

ORIGINAL

IN THE SUPREME COURT OF OHIO

TORRI AUER,
Plaintiff-Appellee,

v.

JAMIE PALIATH, et al.,
Defendant-Appellant.

Case No. 2013-0459

On Appeal from the Montgomery County
Court of Appeals, Second Appellate District,

Court of Appeals No. 25158

**BRIEF OF NATIONAL ASSOCIATION OF REALTORS®
AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

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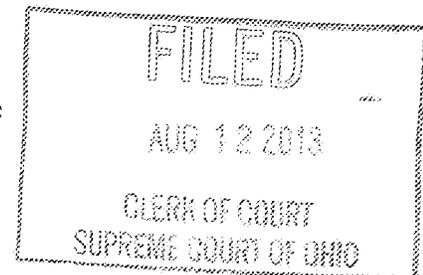
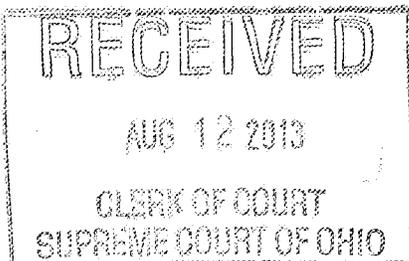


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I. INTEREST OF *AMICUS CURIAE*

Amicus NATIONAL ASSOCIATION OF REALTORS[®] (NAR)¹ is a nationwide, nonprofit professional association that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraisal, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS[®], approximately 1,500 local Associations of REALTORS[®], and approximately one million REALTOR[®] and REALTOR-ASSOCIATE[®] members. NAR represents the interests of real estate professionals and real property owners in important matters before the legislatures, courts, and administrative agencies of the federal and state governments. The issues presented in those matters include real estate licensing and business practices, fair housing, mortgage lending and mortgage availability, neighborhood revitalization, housing affordability, and others.

NAR's interest in this case arises from its interest in promoting and developing standards for efficient, effective, and ethical real estate business practices. The rule promulgated by the Court of Appeals of Ohio, Second District, for determining broker liability not only affects the approximately 25,800 NAR members doing business in Ohio, but would affect NAR members in every state if this rule is widely adopted.

The court below expressly acknowledged that Ohio courts use a fact specific inquiry, to determine that an agent is acting within her "scope of employment" before imposing liability on a broker under the doctrine of *respondeat superior*. As discussed below, this approach is also

¹ REALTOR[®] is a federal registered collective membership mark used by members of NAR to indicate their membership status.

applied in a number of other states. But the court excused the flaws in the district court's jury instructions regarding that factual inquiry by holding that brokers are absolutely liable, as a matter of law, when they receive a commission from an allegedly fraudulent transaction. To be sure, a broker's receipt of a commission may be *one* factor to be considered in the factual calculus of the "scope of employment" determination. However, the holding that receipt of a commission is conclusively determinative of the broker's liability conflicts with the law in Ohio and elsewhere. This simplistic analysis will result in brokers being unreasonably and unfairly held liable for the acts of their agents.

II. STATEMENT OF THE CASE AND FACTS

NAR incorporates the Statement Facts set forth in the Merit Brief of Appellant Keller Williams Home Town Realty. Merit Brief of Appellant Keller Williams Home Town Realty at Section I, *Auer v. Paliath, et al.*, No. 2013-0459 (filed Aug. 9, 2013).

III. LEGAL ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: The *respondeat superior* liability of an Ohio real estate broker for the intentionally tortious conduct of the broker's agent should be determined by a fact based analysis of whether the agent acted within the scope of her employment, and not based solely on whether the broker received a commission from the transaction.

A. Ohio law requires consideration of all the facts and circumstances in each case to determine whether an agent acted within the scope of her agency or employment.

The Ohio Supreme Court articulated Ohio law regarding *respondeat superior* liability in

Groob v. Keybank:

It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed *within the scope of employment*. Moreover, where the tort is intentional, * * * the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed * * * . . . an intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his

principal or employer is not responsible therefore . . . In other words, an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business.

