

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p>TORRI AUER,</p> <p><i>Plaintiff-Appellee,</i></p> <p>v.</p> <p>JAMIE PALIATH, et al.,</p> <p><i>Defendant-Appellant.</i></p>	<p>Supreme Court Case No. 13-0459</p> <p>On appeal from the Montgomery County Court of Appeals, Second Appellate District, No. 25158</p>
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MERITS BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF REALTORS IN SUPPORT OF APPELLANT

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INTERESTS OF AMICUS CURIAE

Amicus Curiae the Ohio Association of Realtors (“OAR”) submits this merits brief in support Appellant Keller Williams dba Home Town Realty (“Home Town”). Formed in 1910, the OAR is the State’s largest professional trade association with more than 26,400 members who are mostly real estate brokers and salespersons. In addition to serving as a spokesperson for the real estate industry, its activities include services in the areas of education, professional ethics training, legal assistance and legislative advocacy. The Second District’s erroneous decision relating to the vicarious liability of brokers for the acts of real estate salespersons with whom they affiliate has a profound impact on thousands of the OAR’s members. It will submit brokers to expanded liability for actions over which they have no control; it will discourage brokers from supporting the entry of new salespersons into the industry; it will discourage salespersons from seeking to become a broker; and it will increase the costs of providing real estate services to consumers throughout the state.

STATEMENT OF THE CASE AND FACTS

The OAR incorporates the statement of the case and statement of facts submitted by Home Town in its merits brief and submits this additional statement of facts.

The Ohio Real Estate Commission and the Ohio Division of Real Estate and Professional Licensing regulate the practice of real estate in the State of Ohio. Chapter 4735 of the Ohio Revised Code contains the laws governing the actions of real estate brokers and salespersons. Under Chapter 4735, individuals must be licensed in the State of Ohio before they can engage in the practice of real estate. R.C. 4735.01.

Ohio has what is commonly called a “two-tiered” real estate licensing system. This simply means that there are two types of real estate licenses in Ohio, a salesperson’s license and

a broker's license. Perhaps an over-simplification, but brokers are generally more experienced than salespersons in terms of formal real estate education and experience.

To become a real estate salesperson in Ohio, an individual must satisfy the requirements of R.C. 4735.09 including the completion of a certain number of hours of classroom instruction in specified subjects, passage of the salesperson's examination, and "sponsorship" by a real estate broker. "Sponsorship" means that a broker must recommend an applicant for a salesperson's license and the salesperson must be "affiliated" with a broker in the practice of real estate. To become a broker a person must complete additional hours of classroom instruction in specified subjects and pass the broker's examination. R.C. 4735.07; R.C. 4735.08. Moreover, the applicant for a broker's license must have acted as a real estate salesperson for at least two of the last five years (30 hours per week) and handled at least 20 real estate transactions or have the equivalent experience. R.C. 4735.07(B)(5). Perhaps an over-simplification, but a salesperson places his license with a broker (referred to as "sponsorship" above) and is eligible to become a broker only after he or she meets additional requirements for education and experience.

In the typical real estate transaction, a salesperson takes a listing from a potential seller and tries to find a buyer or lessee for the property. Alternatively, a salesperson may work with a buyer to find property to purchase or lease. If successful, the salesperson earns a real estate commission that is paid at closing. By law, the listing must be taken in the name of the broker with whom the salesperson is affiliated, and the commission must be paid to the broker. The broker then splits the commission with the salesperson based upon the agreement between the broker and the salesperson. Many brokerage firms in Ohio will pay the salesperson 100% of the commission and only collect a small desk fee. It is very common that the broker never meets the buyer or seller, and almost never attends the closing. Thus, while the broker provides policies

and procedures for the salesperson, provides the overhead for the salesperson to operate, maintains the records, and provides assistance and education to the salesperson, all of the day-to-day activities related to the sale are generally done by the salesperson.

LAW AND ARGUMENT

- I. **Proposition of Law – The *Respondeat Superior* Liability of an Ohio Real Estate Broker for the Intentional Tortious Conduct of an Associated Salesperson Is Not Absolute and Instead Is Predicated Upon the Conduct Being Within the Scope of the Salesperson’s Agency or Employment.**
- A. **The Second District’s Decision Departs From the Century Old Requirement that a Jury Determine Whether an Agent Is Acting Within the Scope of His or Her Employment.**

The Second District held that a “broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the salesperson committed within the course and scope of employment.” (Op.¹ ¶ 32). The Second District further held 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.” (Op. ¶ 46). This later holding departs from established law in Ohio and is the focus of this appeal.²

For well over a century, this Court has recognized that “to make the master responsible, the act of the servant must be done in the course of his employment, that is, under the express or implied authority of the master.” *The Lima Railway Co. v. Little*, 67 Ohio St. 91, 97, 65 N.E. 861 (1902). The reason for the scope of employment requirement is obvious: “Beyond the scope

¹ “Op.” refers to the February 8, 2013 opinion of the Second District Court of Appeals.

