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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAVID SHOREY and MARY JANE SHOREY, husband and wife,
Plaintiffs/Appellants,

v.

ARIZONA CORPORATION COMMISSION, a political subdivision
of the State of Arizona, *Defendant/Appellee.*

No. 1 CA-CV 14-0510
FILED 6-16-2015

Appeal from the Superior Court in Maricopa County
No. LC2013-000192-001
The Honorable Crane McClennen, Judge

AFFIRMED

COUNSEL

The Law Firm of Heurlin Sherlock, Tucson
By Bruce R. Huerlin, Catherine N. Hounfodji
Counsel for Plaintiffs/Appellants

Arizona Corporation Commission, Phoenix
By Ryan J. Millecam, Julie A. Coleman
Counsel for Defendant/Appellee

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Andrew W. Gould and Judge Peter B. Swann joined.

H O W E, Judge:

¶1 David Shorey (“Shorey”) and Mary Jane Shorey appeal from the superior court’s judgment affirming the Arizona Corporation Commission’s (“Commission”) decision finding Shorey to be a “controlling person” of Cell Wireless Corporation (“CWC”)¹ and therefore secondarily liable for its violations of the Arizona Securities Act’s (“ASA”) anti-fraud statute, A.R.S. §§ 44-1801 to -2126. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 CWC is a publicly traded company formed in Nevada with its corporate address in Tucson. By virtue of a Strategic Consulting Agreement with CWC, Equivest Heritage Group, LLC, (“EHG”) agreed to identify potential investors in CWC and “facilitate[] the terms” of those investments. In return, CWC agreed to pay EHG a commission based on an investment’s value. Shorey and Thomas Brandon, EHG’s chairman, executed the Consulting Agreement in March 2007.

¶3 In July 2007, an entity owned by Joe Cosenza, U.S. Media Team, LLC, agreed to purchase an 80% interest in CWC for \$600,000. Media Team did not pay the purchase price, and Shorey informed Cosenza in December 2007 that Media Team had defaulted on the stock purchase agreement. In response, Cosenza agreed in January 2008 to sell to CWC the assets of his sole proprietorship, USSS, in exchange for the 80% interest in CWC. Because all of CWC’s previous officers except Shorey had resigned in December 2007, Shorey and Cosenza became the sole directors and officers of CWC. Shorey was CWC’s chief financial officer and Cosenza was chief executive officer.

¹ CWC’s name was changed to U.S. Social Scene (“USSS”) in 2008 and then changed back to CWC in 2010. Regardless of its name at any particular time, we refer to the entity as CWC.

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¶4 In late February 2008, Shorey, Cosenza, and Brandon met with potential investors. Shorey attended a portion of the meeting. Cosenza and Brandon represented to the potential investors that investing in CWC was a “can’t miss opportunity . . . [and] if this is going to be successful, [the investors] had to do it now.” They further explained that the invested amount would be returned within two or three months and the investors would receive CWC stock that would “go up 10-fold or 20-fold.” Based on these representations, several individuals made investments in CWC, totaling \$125,000. The investors were not issued stock certificates and did not receive their money back.

¶5 The Commission’s Securities Division (“Division”) subsequently filed a Notice of Opportunity for Hearing, alleging, as relevant here, that CWC, Shorey, and Brandon sold unregistered securities while being unregistered dealers or salesmen and that they committed fraud in the offer or sale of securities, all in violation of the ASA. The Division alleged that Shorey was jointly and severally liable to the same extent as CWC because he controlled CWC under A.R.S. § 44-1999(B). In their answer, the Shoreys denied that Shorey controlled CWC, but did not raise the good faith affirmative defense.

¶6 An Administrative Law Judge (“ALJ”) conducted a hearing and then issued a recommended opinion and order finding Brandon and CWC liable for their violations of the ASA stemming from the CWC stock offering, but finding that Shorey committed no such violations. As relevant here, the ALJ concluded that CWC violated the anti-fraud provisions in A.R.S. § 44-1991.

