



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



RICHARD and MARCIA GRAND v. JOSEPH P. NACCHIO, et al.
CV-09-0317-PR
2 CA-CV 2009-0014 (Opinion)

PARTIES:

Petitioners: Richard and Marcia Grand, co-trustees of the R.M. Grand Revocable Living Trust.

Respondents: Joseph P. Nacchio, John A. McMaster, Qwest Communications, International Inc. and QWEST B.V., a foreign organization.

FACTS:

In 2002, Richard and Marcia Grand, Trustees for the R.M. Grand Revocable Living Trust, filed a multi-count securities fraud action concerning the Trust's purchase of shares in KPNQwest N.V. ("KPNQwest"), a joint venture between Qwest Communications International ("Qwest") and Koninklijke KPN N.V., a European telecommunications company. Respondent Nacchio was Qwest's CEO and KPNQwest's supervisory board chairman. Respondent McMaster, a Qwest employee, was KPNQwest's CEO.

In 2005, the trial court granted partial summary judgment for the Respondents. The Trust appealed. The court of appeals affirmed in part and reversed in part, upholding the trial court's grant of summary judgment in favor of Respondents on the Trust's claims for damages, but reversing summary judgment on the Trust's rescission claims. *Grand v. Nacchio*, 214 Ariz. 9, ¶2, 147 P.3d 763, 767 (App. 2006).

Following remand, the Trust filed its third amended complaint which narrowed its theory of fraud "to focus upon [Respondents'] failure to disclose a billion-dollar fraud." The complaint alleged the Trust had purchased more than 285,000 shares of publicly-traded stock in KPNQwest. Of those shares, 30,000 were purchased as part of KPNQwest's initial public offering ("IPO") in November, 1999, and the remaining 255,000 shares were purchased in the aftermarket between December, 1999 and May 2000. The Trust alleged that during the time it was purchasing its KPNQwest shares, Qwest was fraudulently inflating its own earnings with fictitious revenue. The Trust claimed the Respondents controlled KPNQwest throughout its existence and that if Qwest's fraudulent activities had been known to the public, "KPNQwest's stock would have [been] unmarketable." The complaint sought to rescind the Trust's KPNQwest stock purchases pursuant to A.R.S. §44-2001(A) and A.R.S. §44-1801 through 44-2126 (the Act) under theories of both direct and secondary liability.

The Respondents separately moved to dismiss the complaint. The trial court granted the motions, but only as to the 255,000 shares the Trust purchased outside of the IPO. Later, the Trust filed two unsuccessful motions to reconsider and subsequently stipulated to dismiss with prejudice

its remaining claims concerning the 30,000 IPO shares, thereby disposing of the complaint entirely.

The Trust appealed. The court of appeals affirmed, ruling the Trustees failed to state a direct claim of liability under A.R.S. §44-2003(A) because they did not directly allege Qwest had “made, participated in or induced the unlawful sale or purchase” in the Trust’s aftermarket purchases of KPNQwest stock. The court concluded the Trustees failed to: (1) state a claim under the Act’s provision that KPNQwest was liable as a “control person,” and (2) allege that KPNQwest aided and abetted the unlawful sales. The court of appeals noted that *Standard Chartered v. Price Waterhouse*, 190 Ariz. 6, 945 P.2d 317 (App. 1996), held that the private civil remedy set forth in A.R.S. §§ 44-2001 and 44-2003 does not apply to all violations of §44-1991, but “only against the narrower range of persons ‘who made, participated in or induced the unlawful sale.’” If the legislature intended so extensive a private remedy, it could simply have said that §44-2003(A) liability could be imposed against any person who violated §44-1991. The Trust filed a petition for review.

ISSUES:

1. Whether the court of appeals erred in holding that A.R.S. §44-2003, stating that an action "may be brought against any person . . . who made, participated in or induced" the sale of securities, creates a required element of proof for a securities fraud plaintiff for every basis of liability, including control person liability under A.R.S. §44-1999 and aiding and abetting liability.
2. Whether the court of appeals erred in issuing a decision that makes it impossible for most purchasers of publicly traded securities to sue issuers and insiders who distribute false market information.
3. Whether the court of appeals defined "participation" in the sale of securities too narrowly, thereby holding that the complaint in this case failed to state a claim, and establishing an unduly restrictive definition of participation in all future cases.

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