² The OAR also argued in favor of Home Town before the Second District Court of Appeals that, generally, salespersons are independent contractors over whom brokers do not exercise control. As such, brokers should not be held vicariously liable for the actions of salespersons who affiliate with them. That issue, however, has not been raised on appeal to this Court.

of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant done in the execution of the service for which he was engaged cannot be regarded as the act of the master.” *Id.* The rule of master/servant liability was founded on “public policy and convenience; for, in no other way, could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents.” *The Cleveland, Columbus and Cincinnati Railroad Co. v. Keary*, 3 Ohio St. 201, 207 (1854). But that principle does not apply when the servant is acting outside the scope of his or her employment.

More importantly, this Court has held for over a century that the issue of whether a servant was acting within the scope of his or her employment is a **question of fact**. (Emphasis added). *Lima Railway* at syllabus paragraph 1. (“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.”). This Court has held that “[t]he term ‘scope of employment’ has never been accurately defined and * * * it cannot be defined because it is a question of fact and each case is *sui generis*.” *Posin v. A. B. C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 278, 344 N.E.2d 334 (1976). Ohio courts continue to apply these same principles today. *See, e.g., Webb v. Higgs*, 2d Dist. No. 2011-CA-22, 2012-Ohio-3291, at ¶ 5.

Despite this longstanding precedent, the trial court incorrectly instructed the jury that “[i]f you find that Defendant Jamie Paliath committed fraud * * * then you **must** find in favor of Plaintiff Tori Auer and against Defendant Keller Williams Hometown Realty of Vandalia in the

amount of Plaintiff Torri Auer's damages." (Emphasis added). (Trans.³ at 989-90). This was an incorrect statement of Ohio law. This instruction removed the question of whether Paliath was acting within the scope of her employment from the jury.

The Second District's opinion upholding this instruction was likewise in error. The basis for the Second District's opinion was that, under R.C. 4735.21, a salesperson cannot complete a real estate transaction outside of his or her affiliation with a licensed broker, and, thus, a broker should be liable for the acts of a salesperson done in connection with a transaction from which the broker received a commission. (Op. ¶ 48). But the Second District wrongly interpreted this statutory requirement to mean that a broker should be liable for each and every action of the salesperson including rogue actions by the salesperson done without the knowledge of the broker. The Second District's decision simply went too far.

This Court previously recognized that the term scope of employment cannot be defined because it depends upon the facts of each case. But the trial court and the Second District wrongfully created such a bright line definition in the context of brokers' vicarious liability for the acts of salespersons affiliated with them. Neither the trial court nor the Second District found there was no dispute of fact on whether Paliath's actions were within the scope of her employment. The Second District based its conclusion solely on the evidence that Home Town was listed as the broker and that it received a commission from the closings. (Op. ¶ 48). These facts alone cannot demonstrate as a matter of law that Paliath was acting within the scope of her employment. And the Second District ignored clear evidence in the record demonstrating there was at least a dispute of fact on whether Paliath was acting within the scope of her employment.

³ "Tran." refers to the transcript of the trial in this matter.

Moreover, the record indicates that the jury did not want to find against Home Town. During deliberations, the jury came back with the question, “if we sign for Plaintiff Tori Auer with respect to Interrogatory Number 2, are we required to find for Plaintiff Torri Auer against Keller Williams?” (Trans. at 1007). The answer to this question should have been: “No, not unless you find that Paliath was acting within the scope of her authority.” Unfortunately, the trial court compounded the error by merely referring the jury back to the improper jury instructions, which failed to instruct the jury that they needed to determine that issue. (*Id.*).

The Second District should have found the trial court’s jury instruction stating that the jury must find Home Town liable if it found Paliath committed fraud was erroneous. Departing from century old precedent, this instruction removed the requirement that the jury find, based upon evidence submitted at trial, that Paliath was acting within the scope of her authority. As such, the Second District’s opinion should be reversed.

B. The Second District’s Opinion Places Brokers in the Tenuous Position of Having to Supervise the Day-to-Day Activities of Every Salesperson Affiliated With the Broker and Without Being Able to Insure Against Rogue Actions of Salespersons.