¶7 The Division objected to the ALJ’s recommendation and filed exceptions with the Commission, arguing that Shorey was a “controlling person” of CWC and therefore should be found secondarily liable for CWC’s violations of A.R.S. § 44-1991. The Commission held an open meeting on the matter and issued a final decision incorporating the Division’s exceptions. Contrary to the ALJ’s recommendation, the Commission found that Shorey was a controlling person of CWC and that the Shoreys “failed to present sufficient evidence that [Shorey] acted in good faith and did not directly or indirectly induce the antifraud violation of the Act by CWC.” The Shoreys subsequently sought judicial review of the Commission’s decision. The superior court affirmed, and this appeal followed.

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DISCUSSION

¶8 The Shoreys argue that the evidence does not support the Commission's determination that he was a "controlling person" under the ASA. Shorey contends that the Commission "used the wrong or no legal standard." Alternatively, the Shoreys argue that the Commission erred in imposing control person liability because he acted in good faith and did not induce the fraudulent sale of CWC stock.² In reviewing an administrative agency's decision, the superior court examines whether "the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E). In our review of the superior court's order upholding the administrative decision, we independently examine the record to determine whether the evidence supports the judgment. *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 557 ¶ 7, 48 P.3d 505, 507 (App. 2002). Neither this Court nor the superior court may substitute its judgment for that of the agency on factual questions or matters of agency expertise. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984). Although we view the evidence in the light most favorable to upholding the administrative decision, *Special Fund Div. v. Indus. Comm'n of Ariz.*, 182 Ariz. 341, 346, 897 P.2d 643, 648 (App. 1994), we are not bound by an agency's or the superior court's legal conclusions, *Sanders v. Novick*, 151 Ariz. 606, 608, 729 P.2d 960, 962 (App. 1986).

1. Control Person Liability

¶9 The Shoreys argue that the evidence does not support the Commission's determination that he was a "controlling person" under the

² The Shoreys also contend that the Commission, by amending the ALJ's recommendation that Shorey was a "controlling person," failed to afford proper deference to the ALJ. But as the ultimate decision maker in this administrative proceeding, the Commission may rightfully accept, reject, or modify the ALJ's decision. A.R.S. § 41-1092.08(B) ("[T]he . . . commission may review the [administrative law judge's] decision and accept, reject or modify it."); *see also* A.A.C. R14-3-110(A), (B); *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 189-90 ¶ 8, 140 P.3d 970, 972-73 (App. 2006). Accordingly, we review the record to determine whether the Commission's decision is supported by substantial evidence, not the ALJ's recommendation to the Commission. *See Smith v. Ariz. Long Term Care Sys.*, 207 Ariz. 217, 220 ¶ 15, 84 P.3d 482, 485 (App. 2004).

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ASA. In Arizona, a controlling person is anyone who directly or indirectly controls another person liable under §§ 44-1991 or -1992 of the ASA:

Every person who, directly or indirectly, controls any person liable for a violation of § 44-1991 or 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action.

A.R.S. § 44-1999(B). “Person” includes a corporation. A.R.S. § 44-1801(16). Thus, because the Shoreys do not contest CWC’s liability for violating A.R.S. § 44-1991, the issue is whether the Commission’s determination that Shorey controlled CWC for purposes of A.R.S. § 44-1999(B) is supported by the record and in accord with Arizona law.

¶10 We liberally construe the ASA “to effect its remedial purpose of protecting the public interest.” *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 206 Ariz. 399, 410 ¶ 36, 79 P.3d 86, 97 (App. 2003). Accordingly, section 44-1999(B) imposes “presumptive control liability on those persons who have the *power* to directly or indirectly control the activities of those persons or entities liable as primary violators of §[] 44-1991[.]” *Id.* at 412 ¶ 42, 79 P.3d at 99. In *Eastern Vanguard*, we rejected the notion that to impose secondary liability under A.R.S. § 44-1999(B), a “controlling person” must have actually participated in the fraudulent activity that gave rise to a violation of A.R.S. § 44-1991. *Id.* at 411-12 ¶ 41, 79 P.3d at 98-99. Instead, the evidence need only establish that the purported “controlling person had the legal power, either individually or as part of a control group, to control the activities of the primary violator.” *Id.* at 412 ¶ 42, 79 P.3d at 99.

