

STATE OF OKLAHOMA  
2005  
MICHAEL S. FORD  
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF )  
SECURITIES *ex rel.* IRVING L. )  
FAUGHT, Administrator, et al., )

Plaintiff/Appellee, )

Supreme Court No. 109111

v. )

District Court Case No.: CJ-2005-3796

MARVIN LEE WILCOX, PAMELA )  
JEAN WILCOX, et al., )

Defendants/Appellants. )

**APPELLANTS' RESPONSE TO  
APPELLEES' MOTION TO DISMISS**

COMES NOW, Appellants' for their Objection to the Appellee's' Motion to Dismiss and would show this court as follows:

**FACTS**

1. This case was filed on May 11, 2005 in the District Court of Oklahoma County by a Petition, which listed 158 defendants and in that petition the appellees sought relief on the grounds of unjust enrichment, fraudulent transfer and equitable lien. Nowhere in the original petition were there any allegations that any of the 158 defendants (including the Appellants) had in any way violated securities laws of the State of Oklahoma. See Petition, Record on Appeal, Tab 2. Subsequently, the Oklahoma Department of Securities sought summary judgment only on the grounds of unjust enrichment against all 158 defendants and judgment was entered as to the appellants

Wilcox on the sole grounds of unjust enrichment on February 5, 2007. *See* Docket Sheet, Record on Appeal, Tab 1.

2. The judgment against Appellant Wilcox was subsequently appealed as part of Case No. 104304, which was consolidated with Case No. 104262. *See Oklahoma Department of Securities, et al. v. Blair*, 2010 OK. 16.

3. In its opinion the Supreme Court noted "In the trial court, the Department explained that it made no allegations that the defendants violated the securities statutes or materially aided in the violation of those statutes". 2010 OK. 16, ¶ 10. In footnote 10 of the Supreme Court decision it is noted that the Department stated in its response brief that it made no allegations that the relief defendants, (the 158 defendants) violated the act. *See Oklahoma Department of Securities, et al. v. Blair*, 2010 OK 16, footnote 10.

4. In its determination of its first appeal, the Supreme Court concluded

"The petitions for certiorari in these appeals challenge the Department's action against innocent investors and the ability of the court-appointed receiver to seek equitable refunds from innocent investors who received more than their original investments."

"Summary judgment was granted based upon the principle that a profit to a Ponzi-scheme investor is, as a matter of law, unjust enrichment, and subject to an action by the Department for restitution. We have rejected that concept today and explained that equitable recovery against an innocent investor must be based upon that investor's receipt of an unreasonably high dividend on his or her investment, a mixed question of law and fact that must be decided by the trier of fact on remand. Judgment for the receiver must be based upon the investor's receipt of an unreasonably high dividend on his or her investment, an issue that must be decided by the trier of fact on remand."

"Due to the missed question of fact and law whether the investors' individual returns were unreasonably excessive, the summary judgments must be reversed. The summary judgment granted against Defendants in Okla. County Cause No. CJ-2005-3796 (consolidated with CJ-2005-3299) challenged herein in Okla. Sup. Ct. Nos. 104,004, 104,161, and 104,262 consolidated with 104,304, are hereby reversed and the causes remanded to the District Court for further proceedings consistent with this opinion."

*See Oklahoma Department of Securities, et al. v. Blair*, 2010 OK 16, ¶¶ 51, 52, 53, and 54.

5. Upon remand, the Department of Securities did not file any amended petition against the Wilcox, and in the pre-trial conference order the Department sought only unjust enrichments based upon *Oklahoma Department of Securities, et al. v. Blair* and 71 O.S. § 1-603, which was the same contentions they made in their original petition. *See* Docket Sheet, Record on Appeal, Tab 1 for lack of any amended petition filing, and Pre-Trial Conference Order, Record on Appeal, Tab 7.

6. The Oklahoma Department of Securities in its Motion for Summary Judgment against the Appellant Wilcox filed on August 23, 2010 included claims that Wilcox were not innocent investors, which was objected to by the Appellant Wilcox in their objection filed September 7, 2010. *See* Plaintiff's Motion for Summary Judgment filed on August 23, 2010, Record on Appeal; Tab 3 and Appellant Wilcox Objection filed September 7, 2010, Record on Appeal, Tab 4, and Plaintiff's Reasserted Motion for Summary Judgment filed on November 18, 2010, Record on Appeal, Tab 8. The court in its Journal Entry of October 18, 2010 granted summary judgment that the Appellant Wilcox were not innocent investors, and then subsequently in its Journal Entry on

December 17, 2010 again found that Wilcox were not innocent investors and found that they owed \$509,505.00. Neither journal entry entered by the court makes any findings as to whether Wilcox had received unreasonably high dividends as mandated by the Supreme Court in *Oklahoma Department of Securities, et al. v. Blair*, 2010 OK, 16. See Judgment, Record on Appeal, Tab 6 and Tab 9.

### ARGUMENTS AND AUTHORITIES

#### **PROPOSITION I:**

**THE MOTION TO DISMISS SHOULD BE DENIED AS THE TRIAL COURT AT THE APPELLEES URGING EXCEEDED THE MANDATE OF THE SUPREME COURT.**

Under the undisputed facts, the Appellee, Department of Securities, had asserted to the trial court and the Oklahoma Supreme Court that none of the defendant investors, including the Appellant Wilcox had violated any securities laws. Based upon those assertions the Oklahoma Supreme Court reversed and remanded the decision of the trial court for a determination as to whether or not the investors had received unreasonably excessive dividends. The case was remanded to the District Court for further proceedings consistent with that opinion.

