

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

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

Plaintiffs/Appellees,]

vs.]

MARVIN LEE WILCOX and PAMELA]
JEAN WILCOX,]

Defendants/Appellants.]

FEB - 7 2011

MICHAEL S. RICHIE
CLERK

Supreme Court No. 109111

District Court Case No. CJ-2005-3796

RESPONSE TO PETITION IN ERROR

Are Appellees willing to participate in an attempted settlement of the appeal by predecisional conference under Rule 1.250?

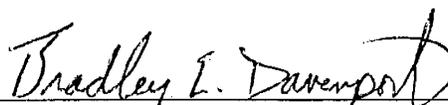
_____ YES X NO

Attach as exhibit "A" Appellees' statement of the case *not to exceed one "8 1/2 x 11" double spaced page* if not clearly set out by appellant in petition in error.

In accelerated appeals from orders granting motion for summary judgment or motion to dismiss **only** appellees shall also file concurrently with response any supplement to record on accelerated appeal. See Rule 1.36.

DATED: Feb. 7, 2011

Verified by:



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Attorneys for Plaintiff/Appellee,
Douglas L. Jackson, as Court-Appointed Receiver

AND



Melanie Hall, OBA #1209
Amanda Cornmesser, OBA #20044
Gerri Kavanaugh, OBA #16732
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Attorneys for Plaintiff/Appellee,
Oklahoma Department of Securities

CERTIFICATE OF MAILING TO ALL
PARTIES AND COURT CLERK

7th I certify that a true and correct copy of the Response to Petition in Error was mailed this
day of February, 2011, to:

Robert N. Sheets
Phillips Murrah, P.C.
One Corporate Tower
13th Floor
101 N. Robinson
Oklahoma City, OK 73102
Attorney for Defendants/Appellants
Marvin and Pamela Wilcox

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

I further certify that a copy of the Response to Petition in Error was mailed to, or filed in,
the Office of the Court Clerk for the District Court of Oklahoma County on the ___ day of
February, 2011.

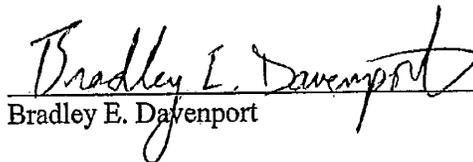

Bradley E. Davenport

EXHIBIT "A" – APPELLEES' STATEMENT OF THE CASE

Appellees stipulate to Appellants' summary of the case to the point of remand following this Court's February 23, 2010 opinion. On remand, Appellees filed a motion for summary judgment against Appellants on August 23, 2010, which did assert that Appellants were not innocent investors. Appellants filed a response brief that included, among other things, a conclusory statement that they were innocent investors unsupported by any probative evidence. Appellants did not object or argue that such issue exceeded the scope of this Court's mandate in Blair or was barred by judicial estoppel or *res judicata*. At the October 1, 2010 hearing on Appellees' motion, Appellants failed to raise any issue or make an objection that Appellees were judicially estopped from raising the issue of Appellants' status as innocent investors or that consideration of such argument would exceed the scope of this Court's mandate. The trial court granted partial summary judgment in favor of Appellees as to liability.

Appellees stated in their "General Statement of Facts" section of the Pretrial Conference Order that Appellants were not innocent investors. Appellants made no objection and signed the Pretrial Conference Order that was filed October 22, 2010.

Appellees re-asserted their motion for summary judgment on November 18, 2010 as to the amount of Appellants' unjust enrichment. Appellants failed to file a response brief. Appellants failed to appear at the December 17, 2010 hearing on the re-asserted motion. The trial court granted Plaintiff's reasserted motion for summary judgment. Appellants did not file a motion with the trial court to vacate or modify the December 17, 2010 judgment. The issues identified on Exhibit "C" to Appellants' Petition in Error are being raised for the first time on appeal.

IN THE SUPREME COURT OF THE 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.]

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JEAN WILCOX,]

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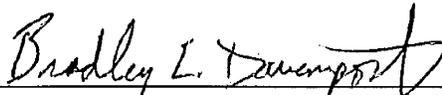
] Supreme Court No. 109111

] District Court Case No. CJ-2005-3796

SUPPLEMENT TO RECORD ON ACCELERATED APPEAL

Appellees, Douglas L. Jackson, in his capacity as court-appointed Receiver for Marsha Schubert, Schubert and Associates, and the creditors and claimants of Marsha Schubert and Schubert and Associates, and the Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, submit the attached Supplement to Record on Accelerated Appeal pursuant to Okla.Sup.Ct.R. 1.36(d).

