ORIGINAL

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,	:	**CASE NO. 13-0655**
Plaintiff,	:	
vs.	:	**On Appeal from the Brown County Court of Appeals, Twelfth Appellate District**
DONALD RAY SMITH, et al.,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	**Court of Appeals Case No. CA2012-0406**
vs.	:	
AMERIFIRST FINANCIAL CORPORATION, et al.,	:	
Third-Party Defendants-Appellees.	:	

APPELLEES' MEMORANDUM OPPOSING JURISDICTION

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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case is not a case that involves any constitutional question, substantial or otherwise, and, for the reasons set forth below, it is also not a case that is of public or great general interest. Specifically, the Trial Court and the Ohio Twelfth District Court of Appeals correctly applied an unambiguous Ohio statute concerning securities fraud, R.C. 1707.43, and found that Appellees did not participate or aid the seller, American Benefits Concepts ("ABC"), in any way in making a sale of securities. In reaching their decisions, both the Trial Court and Twelfth District followed the consistent rationale set forth by other courts that have had an opportunity to interpret this statute. Simply stated, there is no conflict among appellate courts when it comes to interpretation of R.C. 1707.43.

In an effort to have yet another court re-examine and potentially re-weigh evidence already evaluated by the courts below, Third Party Plaintiff/Appellant Donald Smith ("Appellant" or "Mr. Smith") asks this Court to accept jurisdiction over this case. This jurisdictional request is made even though acceptance of the proposition of law would neither change the outcome of this case nor change or clarify Ohio law in general. Additionally, even if the proposition of law set forth by Appellant would change the outcome of the case before this Court, the ruling would only benefit Appellant and not the general population of the State of Ohio since the proposition is nothing more than a restatement of the statute, R.C. 1707.43, itself. In considering whether to exercise its discretionary jurisdiction over a case, this Court has held that cases involving questions of great general interest must be distinguished from cases merely involving "questions of interest primarily to the parties." *Williamson v. Rubich,* 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960).

On March 11, 2013, the Twelfth District Court of Appeals, in a nineteen-page, detailed opinion, correctly applied clear Ohio statutory law to the facts of the instant case and held that no genuine issue of material fact existed as to whether AmeriFirst "participated in or aided" the sale of securities under R.C. 1707.43 to Mrs. Evelyn Smith. In doing so, the Twelfth District also employed the guidance of several Ohio appellate cases interpreting R.C. 1707.73, especially three cases that applied the language of R.C. 1707.43 to actions taken by a bank. None of the myriad cases cited by the Twelfth District conflicted with a holding in any other case, and all unanimously supported the court's finding that Mr. Smith presented no evidence to demonstrate that either Third Party Defendant/Appellee (collectively, "Appellees") (separately, "AmeriFirst" and "Mr. Hamminga") participated in or aided the sale of fraudulent securities to Mrs. Smith.

Mr. Smith contends that this case is of great general interest because thousands of Ohioans have been victims of securities fraud. While Mr. Smith's contention may be true, the Court's acceptance of this particular case and reversal of the Twelfth District Court of Appeals decision will not remedy or prevent securities fraud in Ohio, as Mr. Smith's solution simply replaces one innocent person or entity with another. In other words, Mr. Smith would like Ohio law to remedy an investor's decision to invest in fraudulent securities by holding the mortgage banker from which the individual obtained the money to invest liable for the entire amount owed. This scenario of replacing one innocent person with another is certainly not in the public's interest.

Therefore, because it is not of public or great general interest, this case does not warrant this Court's review.

STATEMENT OF THE CASE AND FACTS[1]

This case involves a failed investment in fraudulent unregistered securities purchased by Mrs. Evelyn Smith ("Mrs. Smith") from a company called ABC. The securities sold to Mrs. Smith were part of a multi-million dollar Ponzi scheme run by Diversified Lending Group ("DLG"). ABC sold Medicare supplemental insurance and investments to their clients as well as DLG's securities. ABC's clients sometimes obtained the funds to purchase DLG securities by taking out a mortgage on their homes. ABC's customers chose where they wished to obtain their mortgages, and several (10) different mortgage banking firms and/or banks, including AmeriFirst, were used by ABC customers to obtain the funds necessary to invest in the DLG securities.

