

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001348-MR

SENIOR HEALTHCARE INSURANCE AND
FINANCIAL SERVICES, INC. AND FRANK
CRIPPS

APPELLANTS

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CI-00387

JOSEPH CLEMENTI; EULA CLEMENTI;
VERNON SHIFLETT, D/B/A NOUVEAU
ENTERTAINMENT; AND LEWIS L. RAY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT JUDGE: Frank Cripps and Senior Health Care Insurance and Financial Services, Inc., appeal the circuit court's grant of summary judgment to Joseph and Eula Clementi on their statutory securities fraud claims. For the reasons set out herein, we affirm the judgment below.

¹Senior Judge Michael L. Henry, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Procedural Background

The Clementis instituted this securities fraud action against Lewis L. Ray, a soliciting agent of Senior Health Care, which is an insurance company closely held by Frank Cripps, to recover substantial monetary losses they incurred after purchasing bogus option contracts from Vernon Shiflett (d/b/a/ Nouveau Entertainment) following Mr. Ray's solicitations. They also brought securities fraud claims directly against Mr. Shiflett, the originator of bogus option contracts, and vicarious liability claims against Senior Health Care and Cripps for facilitating Ray's sale of the bogus contracts to them. As framed by the parties, the subject matter of this appeal solely involves the Clementis' statutory, vicarious liability claims against Senior Health Care and its sole owner, Mr. Cripps.

Below, the parties filed cross-motions for summary judgment on the Clementis' statutory, vicarious liability claims. After conducting a hearing, the circuit court granted summary judgment to the Clementis, stating its rationale on the record at the hearing. Now, Senior Health Care Insurance and Cripps appeal, contending that material issues of fact preclude summary judgment.

Factual Background

The record indicates that the factual basis of the circuit court's judgment rests entirely on facts that were admitted by Senior Health Care and Cripps in open court, or that were contained in Cripps's own deposition. Specifically, the circuit court relied on the acknowledgments by Senior Health Care and Cripps (1) that when he sold the bogus

option contracts to the Clementis, Lewis L. Ray was a soliciting agent of Senior Health Care; (2) that the option contracts were in fact fraudulent securities; and (3) that Cripps himself introduced Lewis to the fraudulent securities and encouraged him to sell them without first having investigated their legitimacy.

Legal Standard

Under Kentucky securities law, any person who facilitates another person's securities fraud becomes vicariously liable absent an affirmative demonstration of good faith. The relevant portion of the codified statutes reads:

Every person who directly or indirectly controls a seller or purchaser liable under subsection (1) or (2) of this section, every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of a seller or purchaser *who materially aids in the sale or purchase*, and every broker-dealer or agent who materially aids in the sale or purchase *is also liable jointly and severally with and to the same extent as the seller* or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

KRS 292.480(4) (emphasis supplied).

Analysis

As the undisputed facts of this case indicate that Senior Health Care and Cripps materially assisted Lewis — a long-time soliciting agent of Senior Health Care who kept his offices with Senior Health Care and received secretarial services from Senior Health Care — in selling admittedly fraudulent securities to the Clementis without

reasonably or diligently investigating them beforehand, the circuit court found no option other than to grant summary judgment to the Clementis. We agree. At the summary judgment hearing below, counsel for Senior Health Care and Cripps simply had no answer to the logic of the above summarized reasoning of the circuit court when it was discussed directly with him. In their brief, Senior Health Care and Cripps still have no rebuttal to the sound logic of the circuit court's decision. Consequently, we hold that the trial court correctly granted summary judgment to the Clementis on their statutory securities fraud claim against Senior Health Care and Cripps because they are legally entitled to judgment under KRS 292.480(4) and under the undisputed facts as presented to the court below. CR 56.03.

Moreover, we are unmoved by Senior Health Care Insurance and Cripps's appellate papers. They impeach almost all of their own admissions of fact made in open court during the summary judgment hearing below, and now claim that almost all of the previously undisputed facts are now in dispute and are material to the legal resolution of the Clementis' statutory securities-fraud claims. We reject this “about face” out of hand and refuse to entertain the merits of Senior Health Care and Cripps's 180-degree reversal in position because the law is well settled that no party “will [] be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 223 (Ky. 1976). It is simply too late in the proceedings for Senior Health Care and Cripps to change their position regarding the facts of this case.

Conclusion

For the reasons stated above, we affirm the judgment below.

ALL CONCUR.

BRIEF FOR APPELLANT:

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