Respectfully submitted,



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AND



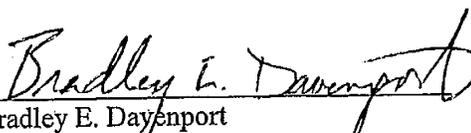
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acornmesser@securities.ok.gov
gkavanaugh@securities.ok.gov
Attorneys for Plaintiff/Appellee,
Oklahoma Department of Securities

CERTIFICATE OF MAILING TO ALL PARTIES

I hereby certify that on the 7th day of February 2011, I mailed a true and correct copy of the above and foregoing instrument to:

Robert N. Sheets
Phillips Murrah, P.C.
One Corporate Tower, 13th Floor
101 N. Robinson
Oklahoma City, OK 73102
Attorney for Defendants/Appellants,
Marvin and Pamela Wilcox

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



Bradley E. Dayenport

INDEX TO SUPPLEMENT TO RECORD ON ACCELERATED APPEAL

| <u>TAB NO.</u> | <u>DESCRIPTION</u> |
|----------------|---|
| 1 | Certified Copy of Transcript of Proceedings had on the 1 st day of October, 2010 before the Honorable Patricia G. Parrish, District Judge (hearing on Plaintiffs/Appellees' Motion for Summary Judgment against Defendants Marvin and Pamela Wilcox filed August 23, 2010 and Objection of Marvin and Pamela Wilcox to Plaintiff's Motion for Summary Judgment filed September 7, 2010). |

TAB 1

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of
Securities, ex rel., Irving L.
Faught, Administrator, et al.,

Plaintiffs,

vs.

Marvin and Pamela Wilcox, et
al.,

Defendants.

COPY

Case No. CJ-2005-3796

* * * * *

TRANSCRIPT OF PROCEEDINGS
HAD ON THE 1ST DAY OF October, 2010
BEFORE THE HONORABLE PATRICIA G. PARRISH,
DISTRICT JUDGE

Reported by: Karen Twyford, RPR

DISTRICT COURT OF OKLAHOMA --- OFFICIAL TRANSCRIPT

1 APPEARANCES

2
3 For the Plaintiff Oklahoma Department of Securities:

4
5 Ms. Amanda Cornmesser, Attorney at Law
6 Ms. Gerri Kavanaugh, Attorney at Law
7 120 North Robinson, Suite 860
8 Oklahoma City, Oklahoma 73102

9
10 For the Plaintiff Receiver:

11
12 Mr. Bradley E. Davenport, Attorney at Law
13 Gungoll Jackson Collins Box & Devoll, PC
14 3030 Chase Tower
15 100 North Broadway
16 Oklahoma City, Oklahoma 73102

17
18 For the Defendants Marvin and Pamela Wilcox:

19
20 Ms. Julie Brower, Attorney at Law
21 Kline, Kline, Elliott & Bryant, PC
22 720 N.E. 63rd Street
23 Oklahoma City, Oklahoma 73105

24
25

1 (whereupon, the following proceedings were had on
2 the 1st day of October, 2010, to wit:)

3 THE COURT: We're on the record in the case of
4 Oklahoma Department of Securities versus Robert Matthews,
5 Case No. CJ-2005-3796. Pending before the court is the
6 plaintiffs' motion for summary judgment against the
7 defendants Marvin and Pamela Wilcox.

8 Counsel, announce your appearance for the record.

9 MS. BROWER: Julie Brower for the defendants
10 Marvin and Pamela Wilcox.

11 MS. CORNMESSER: Amanda Cornmesser with the
12 Securities Department.

13 MR. DAVENPORT: Bradley Davenport for the
14 plaintiff receiver.

15 MS. KAVANAUGH: Gerri Kavanaugh for the Department
16 of Securities.

17 THE COURT: Let me make certain that I have this
18 correct on this. So this is the one where his account was
19 used and the \$77 million flowed through his account. He
20 had given them a bunch of checks that were signed but not
21 endorsed for any amounts. Did he contribute anything
22 whatsoever into the account?

23 MR. DAVENPORT: There was little over \$96,000,
24 your Honor, if you want to use the term, invested,
25 contributed, and that was done in the years 2003 and 2004

1 only and -- even though there were actually some
2 significant sums received prior to that.

3 MS. CORNMESSER: That is the top sheet of the
4 accounting that is an exhibit to our reply.

5 THE COURT: Does the \$509,000 that the Department
6 has come up with, did that give him credit like in the
7 other ones for the 96,000?

8 MS. CORNMESSER: Right.

9 MR. DAVENPORT: Yes, your Honor.

10 THE COURT: But the amount that your client comes
11 up with is \$109,000?

12 MS. BROWER: Is 133,000.

13 THE COURT: Pardon me, 133,945.

14 MS. BROWER: Yes, your Honor. And my clients
15 believe there are five checks that were not accounted for,
16 which defendant's deposition is set for next week, which
17 she is prepared to provide.