¶11 In *Eastern Vanguard*, the evidence supported the Commission’s finding that the individual directors were control persons of the corporation that was primarily liable for A.R.S. § 44-1991 violations. *Id.* at 411-12 ¶ 41, 79 P.3d at 98-99. The individuals’ status as corporate officers and sole directors who lent the corporation nearly all its operating expenses evidenced was “consistent[] involve[ment] in [the corporation’s] management and its financial operations.” *Id.* at 412-13 ¶ 43, 79 P.3d at 99-100. Similarly, the evidence supported a finding that a third individual was liable vis-à-vis another corporate violator of A.R.S. § 44-1991 because of his status as a sole shareholder and director, his role as co-signor on all the corporate bank accounts, and his preparation of agreements with investors. *Id.* at 413 ¶ 45, 79 P.3d at 100.

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¶12 Here, similar evidence exists in the record supporting the Commission's determination that Shorey controlled CWC for purposes of imposing liability under A.R.S. § 44-1999(B). Shorey and Cosenza were CWC's sole directors and officers at the time the investments were made.³ Significantly, Shorey was CWC's chief financial officer, and four press releases from August to October 2007 indicated that Shorey was CWC's contact person. Further, Shorey was the sole signor on CWC's bank accounts, and he maintained CWC's corporate office at his home in Tucson. Except for using one deposit of funds to pay some of CWC's obligations, Shorey personally paid all of CWC's operating expenses after the merger with USSS.

¶13 Additionally, Shorey was the individual associated with CWC who was responsible for identifying Media Team and USSS as merger candidates and then negotiating with those entities and completing CWC's stock transactions with them. Funding the merger with USSS necessitated the investments at issue. Shorey also provided the documents required effectuating the stock transfer to the investors. Moreover, in March 2008, Shorey and Cosenza, as CWC's sole directors, elected some of the investors to serve as CWC's officers. Based on this evidence, the Commission reasonably concluded that Shorey was consistently involved in CWC's management and finances. Accordingly, substantial evidence supports the Commission's decision regarding Shorey's liability as a controlling person of CWC.

2. Good Faith Exception

¶14 The Shoreys argue in the alternative that the Commission erred in imposing control person liability because Shorey acted in good faith and did not induce CWC's violation. Although the Shoreys waived this argument by not raising it as an affirmative defense in their answer, *see* A.A.C. R14-4-305(F), the Commission nonetheless addressed the issue. In doing so, the Commission did not err. The record shows that the Shoreys has presented insufficient evidence to meet their burden of establishing that Shorey acted in good faith and did not directly or indirectly induced CWC's anti-fraud violation of the ASA. *See Eastern Vanguard*, 206 Ariz. at 413 ¶ 46, 79 P.3d at 100 (providing that the burden of proof falls on the controlling person to establish that he acted in good faith and did not induce the

³ Contrary to the Shoreys' implication otherwise, Cosenza's admission to control person liability had no bearing on Shorey's status as a person who directly or indirectly controlled CWC. *See id.* at 412-13 ¶ 43, 79 P.3d at 99-100 (finding two sole directors liable as controlling persons).

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violation). Consequently, because substantial evidence supports the Commission's finding that Shorey was a controlling person of CWC and because the Shoreys failed to present sufficient evidence that Shorey acted in good faith and did not directly or indirectly induce the violation, the Commission did not err.

CONCLUSION

¶15 For the foregoing reasons, we affirm.



Ruth A. Willingham - Clerk of the Court
FILED : ama