(Emphasis added.) 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 42 (quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991) (Internal citations omitted)). Moreover, whether an agent acted *within the scope of her employment* “is to be gathered from all the facts and circumstances in evidence and is a question of fact for the jury.” *Taylor v. Wilson*, 44 Ohio App. 100, 104, 183 N.E. 541 (1st Dist.1932); *see also Posin v. A.B.C. Motore Hotel, Inc.*, 45 Ohio St.2d 271, 278; 344 N.E.2d 334 (1967) (finding that “scope of employment” is a question of fact and each case is *sui generis*); *Lima Railway Co. v. Little*, 67 Ohio St. 91, 65 N.E. 61 (1902) (Held: “That whether the person whose immediate negligence or misconduct caused the particular injury complained of, was, at the time, the servant of, and was then acting for the defendant company sought to be charged, is a question of fact to be submitted to the jury under proper instructions from the court.”).

Here, the lower court created confusion by instructing the jury to consider all the facts and circumstances when determining whether the agent was acting within her scope of employment, but *also* instructing the jury that the broker was liable based solely on whether the agent had committed fraud. The Second District then dismissed Appellant’s objections to those instructions by finding that because the agent’s intentionally tortious acts involved a real estate transaction for which the broker received a commission, the broker was liable for the agent’s acts as a matter of law. This *per se* finding of liability does not conform to Ohio law.

B. Like Ohio, other states employ a facts and circumstances test to determine whether an agent is acting within the scope of employment for purposes of *respondeat superior* liability.

In the cases discussed below, courts in other states have also expressly held that a facts and circumstances analysis must be applied to determine whether an agent was acting within the scope of employment in order to find the principal liable under the doctrine of *respondeat superior*. These courts consider, for example, whether the agent had sole control over the means and methods of the work and schedule, the employer's supervision, remuneration based upon commission or hourly wages, and whether the agent's acts benefit or serve the purpose of the employer. None of these courts have held that a single factor, such as whether the agent's broker received a commission, is dispositive in determining whether a broker is liable for its agent's actions.

In Michigan, "[w]hether the employee was acting within the scope or apparent scope of employment is generally a question for the trier of fact" *Letich v. Switchenko*, 169 Mich.App. 761, 765-66, 426 N.W.2d 804 (1988) (citing *McCann v. Michigan*, 398 Mich. 65, 71-72; 247 N.W.2d 521 (1976); *Smith v. Merrill Lynch Pierce Fenner & Smith*, 155 Mich.App. 230, 236; 399 N.W.2d 481 (1986)). In determining scope of employment for purposes of *respondeat superior liability*, Michigan courts have adopted the Restatement (Second) of Agency § 229 (2012) which states:

- (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
- (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
 - (a) whether or not the act is one commonly done by such servants;
 - (b) the time, place and purpose of the act;
 - (c) the previous relations between the master and the servant;
 - (d) the extent to which the business of the master is apportioned between different servants;
 - (e) whether or not the act is outside the enterprise of the master or, if

- within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

Bryant et al., v. Brannen et al., 180 Mich.App. 87, 99-102, 446 N.W.2d 847 (1989) (citing Restatement (Second) of Agency § 229).

Tennessee courts also recognize that whether an agent is acting within the scope of employment is a question of fact requiring consideration of all the facts and circumstances of the case. *See e.g., Hughes v. Metropolitan Government of Nashville and Davidson County*, 340 S.W.3d 352, 361 (Tenn.2011) (stating that “[w]hether an employee is acting within the scope of his or her employment is a question of fact.”); *Tennessee Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.*, 840 S.W.2d 933, 937 (Tenn.Ct.App.1992) (stating that the determination as to whether an act occurred within the scope of employment “required the weighing and balancing of the facts and circumstances of each case.”). In *Tennessee Farmers*, the court considered all of the facts related to the employee’s driving accident to determine that the employer was not liable because the employee was not acting within the scope of his employment at the time of the accident. 840 S.W.2d at 938-40. Even though the accident occurred during a trip authorized by the employer and the court found that the trip was within the employee’s scope of employment, the court evaluated all the facts in evidence and determined that the employee was not acting within the scope of his employment at the time of the accident, so the employer could not be held liable. *Id.* at 939.

Illinois courts also apply *respondeat superior* liability based on an evaluation of the facts and circumstances of a case in light of the criteria set forth in § 228 of the Second Restatement of Agency. *Adames v. Sheahan*, 233 Ill.2d 276, 298-99, 909 N.E.2d 742 (2009), (citing *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 164, 862 N.E.2d 985 (2007); *Pyne v. Witmer*, 129 Ill.2d 351, 360, 543 N.E.2d 1304 (1989)). The Illinois Supreme Court has held that an employee is acting with the scope of employment if all three criteria of Section 228 of the Second Restatement of Agency are met. That means that the agent's act:

- (a) [...] is of the kind he is employed to perform;
- (b) [...] occurs substantially within the authorized time and space limits;
- (c) [...] is actuated, at least in part, by a purpose to serve the master* * * [.]