18 THE COURT: So do you disagree that the funds need
19 to be returned and the dispute -- is the dispute just over
20 what the amount is, or do you disagree they should even
21 have to pay any funds back?

22 MS. BROWER: That's correct, your Honor, it's the
23 later, both as to the amount and whether or not the return
24 was reasonable is disputed.

25 MR. DAVENPORT: Actually, your Honor, we don't

1 agree with that contention, because even though the Supreme
2 Court in its ruling did make the ability to recover based
3 upon whether there was an unreasonable dividend received,
4 while the plaintiffs did in its motion for summary judgment
5 provide probative evidence on that issue, on that -- and
6 even if it's a fact issue there was probative evidence
7 provided.

8 And in the objection filed on behalf of the
9 defendants, the only argument that was made was that --
10 well, this issue of whether an unreasonably high dividend
11 was received is simply a subjective issue of fact and not
12 proper for summary judgment.

13 In short, even if it's an issue of fact, the
14 plaintiffs have provided probative evidence to address that
15 issue, and the defendants have attached or provided or
16 cited to no probative evidence to show that that refund
17 that they received was reasonable then, you know, there is
18 no dispute on that issue of fact.

19 THE COURT: As to whether or not it was a
20 reasonable return, whether it be the 133,000 or the
21 509,000.

22 MR. DAVENPORT: Right. There has been no evidence
23 provided to show it was reasonable.

24 THE COURT: And, again, this is the gentleman that
25 basically opened his account up?

1 MR. DAVENPORT: Right, your Honor.

2 MS. CORNMESSER: That is correct.

3 THE COURT: I'm going to grant summary judgment on
4 the issue only that -- whatever return this gentleman got,
5 I do not think was a reasonable return based on just the
6 check-kiting scheme that apparently was going on through
7 his account.

8 What I do think is a fact issue still is whether
9 it's the 109,000 or the -- pardon me, the 133,000 or the
10 509. So we can set a -- I don't know if you want to wait
11 until after the deposition then, perhaps, reassert a motion
12 for summary judgment, one or the other of you. If not,
13 then I suggest that we set it for jury or nonjury trial
14 just as quickly as possible. I wouldn't think anything
15 other than the deposition needs to happen.

16 MR. DAVENPORT: Just to be clear, your Honor, then
17 we're having partial summary judgment on the issue of
18 liability but not on the issue of damages?

19 THE COURT: Of damages. Correct.

20 MS. KAVANAUGH: And the conclusion is that they're
21 not innocent investors for purposes of application of the
22 Blair standard?

23 THE COURT: Correct, correct. And then so the
24 only thing at issue, then, is what the amount is between
25 those two figures that you-all had submitted. And the only

1 thing, again, that I would ask is after the deposition is
2 completed is within, perhaps, ten days after that if you
3 would just get together with my bailiff and decide if you
4 want a jury or nonjury, or get a scheduling order is what I
5 meant to say.

6 Does this wrap up the majority of the cases or do
7 we still have --

8 MS. CORNMESSER: This is it.

9 THE COURT: This is it.

10 MS. KAVANAUGH: For you, anyway. Judge Robertson
11 has one left.

12 THE COURT: She has one that I had to recuse from,
13 doesn't she?

14 MR. DAVENPORT: Yes.

15 (Conclusion of proceedings.)
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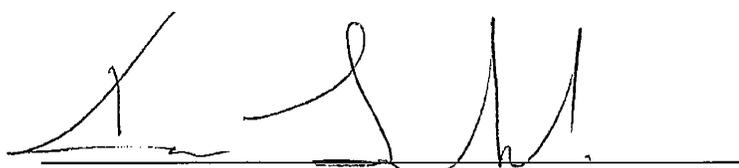
1 STATE OF OKLAHOMA)
2 COUNTY OF OKLAHOMA)

3
4 C-E-R-T-I-F-I-C-A-T-E

5
6 I, Karen Twyford, Certified Shorthand Reporter,
7 in and for the County of Oklahoma, State of Oklahoma, do
8 hereby certify that the foregoing transcript is a true,
9 correct, and complete transcript of my stenographic notes.

10 I further certify that I am not related to any of
11 the parties herein, nor am I interested in any way in the
12 outcome of these proceedings.

13 WITNESS my Hand this 21st day of October,
14 2010.

15
16
17
18 

19 KAREN TWYFORD
20 CERTIFIED SHORTHAND REPORTER
21 CERTIFICATE NO. 01780

22 KAREN S. TWYFORD
23 Oklahoma Certified Shorthand Reporter
24 Certificate No. 1780
25 Exp. Date: December 31, 2010