In 2007, Mr. Hamminga, a loan officer at AmeriFirst, randomly encountered at a restaurant an old acquaintance who happened to be an ABC employee. The old acquaintance explained the DLG investment to Mr. Hamminga and informed Mr. Hamminga that ABC was always looking for other banks from which their customers could obtain mortgages. Mr. Hamminga subsequently received referrals from ABC in 2007 and 2008. Most of ABC's customers referred to Mr. Hamminga wished to mortgage their homes so that they could ultimately choose to invest in DLG securities. Neither Mr. Hamminga nor AmeriFirst solicited these clients to invest in DLG nor did they promote DLG securities in any way. Neither Mr. Hamminga nor AmeriFirst ever received or paid a fee for these referrals or any subsequent mortgage transactions. Finally, neither did Mr. Hamminga nor AmeriFirst ever plan or organize underwritings of the ABC sales. AmeriFirst and ABC had no legal relationship at all.

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[1] Because both AmeriFirst and Mr. Hamminga dispute a number of the facts set forth in Mr. Smith's Memorandum in Support of Jurisdiction, AmeriFirst and Hamminga include their own Statement of the Case and Facts section by tracking the facts section in the Twelfth District's Opinion.

In the fall of 2007, an ABC salesman contacted Mr. Hamminga to inform him that one of ABC's customers, Mrs. Evelyn Smith, was interested in obtaining a mortgage on her home. Mr. Hamminga called Mrs. Smith, who told him that she was not interested in a mortgage. Mr. Hamminga relayed this information to the ABC employee and did not speak with Mrs. Smith any further. A month later, the same ABC employee called Mr. Hamminga to tell him that Mrs. Smith had changed her mind and decided that she did want a mortgage on her home. Mr. Hamminga called Mrs. Smith and reminded her that she had previously told him that she did not want a mortgage. Mrs. Smith assured Mr. Hamminga that she had changed her mind. After speaking with her and determining that she was competent and speaking on her own accord, Mr. Hamminga obtained the financial information that he needed from Mrs. Smith and confirmed that she qualified for the mortgage even without income from the DLG securities.

Subsequently, Mr. Hamminga and AmeriFirst performed their normal banking procedures for closing Mrs. Smith's mortgage, and Mrs. Smith closed on her mortgage loan in January 2008. As was required by the Federal right of rescission, AmeriFirst waited three days after closing to wire Mrs. Smith's loan proceeds to her. AmeriFirst performed its normal business practice of giving the loan proceeds directly to Mrs. Smith, not to either ABC or DLG, and never advised Mrs. Smith as to how she should spend her money. After receiving the money from AmeriFirst, Mrs. Smith made the decision to use the loan proceeds to invest in the DLG notes.

After months of payments, DLG ceased paying Mrs. Smith's mortgage. DLG was placed into a receivership in March 2009 following an SEC investigation regarding DLG's sale of fraudulent securities. In 2010, Mrs. Smith (and later her executor) filed suit against AmeriFirst and Mr. Hamminga but voluntarily dismissed her case on January 12, 2011, rather than respond

to AmeriFirst and Mr. Hamminga's Motion for Summary Judgment. In December 2010, Mr. Smith found himself named as a defendant in the instant case, a complaint for foreclosure filed by Wells Fargo Bank, N.A. Only two months later, on February 28, 2011, Mr. Smith filed a third party complaint against Mr. Hamminga and AmeriFirst. On March 15, 2012, the Trial Court filed a Judgment Entry sustaining AmeriFirst and Mr. Hamminga's Motion for Summary Judgment. Mr. Smith appealed this ruling to the Twelfth District Court of Appeals, which affirmed the Trial Court's Judgment Entry on March 12, 2013. (Opinion, filed March 12, 2013, attached to Mr. Smith's Memorandum in Support of Jurisdiction.) After failing to convince two courts of the merits of his claim, Mr. Smith now appeals to this Court with the hope that the Court will reevaluate his claim for a third time and reach a finding that is inconsistent with all Ohio court precedent on this issue.