Adames, 233 Ill.2d at 298-99.

In *Bagent v. Blessing Care*, the Illinois Supreme Court found that a hospital was not liable for the conduct of its employee because she was not acting within the scope of her employment when she disclosed confidential medical records in violation of hospital policy. That holding was based on the court's factual determination that such disclosure was not the kind of conduct the employee was employed to perform and doing so did not serve a purpose of the employer, and therefore, was not within the employee's scope of employment. 224 Ill.2d 154, 167, 169, 862 N.E.2d 985. The court also found it relevant that "[t]he fact that [the employer] expressly forbade [the employee] to reveal patient information bolsters our conclusion that [the employee's] disclosure of plaintiff's medical records was not the kind of conduct she was employed to perform." *Id.* Summary judgment for the employer was therefore appropriate because there was no factual dispute regarding whether the employee's conduct served the purposes of the employer or the employee's motivation for the disclosure, the key factual underpinnings of the scope of employment determination.

Like Ohio, Michigan, Tennessee, and Illinois, New York courts have also determined that whether an employee was acting within the scope of employment depends on the facts and circumstances specific to each case. *See e.g., Ravello v. Waldron*, 47 Ny.2d 297, 302, 391 N.E.2d 1278 (1979); *Wright v. La Brake*, 267 A.D.2d 578, 579; 699 N.Y.S.2d 227 (1999) (“whether an employee is acting within the scope of employment is so heavily dependent on factual considerations . . .” (Internal quotations omitted.)). “And, because the determination of whether a particular act was within the scope of the servant’s employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury.” *Ravello* at 303. Citing the Section 229 of the Restatement (Second) of Agency, the *Ravello* found that “[a]mong the factors to be weighed are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific acts was one that the employer could reasonably have anticipated.” *Id.*

Finally, California also applies a facts and circumstances test to determine scope of employment for the purpose of *respondeat superior* liability of a real estate broker for the conduct of its sales agent, as recognized in the unpublished decision of the California Appellate Court relied on by the Second District below. *Reagan v. Keller Williams Realty, Inc.*, Cal.App.2d Dist. No. B192890, 2007 WL2447021 (Aug.30, 2007). *Reagan* expressly held that whether the real estate agent was acting within the scope of her employment at the time of the tort is a factual question that may not be decided as a matter of law. *Reagan* at *12 (finding that “the scope of employment is a factual question which is decided as a matter of law only when the facts are undisputed and no conflicting inferences may be drawn.”) (citing *Farmers Ins. Group v.*

County of Santa Clara, 11 Cal.4th 992, 1019, 47 Cal.Rptr.2d 478 (1995); *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1405, 1428, 56 Cal.Rptr.3d 501 (2007); *Baptist v. Robinson*, 143 Cal.App.4th 151, 162, 49 Cal.Rptr.3d 153 (2006)). In reversing summary judgment in favor of the broker on the plaintiff's *respondeat superior* claim against the broker, the *Reagan* court pointed to numerous facts that a jury may consider in determining whether the agent was acting within the scope of her employment, including that she was driving to an open house when the tort happened, the vehicle she was driving had the broker's logo on it, the balloons that caused the accident were to be placed on the broker's sign, the fact that driving a car was considered to be a part of the real estate business, and the broker required the agent to add it as an additional insured on her vehicle. *Id. Reagan* thus affirms that consideration of all the facts and circumstances in evidence is necessary to determine a broker's liability for an agent's actions under the doctrine of *respondeat superior*.

In sum, the Second District's holding must be reversed because it conflicts with the generally accepted facts and circumstances test used in Ohio as well as a number of other states to determine whether a real estate agent was acting within her scope of employment for purposes of *respondeat superior* liability of the agent's broker. To the extent the Second District's test, which relies only on whether a real estate broker received a commission in connection with an allegedly fraudulent transaction, is again employed in Ohio or adopted in other states, real estate brokers will be at risk of being unfairly held liable for the intentional misdeeds of their agents, even in circumstances where they had little or no opportunity to discover or prevent the agents' misconduct.

C. The Second District erred by not reversing based on the trial court's incorrect and confusing jury instructions, and erred by holding, as a matter of law, a broker liable for the intentionally tortious acts of its agent.