There is nothing in the remand, which would permit litigation as to whether or not individual investors where not innocent investors, and there was not any amended pleadings or amendments to the pre-trial order, which would have indicated that there are any claims by the Department of Securities that any of the defendants were other than

innocent investors as they had alleged in their first motion for summary judgment, which was the subject of the first appeal.

The fact that the 158 defendants were innocent investors was settled law of the case as it was asserted by the Department of Securities in its motion for summary judgment and in its original petition and that determination by the court was not appealed, and was not subject of the remand of the Supreme Court.

The settled law of the case doctrine, bars re-litigation of issues in a case, which are finally settled by an appellant opinion or which aggrieved parties fail to raise on appeal. *See Smedsrud v. Powell*, 2002 OK 87, ¶ 13. The opinion of the appellant court becomes the law of the case and it is error for a trial court to revisit issues that either have been settled or were not appealed in the first decision. *See Smedsrud v. Powell*, 2002 OK 87; *Schumacher v. Estate of Freeman*, 1998 OK 17.

The authority of a trial court to act after a mandate by an appellant court is dependant upon the appellant disposition of the matter. When a cause is reversed and remanded by the appellant court and the mandate is received and entered of record by the trial court the trial court is vested with jurisdiction to make any order or enter any judgment and further progress of the cause not inconsistent with the decision of the appellant court. The trial court is duty bound to execute the mandate of the appellate court by following the directions of the appellate court on remand. When the appellant court remands the matter to the trial court with specific instructions for further proceedings, the trial court's authority to act is limited by those instructions. *See Belk v.*

*State of Oklahoma*, 1998 OK CIV APP 86 ¶ 14; *Ray v. The American National Bank & Trust Co. of Sapulpa*, 1997 OK CIV APP 66 ¶ 9.

"An appeal will be entertained from a decree of a district court, which is not in substantial compliance with the mandate of the Supreme Court on a prior appeal on which the decree is rendered".

"Upon receipt of a mandate from the Supreme Court, it is the duty of the trial court to spread the same of record and to proceed in accordance with the directions therein contained and in substantial compliance therewith. If the mandate of the Supreme Court requires the trial court to do other than render a decree in strict conformity therewith, or if it leaves any matter open for determination for the trial court, the determination thereof by the trial court is subject to review by a new proceeding on appeal."

*Crews v. Bird*, 1929 OK 279 Syllabus of the Court 2 and 3.

The appeal of the appellants should not be dismissed as the records show that the trial court at the urging of the Appellee exceeded the mandate of the Supreme Court in determining issues other than whether the Appellant, Wilcox had received unreasonable high dividends as mandated by the Supreme Court.

#### **PROPOSITION II:**

**IN THE ALTERNATIVE, EVEN ASSUMING THAT THE COURT DID NOT EXCEED THE MANDATE OF THE SUPREME COURT IT IS A QUESTION OF FACT AS TO WHETHER THE APPELLANTS ARE OTHER THAN INNOCENT INVESTORS.**

The appeal of the Appellant should not be dismissed as there was a question of fact as to whether or not the Appellants in this case were other than innocent investors as there was a motion for summary judgment filed by the Department of Securities, which

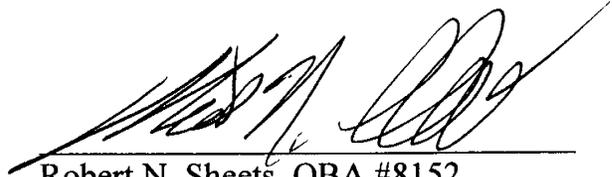
was opposed by the Appellants and based upon affidavits of the Appellants, which created a question of fact. Therefore, the appeal should not be dismissed since Summary Judgment was inappropriate. *See* Record on Appeal Tabs 3 and 4.

The existence of a material question of fact precludes Summary Judgment. *See Bowman v. Presley*, 2009 OK 48.

CONCLUSION

Based upon the foregoing, the appellees' motion to dismiss should be denied, the appeal should go forward, and for other relief deemed just and equitable by the court.

Respectfully Submitted,



Robert N. Sheets, OBA #8152  
Phillips Murrah, P.C.  
One Corporate Tower, 13<sup>th</sup> Floor  
101 North Robinson  
Oklahoma City, Oklahoma 73102  
Telephone: 405-235-4100  
Facsimile: 405-235-4133  
[rnsheets@phillipsmurrah.com](mailto:rnsheets@phillipsmurrah.com)

Attorney for Appellants  
Marvin Lee Wilcox and  
Pamela Jean Wilcox

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the Appellant's Response to Appellee's Motion to Dismiss was mailed this 22<sup>nd</sup> day of February, 2011, to:

Amanda Cornmesser  
Oklahoma Department of Securities  
120 N. Robinson, Suite 860  
Oklahoma City, OK 73120  
Attorneys for Plaintiff, Oklahoma Department of Securities

Bradley E. Davenport  
Gungoll, Jackson, Collins, Box, & Devoll, P.C.  
3030 Chase Tower  
100 N. Broadway Ave.  
Oklahoma City, OK 73102  
Attorney for Plaintiff/Receiver, Douglas L. Jackson

by depositing it in the U.S. Mails, postage prepaid.

  
Robert N. Sheets