

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB -7 2011

MICHAEL S. RICHIE
CLERK

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' MOTION TO DISMISS

Pursuant to Okla.Sup.Ct.R. 1.6(c), Appellees move the Court to dismiss this appeal because of waiver, specifically Appellants' failure to raise or present the issues to the trial court that they raise for the first time on appeal contrary to 12 O.S. §992.

BRIEF STATEMENT OF RELEVANT FACTS

This appeal arises from a case which the Oklahoma Department of Securities and Douglas L. Jackson, in his capacity as court-appointed Receiver for benefit of the creditors and claimants of Marsha Schubert and Schubert and Associates, filed in the District Court of Oklahoma County on May 11, 2005. The suit sought judgment against a multitude of Defendants who had received funds from Marsha Schubert in excess of the amount(s), if any, they had paid to her for investment purposes. Appellees sought judgment for repayment of these fictitious profits because there were no real investments and the funds they received came from and at the expense of other investors Marsha Schubert lured into a Ponzi scheme. The District Court of Oklahoma County granted summary judgment in favor of Appellees against Defendants solely on their unjust enrichment cause of action.

Less than one third of the Defendants against whom summary judgments were entered filed an appeal of those judgments in the spring of 2007. Appellants were among the group that did appeal. The case was initially assigned to the Oklahoma Court of Civil Appeals, which issued an opinion upholding the trial court's granting of summary judgment against the Defendants/Appellants. The Supreme Court of Oklahoma granted Defendants/Appellants' Petition for Certiorari. In an opinion issued on February 23, 2010, corrected April 6, 2010, the Court vacated the opinion of the Court of Civil Appeals and reversed and remanded the case to the District Court for further proceedings consistent with the Court's opinion. *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).

On remand, the Appellees filed Motions for Summary Judgment and Briefs in Support against the remaining Defendants in the case, including Appellants. Appellees actually filed two motions for summary judgment and briefs in support relative to Appellants. The first motion was filed on August 23, 2010, and in response to this Court's decision in Blair, did include a section asserting that Appellants were not innocent investors. Appellants filed their brief objecting to Appellees' motion for summary judgment on September 7, 2010, which included a section contending Appellants were innocent investors. However, Appellants' contention relative to their status as innocent investors was conclusory in nature and wholly unsupported by probative evidence. Nowhere in Appellants' brief in objection did they argue or raise as an issue that their status as innocent investors had already been decided and was established as "the law of the case". Nowhere in Appellants' brief in objection did they assert that the trial court would be exceeding the mandate of this Court in Blair by considering or ruling upon whether Appellants were innocent investors.

The trial court heard oral argument on Appellees' Motion for Summary Judgment on October 1, 2010. Appellants Wilcox were represented by counsel at the hearing, and a transcript of the hearing was made. At no time during the hearing did Appellants' argue or raise as an issue that their status as innocent investors had already been decided and was the law of the case. At no time during the hearing did Appellants argue or contend that the trial court's consideration of that issue would exceed the mandate of this Court. At the conclusion of the hearing, the trial court granted partial summary judgment in favor of Appellees on the issue of liability and denied summary judgment relative to damages. The trial court's ruling was memorialized in the Journal Entry of Judgment filed October 18, 2010.

On October 22, 2010, the pretrial conference was held. Appellees specifically noted in their "General Statement of Facts" portion of the pretrial conference order that the trial court had held that Appellants were not innocent investors. Appellants made no objection to this statement. Further, Appellees listed Appellants' bank account records as exhibits for trial to show Appellants' involvement in Schubert's check exchange whereby Schubert passed approximately \$150 million through Appellants' personal accounts in a two and one-half year period. Appellants did not object to these exhibits but stipulated to their pre-admission into evidence for trial. Appellants signed the Pretrial Conference Order and it was filed in the case on October 22, 2010.

