. The COCA correctly decided the issues in accordance with well-established precedent from this Court relative to the standard of review for motions for summary judgment, the elements of an equitable cause of action for unjust enrichment, and legal standing. In addition, the COCA correctly applied and decided the issue of standing in accordance with Oklahoma statutes, specifically 12 O.S. §1554. Finally, Appellants have failed to demonstrate any genuine issue of material fact relative to the unjust enrichment cause of action, and the undisputed material facts demonstrated that Appellees were entitled to judgment as a matter of law in this case.

WHEREFORE, Appellee, Douglas L. Jackson, in his capacity as receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates and for the assets of Marsha Schubert, individually, and d/b/a Schubert and Associates, respectfully requests that this Court deny Appellants' Petition for Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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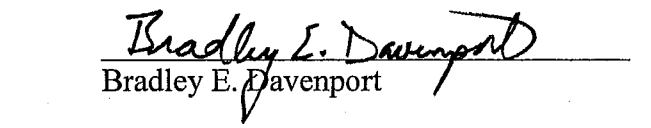

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