There is simply no way a broker can be aware of all of the actions taken by, or representations being made by, the salespersons who have affiliated with that broker. The majority of brokers in Ohio have independent contractor agreements with their salespersons requiring them to conduct their activities in accordance with the real estate licensing laws and to serve the interests of the broker, not the private interests of the salesperson. Moreover, most salespersons are required to comply with the policies and procedures adopted by the broker. But the broker’s ability to enforce these policies and procedures is limited because the broker is not present during most of the contact between the salesperson and third parties. A salesperson who acts for his or her own interest, and contrary to both the policies and procedures and the interests

of the broker, can easily hide these acts from the broker. The broker simply has limited means of policing the acts of salespersons that deviate from the policies and procedures of the broker, and which are therefore outside the purposes of serving the broker.

The above problem is magnified by the fact that the majority of brokers have multiple salespersons affiliated with them. The average member broker of OAR has 12 affiliated salespersons. And many have over 100. It would be impossible for such brokers to be aware of every representation or statement made by one of those salespersons to a prospective buyer or seller. But that is what the Second District's opinion implicitly requires.

And to make matters worse, claims of fraud are not covered by most E&O insurance policies. As one recent study of litigation involving real estate brokers in Ohio found, fraud was the most common basis of claims against brokers. Gary S. Moore, Ph.D, Real Estate Broker Liability Limitation at 25 (January, 2008), available at http://www.com.ohio.gov/real/docs/real_Real_Estate_Broker_Liability_Limitation_Study_final.pdf (accessed August 6, 2013). As that study found, “[a]lmost every property condition lawsuit within the last five years had an allegation of fraud or misrepresentation.” (*Id.*). Thus, not only will brokers be subject to liability for rogue actions of the salespersons affiliated with them, including fraud committed by the salesperson without the knowledge of the broker, they will not be able to insure against those actions. And if brokers have to continually defend such lawsuits, it will only increase the broker's costs of doing business which ultimately will be passed on to the customer. (*Id.* at 2). As one other study recognized:

In an increasingly litigious society, the threat of a legal action against real estate professionals is very real. The possibility of a lawsuit is not only an increasing source of anxiety, but as some industry people claim, it has also raised the cost of doing business and, in some cases, altered the way this business is conducted. There is a growing perception within the industry and among regulators that the

number of lawsuits filed against real estate brokers has been increasing, even if most of the evidence appears to be anecdotal.

Id. at 1, citing Leonard V. Zumpano & Ken H. Johnson, *Real Estate Broker Liability and Property Condition Disclosure*, 31 Real Estate L.J. 285 (2003).

C. Even If Unintentional, the Second District’s Decision Could Place Nearly Limitless Liability on Brokers for the Actions of Salespersons Affiliated With Them.

The Second District’s decision does not define what it meant by “in connection with that real estate transaction.” Nor does it place any limitations on its holding. As a result, brokers may now be held liable, **as a matter of law**, for an infinite number of actions by salespersons that have either been historically considered outside the scope of an agent’s employment in other settings, or would at least be a question for the jury to determine.

For example, Ohio law has long held that intentional assaults by employees are generally outside the scope of employment. *Little Miami R.R. Co. v. Wetmore*, 19 Ohio St. 110 (1869) (finding that physical assault by a railroad baggage checker against passenger was outside the scope of employment because it was not “calculated to facilitate or promote the business for which the servant was employed” and jury charge led jury to draw incorrect inference regarding liability of railroad for actions of baggage checker). Recently, in *Jodrey v. Ohio Dept. of Rehabilitation and Correction*, the Tenth District held that an officer’s conduct in intentionally dumping an inmate from his wheelchair where there was no threat of violence or physical harm, and was done only to vent his own anger, was conduct that was manifestly outside the scope of his employment. 10th Dist. No. 12AP-477, 2013-Ohio-289, at ¶ 20-21.

Other courts have similarly held that the doctrine of respondeat superior is inapplicable to assaults by employees where the evidence showed the employee acted for his or her own personal benefit or purposes. *See, e.g., Taylor v. Doctor’s Hospital (West)*, 21 Ohio App.3d 154,

157, 586 N.E.2d 1249 (10th Dist.1985) (hospital not liable for sexual assault by orderly against patient finding assault was outside the scope of the orderly's employment); *Finley v. Schuett*, 8 Ohio App.3d 38, 39, 455 N.E.2d 1324 (1st Dist.1982) (assault by employee of landlord against tenant based upon employee's own personal enragement and malice was outside the scope of employment); *Hester v. Church's Fried Chicken*, 27 Ohio App.3d 74, 75, 499 N.E.2d 923 (1st Dist.1986) (assault by supervisor against employee was not within the scope of employment); *Blazer v. BW-3*, 9th Dist. NO. 98CA007054, 1999 Ohio App. LEXIS 2268, at *10-11 (May 19, 1999) (bar not liable for assault by bouncer when evidence showed fight between bouncer and patron was result of prior dispute between families that occurred the previous day, and, thus, bouncer was acting for own purposes).