Appellees were permitted to re-assert their motion for summary judgment on the issue of the amount Appellants had been unjustly enriched, which they did on November 18, 2010. Appellants failed to file a brief in response or opposition. Likewise, Appellants failed to appear in person or by counsel at the hearing on the re-asserted motion for summary judgment held on December 17, 2010. By failing to make a written response or to appear and make oral argument

at the hearing, Appellants failed to raise or present any issue to the trial court, including whether their status as innocent investors had already been decided or that the trial court considering that issue allegedly exceeded the mandate of this Court. Furthermore, they wholly failed to offer any probative evidence or otherwise establish that a genuine issue existed relative to whether they were innocent investors. The trial court granted summary judgment in favor of Appellees and against Appellants at the conclusion of the December 17, 2010 hearing, which was memorialized by a Journal Entry of Judgment filed the same date.

RELIEF REQUESTED AND LEGAL AUTHORITY

Appellees move the court to dismiss this appeal pursuant to Okla.Sup.Ct.R. 1.6(c)(1) for waiver or failure of Appellants to raise or present the issues to the trial court now complained of for the first time herein. It is well established under Oklahoma law that a party may not assign errors on appeal which were not presented to the trial court. See 12 O.S. §992; Matter of N.L., 1988 OK 39, 754 P.2d 863, 866; Arkansas Louisiana Gas Co. v. Cable, 1978 OK 133, 585 P.2d 1113, 1116; Kepler v. Strain, 1978 OK 52, 579 P.2d 191, 193; Tortorelli v. Mercy Health Center, Inc., 2010 OK CIV APP 105, ¶50, 242 P.3d 549, 565. Specifically, 12 O.S. §992 provides in pertinent part that "...errors in perfecting an appeal that could have been raised in the trial court may not be raised for the first time in the appellate court."

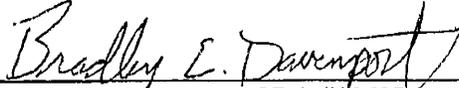
In Matter of N.L., this Court addressed the appeal of a juvenile action in which provisions of both the state and federal Indian child welfare statutes were implicated. 754 P.2d 863, 865. The child was found to be deprived and made a ward of the court. Id. at 866. The mother appealed the trial court decision asserting as errors the trial court's failure to follow or comply with three different procedures *mandated* by state and federal statute. Id. This Court noted that the mother had failed to raise or question the statutory sufficiency of the amended petition to the

trial court. Id. The mother had made no motion or argument to the trial court relative to the temporary custody orders entered without a hearing pursuant to 10 O.S. §1104.1. Id. There was nothing in the trial court record indicating the mother made any effort to address or object to the failure of the proceedings to conform to 25 U.S.C. §1922. The Court held that it could not “review the mother’s contention that the trial court failed to follow these three statutes. ... A party may not assign errors on appeal which were not presented to the trial court.” Id.

Here, Appellants, who were represented by counsel, had multiple opportunities to argue, question or present to the trial court the issue of whether consideration of their status as “innocent investors” exceeded the mandate of this Court. They did not do so. Appellants had more than one opportunity to assert and argue to the trial court that their status as innocent investors had already been decided and had become the law of the case. Again, they failed to do so. Appellants failed to present any probative evidence or otherwise establish that there was a genuine issue of fact relative to their status as innocent investors. In fact, they neglected to file a written response to or to appear at the hearing on Appellees’ reasserted motion for summary judgment. Finally, Appellants made no objection to statements of fact and exhibits pertaining directly to the issue of their status as innocent investors contained in the pretrial conference order, which Appellants signed. Appellants may not assign errors on appeal which were not presented to the trial court.

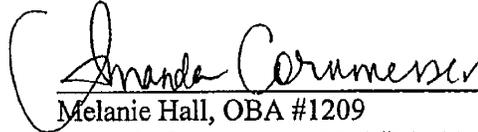
WHEREFORE, based on the foregoing facts and legal authority, Appellees respectfully request that this appeal be dismissed.

Respectfully submitted,



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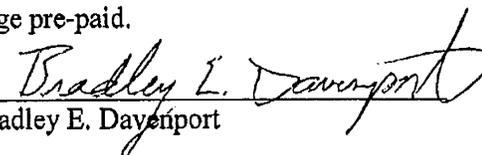
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CERTIFICATE OF MAILING TO ALL PARTIES

I certify that a true and correct copy of Appellees' Motion to Dismiss was mailed this 7th
day of February, 2011, to:

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



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