The Second District erred when it rejected Appellant's challenge to the following jury instruction: "if you find that Defendant Jamie Paliath committed fraud with respect to the sale of [five properties] to Plaintiff Torrie Auer, then Defendant Keller Williams Hometown Realty of Vandalia is vicariously liable . . ." *Auer v. Paliath*, 2013-Ohio-391, 986 N.E.2d 1952, ¶ 35 (2d Dist.). Before that instruction, the court had also given the jury the conflicting instruction that "[A] real estate broker is vicariously liable for the intentional torts committed by salesmen acting within the scope of their authority." (Emphasis added.) *Id.* Thus, even though the court putatively instructed the jury to consider the factual question of whether Paliath was acting within the scope of her authority (the appropriate analysis, as discussed above), the jury was also instructed that they need consider *only* whether or not Paliath committed fraud. That latter instruction directed the jury's attention *away* from consideration of the facts related to the agent's scope of employment. But under Ohio law, whether an agent acted within the scope of employment "is to be gathered from all the facts and circumstances in evidence and is a question of fact for the jury." *Taylor*, 44 Ohio App. 100, 183 N.E. 541, at 104. The court's instruction to the jury that the agent's fraud is sufficient for the broker's liability is not only inconsistent with Ohio law, but undoubtedly created confusion and contradiction in the jury's mind, a further basis for reversal. *Groob*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, at ¶ 32 ("A trial court must give jury instructions that correctly and completely state the law. An inadequate jury instruction that misleads the jury constitutes reversible error.") (citing *Sharp v. Norfolk & W. Py. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995); *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985)).

Further compounding the jury's confusion, the court instructed the jury that "A real estate agent is not acting within the scope of her agency when she clearly and completely departs from the services or job that she was hired to do. When an agent acts solely for her own benefit, or solely for the benefit of a person other than her broker, she does not act within the scope of her agency, and the broker is not liable for the agent's acts." *Auer*, 2013-Ohio-391, 986 N.E.2d 1952, at ¶ 35. Despite having received this instruction, the jury was, in effect, directed to ignore consideration of the facts and circumstances related to the scope of employment because the *per se* liability instruction *required* it to find that the broker was liable for the agent's actions if the agent had committed fraud.

The trial court should have instructed the jury to consider all the facts and circumstances in evidence related to the agent's scope of employment, and not merely whether the agent committed fraud. The trial court's failure to do so constitutes reversible error because the instructions were incorrect, inadequate, and misleading to the jury. *Groob* at ¶ 32.

On review, the Second District excused this confusing and conflicting array of jury instructions by holding that "when a real estate salesperson acts in the name of a real estate broker in connection with the type of real estate transaction for which he or she was hired and the broker collects a commission for the transaction, the salesperson's actions in connection with that real estate transaction are within the scope of the salesperson's employment, as a matter of law." *Auer*, 2013-Ohio-391, 986 N.E.2d 1952, at ¶ 46. But as explained above, this conclusion is incorrect because it relies on a single fact – whether the agent's intentionally tortious acts involved a real estate transaction for which the broker received a commission. Whether an agent acted within the scope of her employment is to be gathered from *all* the facts and circumstances in evidence and each case is *sui generis*. *Taylor*, 44 Ohio App. 100, 183 N.E. 541, at 104; *Posin*,

45 Ohio St.2d 271, 344 N.E.2d 334, at 278. The trial court failed to follow the law of Ohio by not requiring the jury to consider all the facts and circumstances in evidence to determine whether the agent was acting within the scope of her employment for purposes of *respondeat superior* liability of the real estate broker for the acts of the broker's agent. The Second District not only left that error uncorrected, but added its own. To the extent this misguided conclusion is again applied in Ohio or adopted in other states, brokers will be improperly and unfairly held liable for the intentionally wrongful acts of those agents. This Court should reverse the Second District to ensure that this erroneous conclusion is not reproduced elsewhere.

IV. CONCLUSION

For these reasons, the Second District decision should be reversed and this Court should confirm the longstanding requirement of Ohio law that all the facts and circumstances must be considered to determine whether an agent is acting within the scope of her employment for purpose of finding *respondent superior* liability.

Respectfully submitted,



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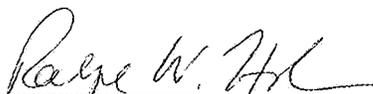
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by first class U.S. mail on August 9, 2013:

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