STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2076

Community First Bank, a Wisconsin banking corporation,
Plaintiff,

vs.

First United Funding, LLC,
Defendant, et al., Defendants,

Lighthouse Management Group, Inc.,
as Receiver for First United Funding, LLC,
Respondent,

Corey N. Johnston,
Appellant,

vs.

Community Financial Bank, a Wisconsin banking corporation, et al.,
Intervenors,

vs.

John Doe, et al.,
Additional Defendants,

and

Western National Bank,
Plaintiff,

vs.

First United Funding, LLC,
Defendant.

Filed September 24, 2018
Affirmed
Hooten, Judge

Dakota County District Court
File No. 19-HA-CV-09-6282

Brett M. Larson, Daniel L. Lowin, Messerli & Kramer P.A., Minneapolis, Minnesota (for appellant Corey Johnston)

Ryan T. Murphy, Joseph J. Cassioppi, Jacob P. Harris, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent Lighthouse Management Group Inc., and intervenors Bank Forward, Choice Financial Group, Community First Bank, First Southern Bankcorp, Maple Bank, Minnwest Bank Luverne, Republic Bank of Chicago and Triumph Community Bank)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

In this appeal from a final judgment in a receivership action, appellant Corey Johnston, who had operated a Ponzi scheme through his company, First United Funding, LLC, asserts that the district court erred in awarding post-judgment interest under Minn. Stat. § 549.09 (2016) on the judgments obtained by the receiver on behalf of the victims of the scheme. We affirm.

FACTS

Beginning in 2002, appellant Johnston, as the owner and principal of First United, operated a Ponzi scheme in which he fraudulently sold loan participation interests to respondent banks in counterfeit, unsecured, over-sold, and underfunded loans. In a loan participation, loans are arranged for borrowers, who take the loans and give promissory

notes and other assurances of payment, and then the lender enters into an agreement with a bank for funding of the loans in return for a percentage interest in the promissory notes. Johnston presented false documents to the banks and altered brokerage account statements and other financial documents. Proceeds were then utilized to further the scheme and Johnston's lavish lifestyle. In August 2010, Johnston was indicted, and then pleaded guilty, to a charge of operating what was called a "Ponzi scheme with bank money" by the United States Attorney's Office.

In the fall of 2009, Community First Bank, a creditor of First United, sought a temporary restraining order and appointment of a receiver. Additional creditors also filed claims against Johnston for an amount totaling approximately $136 million. In October 2009, the district court appointed respondent Lighthouse Management Group, Inc. as the receiver and granted the receiver "all of the powers and authority usually held by receivers and reasonably necessary to accomplish the purposes stated in [the order]." The district court expanded the receiver's authority in December 2009 and again in February 2010. The principal duties of the receiver included: tracking over $4.5 billion in cash transfers made by First United and determining whether First United was insolvent; cooperating with federal officials in the criminal investigation and prosecution of Johnston; identifying the victims of the fraud; recovering or clawing back any amounts paid to non-victim participants that had profited under the Ponzi scheme by receiving more than what they had paid into the scheme; obtaining any other monies owed to First United; and distributing the proceeds of the receiver's recovery efforts among the victim participants as compensation for losses under the scheme. All of the non-victim participants have reached

settlement agreements with the receiver which released any claims they may have against the receiver, Johnston, and First United as to any amounts recovered by the receiver. None of the non-victim participants are parties to the current receivership action.

Before a distribution plan regarding the recoveries obtained by the receiver was adopted, the receiver obtained a court order to make interim distributions to the victim participants beginning in 2010. On November 17, 2011, the district court authorized a net investment *pro rata* distribution plan to compensate victims that had sustained actual principal losses on the loans in which they participated. The district court calculated the claims of the victim participants under this method to equal $91,193,042.

The receiver succeeded in paying over 99% of the victim participants' original principal claims. Throughout the receivership, the receiver consulted with the victim participants and provided written reports regarding the proceedings. The receiver provided the district court with 12 reports concerning the progress of distributions beginning on April 8, 2010 and ending on September 21, 2017. The last report also contained a motion for final distribution, discharge of the receiver, and an amended final judgment to include post-judgment interest, as judgments had been entered on behalf of each of the victim participants. Similar to other requests for relief throughout the case, the receiver obtained support from all of the victim participants for the final distribution motion. Only Johnston opposed the receiver's motion, arguing that equity precluded application of Minn. Stat. § 549.09 and that the calculation of interest was incorrect. At the motion hearing, Johnston also challenged the receiver's standing and authority to seek post-judgment interest. The

district court granted the receiver's motion and entered an order for final distribution and judgment. Johnston appealed.