ARGUMENTS REGARDING APPELLANT'S PROPOSITION OF LAW

This Court should not entertain ruling on Mr. Smith's proposition of law for three reasons. First, Mr. Smith's proposition of law is nearly identical to the language that is already employed in R.C. 1707.43, which was correctly applied by both the Trial Court and the Twelfth District in this case, and, if adopted as written, will not change Ohio law in any manner, including the outcome of this case. Second, Mr. Smith's argument is based upon his argument that there is conflicting or inconsistent case law concerning what constitutes "participate or aid in" the sale of a fraudulent security, which there is not. And third, although his proposition of law does not say so, Mr. Smith seeks to reverse time-tested precedent and establish a rule holding any company or individual liable under R.C. 1707.43 who provided funds to an individual who ultimately invested those funds in fraudulent securities, with no actual legal support for the extreme broadening of the meaning of R.C. 1707.43.

Mr. Smith asks this Court to adopt a proposition of law that would neither change the outcome of this case nor change or clarify existing Ohio law. R.C. 1707.43(A) says, in pertinent part, "every person that has participated in or aided the seller in any way in making such a sale [in violation of Chapter 1707] or contract for sale, are jointly and severally liable to the purchaser . . .." Mr. Smith proposes that this Court adopt the following, almost identical, language in his proposition of law: "A person who, in any way, participates in or aids a seller in the sale of a security in violation of R.C. Chapter 1707 is liable under R.C. 1707.43." (Memorandum in Support of Jurisdiction, at 5.)[2] Mr. Smith's proposition of law is essentially a repeat of the language already codified and contained in R.C. 1707.43 — the same language that the Twelfth District correctly applied to the facts of this case. If this Court were to adopt Mr. Smith's proposition of law as written, neither Ohio law nor the outcome of this case would change in any way. By employing Mr. Smith's proposition of law, this Court would simply be restating what is already clear and unambiguous language in R.C. 1707.43, which would not be beneficial to Ohio litigants.

Furthermore, Mr. Smith argues that there is a conflict, or some confusion, among Ohio courts with regard to what constitutes "participate in or aid" the sale of a fraudulent security. To the contrary, Ohio courts, including the Twelfth District in this case, have uniformly applied the language of the statute to very different, and very fact-specific situations, which has successfully resulted in a consistent body of law interpreting R.C. 1707.43 for Ohio trial and appellate courts to follow. For instance, the Twelfth District in this case had no problem applying the holdings of three different Ohio appellate cases interpreting R.C. 1707.43 with regard to actions taken by banks to the facts of the instant case to reach a conclusion entirely consistent with those courts'

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[2] Mr. Smith did not include page numbers on his Memorandum, so Appellees have numbered it themselves, starting with page 1 immediately following Mr. Smith's cover page.

findings. (Opinion, at 10 (citing *Fed. Mgt. Co. v. Coopers & Lybrand,* 137 Ohio App.3d 366, 391 (10th Dist. 2000); *Boomershine v. Lifetime Capital, Inc.,* 2d Dist. No. 22179, 2008-Ohio-14, ¶ 15; *Hild v. Woodcrest Ass'n.,* 59 Ohio Misc. 13, 30 (M.C. 1977).)) All of the cases cited by the Opinion concerned actions taken by banks, and all of the cited cases concerned Motions for Summary Judgment, as did the instant case. The Twelfth District bolstered its opinion by citing holdings from other Ohio courts applying the language of R.C. 1707.43 to the facts of their respective cases. (Opinion, at 9 (citing *Boland v. Hammond,* 144 Ohio App.3d 89, 94 (4th Dist. 2001); *Gerlach v. Wergowski,* 65 Ohio App.3d 510, 513-14 (1st Dist. 1989); *Perkowski v. Megas Corp.,* 55 Ohio App.3d 234 (9th Dist. 1990).) None of the cases cited by the Twelfth District in support of its holding are in conflict with another.

