

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT 31 2011
MICHAEL S. RICHIE
CLERK

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

Plaintiff/Appellee,)

v.)

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

Defendants/Appellants.)

No. 109111

Appealed from:

District Court Case No.:
CJ-2005-3796

**PETITION FOR REHEARING OF APPELLANTS'
AND BRIEF IN SUPPORT THEREOF**

District Court of Cleveland County – The Honorable Patricia Parrish
District Court Case No. CJ-2005-3796

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AND BRIEF IN SUPPORT THEREOF**

COMES NOW, Appellants' pursuant to Supreme Court Rule 1.13, and requests rehearing in the above-captioned case. In support of this petition appellants 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".

"Due to the mixed 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. After remand, the Department of Securities exceeded the Mandate of the Court in *Oklahoma Department of Securities, et al., Faught v. Blair*, 2010 OK 16. The Mandate of the Supreme Court reversed and remanded the case to the district court to determine the question of "whether the investor's individual returns were unreasonably excessive". *Blair*, 2010 OK 16, ¶ 54. The trial court, however, reopened the question of the status of the investors as to Wilcox only.

6. The question of whether the investors were innocent investors had already been determined in the trial court, and that decision remained undisturbed by this Court's opinion in *Blair*.

7. Because of the Mandate and the instructions on remand by the Supreme Court in *Blair* the trial court was without jurisdiction to hear the issue of whether some investors were other than innocent investors.

ARGUMENTS AND AUTHORITIES

PROPOSITION I:

THE TRIAL COURT WAS WITHOUT JURISDICTION TO DETERMINE THE ISSUE OF THE STATUS OF THE INDIVIDUAL INVESTORS AS THE MANDATE OF THE SUPREME COURT MADE SPECIFIC INSTRUCTIONS TO THE TRIAL COURT TO DETERMINE THE QUESTION OF WHETHER INVESTOR'S RETURNS WERE UNREASONABLY EXCESSIVE.

In the *Blair* case the Supreme Court noted that in the trial court the Department of Securities had stipulated that 158 investors were not participants in the Ponzi scheme. The Supreme Court remanded the case stating; "Due to the mixed question of fact and law, whether the investor's individual returns were unreasonably excessive; the summary judgments must be reversed". *Blair*, 2010 OK 16, ¶ 54. The Supreme Court also stated "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 reject that concept today, and explain 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". *Blair*, 2010 OK 16, ¶ 52. It is clear from the Court's opinion that the sole issue to be determined by the trial court on remand was whether the investors had received an unreasonably high dividends in order to the require some repayment.

Upon remand, however, the Department of Securities sought a determination that the Wilcox, and only the Wilcox were not innocent investors and the Court made findings

on that issue¹. This finding by the trial court exceeded the mandate of this court and exceeded the authority and jurisdiction of the district court. In the case of *Belt v. State of Oklahoma*, 1998 OK CIV APP 86. The Court of Appeals held; "Belt contends that 'the trial court had no authority to modify its final order'. The argument is that once the trial court's order granting modified driving privileges had been appealed, and mandated, the trial court is without authority to vacate, rescind, or modify its terms. We agree". *Belt v. State of Oklahoma*, 1998 OK CIV APP 86 at ¶ 12.

The court went on to hold:

The authority of a trial court to act after mandate by an appellate court is dependent upon the appellate disposition of that matter. When a cause is reversed and remanded by the appellate 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 in further progress of the cause, not inconsistent with the decision of the appellate court.... (emphasis by the courts as to "reversed and remanded" and added otherwise)

When the appellate court remands the matter to the trial court with specific instructions for further proceedings, the trial court's authority to act is limited to those instructions. *Crews v. Bird*, 1929 OK 279, 285 P. 132 (1929).

After affirmance on appeal, and issuance of a mandate, the lower court is without jurisdiction to reopen the cause other than to comply with the appellate mandate. *Belt v. State of Oklahoma*, 1998 OK CIV. APP. 86 at ¶ 14. (citations omitted)

¹ Appellant's believe that the Department sought this determination to assist in the Wilcox's appeal of a bankruptcy court's decision pending in the Tenth Circuit.

“The mandate from the Supreme Court [42 P.3d 868] is an order requiring the lower tribunal to comply with an appellate opinion, and it carries with it the authority of the trial court to proceed.” *Daniel v. Daniel*, 2001 OK 117, at ¶ 12

Since the mandate, under previous decisions of this court, defines the jurisdiction of the trial court on remand the trial court lacks jurisdiction on matters not part of the mandate on remand. Settled case law in Oklahoma holds that questions of jurisdiction may be raised at any time, even at the appellate level. *See, Indiana National Bank v. Department of Human Services*, 1993 OK 101, 857 P. 2d 101, footnote 3; *Cate v. Archon Oil Co., Inc.*, 1985 OK 15, 695 P. 2d, 352, footnote 12.

In this case, the Supreme Court found that the questions of error raised by Wilcox on their appeal had not been argued to the trial court, and therefore, they could not be heard on appeal. *Oklahoma Department of Securities v. Wilcox*, 211 OK 82, at ¶ 17.

The question of whether the trial court had exceeded a mandate, however, is a jurisdictional question, and jurisdictional questions may be raised at any time, even the appellate level. *See, Indiana National Bank v. Department of Human Services*, 1993 OK 101, 857 P. 2d 101, footnote 3; *Cate v. Archon Oil Co., Inc.*, 1985 OK 15, 695 P. 2d, 352, footnote 12.

In the case of *Crews v. Bird*, 1929 OK 279, 285 P. 132, the court in its syllabus stated "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 by 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, ¶ 0 syllabus of the court 2 and 3; 285 P. 132.

Since the trial court exceeded the mandate in the *Blair* case, the decision as to whether the Wilcoxes were innocent investors was outside the jurisdiction and authority of the district court, and therefore, should be available for review by the appellate court.

CONCLUSION

Based upon the foregoing, the appellants' Wilcox, would request that their petition for rehearing be granted and that the order of the district court finding that they were not innocent investors be reversed, and for such other relief deemed just and equitable by the court.

Respectfully Submitted,



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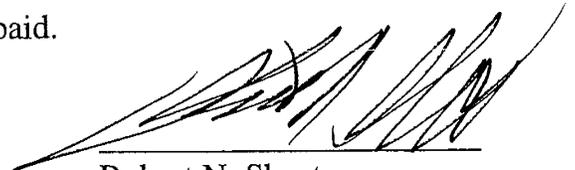
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Appellant's Response to Appellee's Motion to Dismiss was mailed this 31st day of October, 2011, to:

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