D E C I S I O N

I. The Issues are Properly Preserved for Appeal.

Johnston argues that the district court erred in applying post-judgment interest to the judgments entered against Johnston and First United, claiming that the receiver did not have standing or authority to seek post-judgment interest against him and his company. The receiver argues that Johnston did not preserve the issues of the receiver's standing and authority for appeal from the district court's final distribution order and judgment because he failed to present these arguments to the district court and the district court did not address them. But, it is well settled that "standing cannot be waived and may be raised at anytime." *In re Horton*, 668 N.W.2d 208, 212 (Minn. App. 2003); *see Patzner v. Schaefer*, 551 N.W.2d 736, 737 (Minn. App. 1996) (noting that appellate courts "are required to address [standing] even if the courts below have not passed on it, and even if the parties fail to raise the issue before us" (quotation omitted)).

Moreover, with regard to the question of our authority to consider these issues, Minn. R. Civ. App. P. 103.04 provides that appellate courts "may review any order involving the merits or affecting the judgment" or "any other matter as the interest of justice may require." Generally, appellate courts "will not consider questions which were not presented to or decided by the court." *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282, 286 (Minn. 1957). However, the well-established exception to Minn. R. Civ. App. P. 103.04 states:

> [A]n appellate court may base its decision upon a theory not presented to or considered by the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.

Id. (emphasis omitted).

Whether or not the receiver is authorized to move for post-judgment interest is decisive of the entire controversy. Neither party disputes any underlying facts. The sole dispute on appeal is the amount of power the October, December, and February orders grant the receiver. Because there are no factual disputes and the entire controversy may be resolved by the resolution of a legal issue, there is no advantage to either party in not having a prior ruling by the district court. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 688 (Minn. 1997) (stating that "the parties in this case do not dispute the facts; thus, there is no possible advantage or disadvantage to either party"). Therefore, we conclude that the issue of the receiver's standing and authority may be reviewed by this court.

II. The Receiver has Standing and Authority.

The first issue for our consideration is whether the receiver has standing to seek post-judgment interest on behalf of the creditors against Johnston and First United. "Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). While it is true that "the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself . . . it is equally true that when an act has been done in fraud of the rights of the creditors of the insolvent corporation the receiver

may sue for their benefit." *Magnusson v. Am. Allied Ins. Co.*, 189 N.W.2d 28, 33–34 (Minn. 1971). Additionally, "[t]he role of a receiver is to act as a fiduciary representing the court and all parties in interest, and the purpose and scope of a receivership is defined by court order." *Equity Tr. Co. Custodian ex rel. Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 341 (Minn. App. 2009). The receiver represents not only First United, but also the court and all interested parties.

When considering whether a receiver had standing, this court has previously discussed the bounds of a receiver's authority within its analysis. *Id*. "A receiver's powers are defined by the orders of the court and include authority as may reasonably or necessarily be implied for such orders." *Hancock-Nelson Mercantile Co. v. Weisman*, 340 N.W.2d 866, 869 (Minn. App. 1983). If an order gives authority for a receiver to act, then the receiver has standing. *See Equity Tr. Co.*, 766 N.W.2d at 341.

In this case, the receiver was appointed in October 2009. The district court ordered, among other things, that the "Receiver shall have all of the powers and authority usually held by receivers and reasonably necessary to accomplish the purposes stated in this Order." The order was expanded in December 2009 to authorize the receiver "to gather information regarding the other similar participation agreements with [First United] and to share that information among the holders of such participation agreements as needed to be able to report to the Court and to make recommendations as appropriate." And, in the February 2010 order, the receiver's authority was expanded to include "the management and operations of the assets and debts of First United" and the receiver was authorized to "[i]nvestigate and pursue any and all claims that First United or the Receiver may have

against any third party, including but not limited to, fraudulent transfer and illegal distribution claims." The grant of these broad powers by the district court allowed the receiver to do what was reasonably necessary to accomplish its purpose in resolving the claims of the victim participants, which would necessarily include obtaining judgments, including post-judgment interest on the judgments, against Johnston, who orchestrated the elaborate Ponzi scheme, and First United.

III. The Receiver has Statutory Authority under Minn. Stat. § 549.09.

Johnston argues that the receiver does not have statutory authority to seek post-judgment interest under Minn. Stat. § 549.09. Statutory interpretation is a question of law, which this court reviews de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). "If the Legislature's intent is discernible from the statute's plain and unambiguous language, the letter of the law shall not be disregarded under the pretext of pursuing its spirit." *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015).

Minn. Stat. § 549.09, subd. 1(a) states, "[w]hen a judgment or award is for the recovery of money . . . interest from the time of the verdict, award, or report until judgment is finally entered shall be computed by the court administrator or arbitrator as provided in paragraph (c) and added to the judgment or award." Subdivision 1(c)(2) further states that "[f]or a judgment or award over $50,000 . . . the interest rate shall be ten percent per year until paid." The statutory provisions requiring that post-judgment interest of ten percent per year be paid on judgments are unambiguous. *Redleaf v. Redleaf*, 807 N.W.2d 731, 733 (Minn. App. 2011). "By using the term 'shall' in setting the rate of interest, the legislature mandated that the district court set a rate of ten percent when a judgment amount exceeds

$50,000." *Id*. As set forth in the unambiguous language in subdivisions 1(a) and (c)(2) of the statute, post-judgment interest of ten percent per year is mandatory for any judgment or award over $50,000.