But under the Second District's opinion, a broker would now be liable as a matter of law for an assault by a salesperson against another salesperson occurring at a closing. Because the assault occurred during the closing, such action could easily be considered "in connection with that real estate transaction." According to the Second District, the jury wouldn't even be entitled to consider or weigh the fact that the assault was the result of prior animosity between the two salespersons in determining whether the act was within the scope of employment. So long as the broker received a commission, the broker would be liable for the salesperson's intentional tortious actions.

Similarly, assume that on the way to the closing at the broker's office an intoxicated salesperson collides with another driver causing the other driver injuries. Ohio law generally holds that "*as a matter of law*, a master is not liable for the negligence of his servant while the latter is driving to work * * * where such driving involves no special benefit to the master other than the making of the servant's services available to the master at the place where they are

needed.” *Boch v. New York Life Ins. Co.*, 175 Ohio St. 458, 196 N.E.2d 90, paragraph two of the syllabus (1964). But under the Second District’s opinion, a broker could be liable for such actions because the salesperson was on the way to a closing and the injury arguably occurred “in connection with that real estate transaction.” The jury would not get to consider the salesperson’s independent negligence in driving intoxicated.

While the above examples may be hyperbole, they serve to demonstrate the potentially limitless situations in which brokers can be wrongfully held liable as a matter of law under the Second District’s opinion for the rogue actions of salespersons which in no way serve the purposes of the broker. A broker would be held liable in circumstances where nearly no other master or principal would be held liable.

The unique circumstances of each master/servant relationship and the scope of the servant’s duties are what make it a factually intensive question. This is no different in the case of a broker/salesperson relationship. Taking this issue out of the hands of the jury by mandating that the jury find the broker liable if it found the salesperson liable eliminates the broker’s ability to demonstrate those unique factual circumstances. The Second District should have held that the trial court’s instruction removing this issue from the jury was improper. Its holding to the contrary should be reversed.

D. This Court Should Reverse the Second District’s Opinion and Hold As a Matter of Law that Paliath’s Rogue Actions Were Not Within the Scope of Her Employment under this Court’s Decision in *Groob*.

If the Second District was going to make any holding as a matter of law, it should have held that Home Town was not responsible for the “rogue” actions of Paliath. A person acts within the scope of his or her employment if “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least

in part, by a purpose to serve the master.” *Akron v. Holland Oil Co.*, 102 Ohio St.3d 1228, 2004-Ohio-2834, 809 N.E.2d 666 at ¶ 12-15, quoting Restatement of Law 2d, Agency, Section 228 (1957); *Webb*, 2012-Ohio-3291, at ¶ 5. “Where an act has no relation to the conduct of the master’s business, it may not be argued that the servant was acting upon the scope of his authority.” *Finley*, 8 Ohio App.3d at 39, 455 N.E.2d 1324. Additionally, when the act is malicious or willful, it is generally not considered to be within the scope of the employment. *Id.*

Thus, under Ohio law, a master is only liable for an intentional tort committed by his servant if (1) the tort was committed within the scope of employment; and (2) the behavior giving rise to the tort was calculated to promote the employer’s business. *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991). “The principal or master, ordinarily, is not liable for the willful and malicious torts of the subordinate, if the act is done for no other purpose than to gratify the subordinate’s ill will against the person injured, for such assault is a departure from the employment.” *Finley* at 37, quoting 3 Ohio Jurisprudence 3d (1978), Agency, Section 155. “A servant who departs from his employment to engage in affairs of his own relieves the master from liabilities for his acts.” *Posin*, 45 Ohio St.2d at 278, 344 N.E.2d 334.

In *Groob v. Keybank*, this Court upheld a jury instruction stating: “An employer is not liable for damages to a third party caused by the act or acts of an employee performed intentionally and solely for the employee’s own purposes which in no way facilitate or promote the employer’s business.” 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, at ¶ 38. This Court found that the instruction was a “correct and complete statement of the law as it applies to this case.” *Id.* at ¶ 42. Following the principle that the tort of the employee must be committed within the scope of employment, this Court held that “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.” *Id.* at ¶ 42, quoting *Vrabel v. Acri*, 156 Ohio St. 467, 474 (1952).