To support his argument, Mr. Smith cites two federal cases, which he claims "take a broader view of RC 1707.43" than does Ohio state case law interpreting R.C. 1707.43. (Memorandum in Support of Jurisdiction, at 6 (citing *In re National Century Financial Enterprises, Inc., Inv. Litigation,* 580 F.Supp.2d 630 (S.D.Ohio 2008) and *Escue v. Sequent, Inc.,* 2010 WL 3365933, at *15 (S.D.Ohio Aug. 25, 2010).) In reality, however, neither of these cases contradicts holdings in any Ohio case, and importantly, in both cases, the court renders a decision on a motion to dismiss, not a summary judgment motion as was the case here and in the Ohio cases cited by the Twelfth District. Both federal courts ruled that at the pleading stage, the plaintiff had alleged adequate facts to state a claim under R.C. 1707.43, and neither evaluated whether a plaintiff's evidence was sufficient to overcome a motion for summary judgment on an R.C. 1707.43 claim. *In re National Century Financial Enterprises, Inc., Inv. Litigation,* 580

F.Supp.2d at 649-50; *Escue,* 2010 WL 3365933, at *15 (S.D.Ohio Aug. 25, 2010). Furthermore, neither of the cases cited by Mr. Smith are inconsistent, in any way, with the myriad of consistent Ohio cases cited by the Trial Court and the Twelfth District in this case.

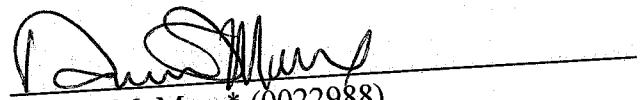
Finally, although he included a proposition of law that simply restates the language codified in R.C. 1707.43, Mr. Smith then argues that this Court should reverse a time-tested precedent by holding any mortgage banker or lending institution liable under R.C. 1707.43 that provided funds to an individual who ultimately invested those funds in fraudulent securities, even if the banking entity engaged in normal banking practices in lending the funds. This widening of the existing interpretation of the language of R.C. 1707.43 would apply a strict liability standard to lenders who advance funds that are later poorly invested by borrowers. In making this argument, Mr. Smith has presented this Court with no actual legal support for changing Ohio law that could result in extreme broadening of the meaning of R.C. 1707.43. As Mr. Smith points out, R.C. 1707.43 is meant to be broad in scope, as the language itself holds liable any individual who participated in or aided <u>the sale of a security</u>. However, Mr. Smith still has yet to show, and cites no legal authority to show, how simply lending money to a person who then subsequently chooses what to do with that money by making an investment in fraudulent securities can be participating in or aiding the sale of a security. Mr. Smith's argument suggests that all lending institutions should now have a duty and responsibility to regulate what a mortgage customer chooses to do with the funds that she receives from the loan and discriminate among customers on the basis of what they plan to do with their mortgage proceeds. If they do not and the customer chooses to make a bad investment, in Mr. Smith's view, the banks should be liable to that customer for securities fraud. Such a conclusion of law is contrary to every Ohio case that has interpreted R.C. 1707.43 in the past ten years and is contrary to the language of

R.C. 1707.43 itself. As both the Trial and Appellate Court held, AmeriFirst and Mr. Hamminga engaged in "normal banking practices," which does not, and has never, constituted participating in or aiding the sale of fraudulent securities under R.C. 1707.43. (Opinion, at 10.)

CONCLUSION

This case involves neither a substantial constitutional question nor is it of public or great general interest. Both the Trial Court and the Twelfth District applied clear statutory language and consistent Ohio case law interpreting the statutory language to the facts of the instant case and arrived at the same conclusion —both AmeriFirst and Mr. Hamminga engaged in normal mortgage banking practices and did not participate in or aid the sale of fraudulent securities in any way. Mr. Smith has not presented this Court with a proposition of law that would change either Ohio law or the outcome of this case, and this Court's adoption of Mr. Smith's reasoning could create for lending institutions, including mortgage bankers, an unprecedented duty to inquire of their customers as to the usage of withdrawn funds. For all of the foregoing reasons, AmeriFirst and Mr. Hamminga respectfully request that the this Court decline accepting jurisdiction of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ***Appellees' Memorandum Opposing Jurisdiction*** has been served upon the following by U.S. Ordinary Mail, postage prepaid, this 23rd day of May, 2013:

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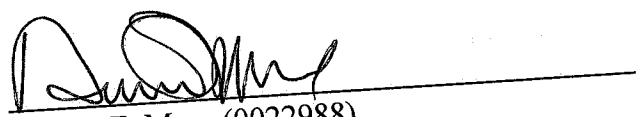

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