In support of his argument that the receiver does not have statutory authority to seek post-judgment interest, Johnston points to subdivision 3 of the statute, which controls the process for "a judgment creditor, or the judgment creditor's attorney or agent" to follow when seeking execution of a judgment after receiving partial payment. Johnston claims that the reference to "a judgment creditor, or the judgment creditor's attorney or agent" in subdivision 3 is indicative of the legislature's intent that the entire statute only pertains to judgment creditors and their attorneys or agents, but not receivers in a receivership action. But the unambiguous language of subdivisions 1(a) and 1(c)(2) indicates that the statute applies more broadly. There is no language in subdivisions 1(a) and 1(c)(2) that indicates that judgments obtained in a receivership are excluded from these mandatory post-judgment interest provisions. Subdivision 3, which only pertains to the execution of a judgment, is inapplicable relative to the issue of post-judgment interest. In the event that these victim participants decide to execute the judgments against Johnston and First United, they certainly qualify as "judgment creditors" under subdivision 3.

IV. Principles of Equity Do Not Apply.

Finally, Johnston argues that the district court abused its discretion in awarding post-judgment interest. An abuse of discretion occurs when "the district court disregards facts on the applicable principles of equity." *Cmty. First Bank v. First United Funding, LLC*, 822 N.W.2d 306, 310 (Minn. App. 2012). Johnston asserts that the net-investment method

forecloses the victim participants from recovering post-judgment interest. The net-investment method allowed the receiver to claw back amounts paid to non-victim participants that exceeded their initial investment and use those proceeds to compensate victim participants who had received less than their investments. *See id*. at 309. In his briefing in this appeal, Johnston stated:

> The Victim Participants recovered nearly 100% of their investment, just like the Non-Victim Participants. However, when the trial court granted post-judgment interest to the Victim Participants, it gave them a 10% return on their principal investments using returns First United paid to the Non-Victim Participants. . . . This treated the Victim Participants materially better than the Non-Victim Participants and contravened the *pro rata* distribution goal . . . .

There are three flaws with this argument. First, Minn. Stat. § 549.09 is a statutory mandate. *See Redleaf*, 807 N.W.2d at 733. Principles of equity do not factor in to interpreting unambiguous statutory language. *Id*. at 734–35. Because post-judgment interest is statutorily required under Minn. Stat. § 549.09, subd. 1(a), and the amount of interest is controlled by subdivision 1(c), the equitable power of the district court is not implicated.

Second, interest is the payment for the lost use of money. *See Thompson v. Gasparro*, 257 N.W.2d 355, 356 (Minn. 1977). The non-victim participants gained more from the Ponzi scheme than what they had initially paid into it. The district court allowed the receiver to claw back only the funds in excess of their initial investment to compensate the victim participants. The non-victim participants had the use of their initial investment money during the entire duration of this case. It was only the victim participants who lost

their use of their principal investment during the period of time they were waiting to be reimbursed by the receiver. Even if equitable principles controlled the payment of post-judgment interest, Johnston has failed to show such payment of interest to the victim participants is inequitable to the non-victim participants.

Third, even if the payment of post-judgment interest to the victim participants was inequitable to the non-victim participants, the non-victim participants are not parties to the receivership. In fact, all of the non-victim participants have reached settlement agreements with the receiver which released any claims against the recoveries of the receivership, Johnston, and First United. As the person who orchestrated the Ponzi scheme through his company, First United, Johnston is unable to cite to any case law or statutes that would provide him with standing to make an equitable argument on behalf of non-party non-victim participants in the scheme which only benefits him. *See State by Cooper v. Sports & Health Club, Inc.*, 438 N.W.2d 385, 390 (Minn. App. 1989).

Arguing equitable principles, Johnston also claims that Minn. Stat. § 549.09 should not apply because "the Receiver controlled both the timing of principal distributions and the demand for interest arising from those distributions." However, there is nothing in the record to show that the receiver acted improperly in the timing of the distributions. Over the course of the receivership, the receiver provided the district court with 12 reports regarding the distribution of funds. There is no record that Johnston or First United objected to the timeliness of the distributions or that the district court questioned the timeliness of the distributions.

Because an award of post-judgment interest is mandatory under Minn. Stat. § 549.09, and principles of equity do not apply when a legal determination is dispositive of an issue, the district court did not err in awarding post-judgment interest on the judgments in favor of the victim participants against Johnston and First United.

Affirmed.