In *Groob*, a prospective borrower applied for a loan with the bank to purchase a company. The bank employee who obtained the borrower’s information, as well as information about the company, turned down the application, but used the information to purchase the company through her husband and another individual. *Id.* at ¶ 3-9. The First District Court of Appeals held the jury instruction on vicarious liability was insufficient because it failed to incorporate the exception for “when the agent’s misconduct is not a result of unrelated intentional conduct—that is, when the agent’s position enables her to commit the tort.” *Id.* at ¶ 44.

The First District relied on both Section 261 and 219(2) of the Restatement of Law 2d, Agency (1958). In particular, it relied upon Section 219(2)(d) in finding that the bank could be liable under a theory of apparent authority if its employee was aided in accomplishing the tort by the existence of the agency relationship. *Groob* ¶ 45. But this Court reversed, holding that it had not adopted Section 219(2)(d) and declined to do so. More specifically, it stated: “We have not previously determined that an employer can be found liable for the acts of its employee committed outside the scope of employment.” *Id.* at ¶ 54. Therefore, this Court stated that a jury instruction based upon Section 219(2)(d) is inappropriate. *Id.* It held that “an employer is not liable under a theory of respondeat superior unless its employee is acting within the scope of her employment when committing a tort – merely being aided by her employment status is not enough.” *Id.* at ¶ 58.

The Second District’s opinion in this case is inconsistent with this Court’s decision in *Groob*. Under *Groob*, real estate brokers should not be held liable for the rogue, intentional, and self-serving torts of real estate salespersons. When a rogue salesperson commits fraud purely for

his or her own interest or personal gain, that salesperson is not acting in the interest of serving the broker. And such actions are not of the type the salesperson was engaged to perform. If anything, intentional fraud committed by the salesperson in connection with a real estate transaction would only harm the broker's reputation, not serve the interests of the broker. The Second District's holding that a broker is liable as a matter of law for the actions of a salesperson merely because the broker received a commission on the transaction is akin to holding the broker liable because the salesperson was aided in committing the tort because of his or her affiliation with the broker – an argument already rejected by this Court in *Groob*.

In this case, Paliath's actions were in pursuit of her own interests, not that of Home Town. The jury found that Paliath committed fraud in inducing Appellee to purchase various properties, including by fraudulently representing that she had companies that could rehabilitate said properties, and that she would manage said properties thereafter. (Op. ¶ 6-10, 18). Paliath's actions involved forming a company with Appellee to purchase certain properties and separate agreements between Appellee and her independent management and rehabilitation companies. (*Id.* at ¶ 6-10). But Appellee presented no evidence that Home Town had any knowledge about Paliath's conduct until after it surrendered Paliath's license. And none of Paliath's fraudulent statements and actions was designed to serve or promote the interests of Home Town.

Notably, the Ohio General Assembly has already considered whether a real estate broker can be disciplined for statutory violations of a real estate salesperson. Specifically, R.C. 4735.18(B) provides:

Whenever the commission * * * imposes disciplinary sanctions for any violation of [R.C. 4375.18], the commission also may impose such sanctions upon the broker with whom the salesperson is affiliated **if the commission finds that the broker had knowledge of the salesperson's actions that violated the section.**

(Emphasis added). The General Assembly has determined that a broker should not be disciplined for the actions of a real estate salesperson with whom he or she is affiliated unless the broker has knowledge of the salesperson's actions. In fact, the Ohio Department of Commerce, Division of Real Estate and Professional Licensing, did not take any action against Home Town though Paliath surrendered her license after Appellee filed a complaint against her with the Division of Real Estate.

In cases where the salesperson is committing rogue acts, without the broker's knowledge and that are not in the interests of the broker, there is no dispute of fact that the salesperson is not acting within the scope of his or her employment. Thus, consistent with this Court's decision in *Groob*, the Second District should have held that Home Town was not liable for the rogue actions of a Paliath conducted without its knowledge.

CONCLUSION

For the reasons stated above, Amicus Curiae the Ohio Association of Realtors respectfully requests this Court reverse the decision of the Second District Court of Appeals.

Respectfully submitted,



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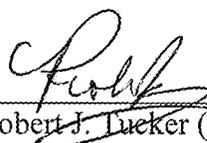
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CERTIFICATE OF SERVICE

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

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Robert J. Tucker (0082205)