

IN THE SUPREME COURT OF OHIO

TORRI AUER : Case No.: 2013-0459  
Plaintiff-Appellee, : On Appeal from the Montgomery County  
vs. : Court of Appeals, Second Appellate  
District  
JAMIE PALIATH, et al : Court of Appeals  
Defendants-Appellants. : Case No.: CA25158

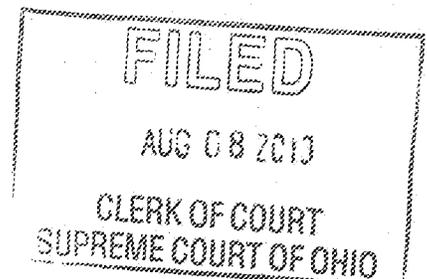
MERIT BRIEF OF APPELLANT  
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**I. STATEMENT OF FACTS**

**A. Introduction**

The case *sub judice* is before this Honorable Court by reason of the fact that a rogue real estate agent, Jamie Paliath, deceived and exploited the real estate firm with which she was formerly associated, Appellant Keller Williams Home Town Realty (hereinafter "Home Town"). Unbeknownst to Home Town, while Ms. Paliath was associated with it she covertly established her own real estate firm, an entity called "The Investment Genie Realty Group" or "TIG Realty" that was operating illegally without a broker. Unbeknownst to Home Town, while Ms. Paliath was associated with it she covertly operated her own property management firm, an entity called "A-1 Property Management Company" for the purpose of rehabbing properties she convinced others to buy. In September of 2007, Appellee Torri Auer (hereinafter "Ms. Auer" or "Appellee") became ensnared by Ms. Paliath, having been convinced to acquire certain commercial investment properties that Ms. Paliath either owned, had agreed to manage, had agreed to rehabilitate through another entity she controlled named "Miami Valley Home Improvement", or all of the above. Unbeknownst to Home Town, Ms. Paliath even prevailed upon Ms. Auer to form a corporation together ("Gem City Investment Group") to acquire such properties, and in another instance an entity created by Ms. Paliath named "Miami Valley Custom Homes" was the seller of a property acquired by Ms. Auer although Ms. Paliath's role in that company was not disclosed. Ms. Paliath's scheme was conducted in direct contravention of the terms of Ms. Paliath's independent contractor agreement with Home Town, and for the obvious purpose of benefitting only herself. At no time did Appellee even allege, much less try

to prove, that Home Town had any knowledge of Ms. Paliath's illicit activities or acquiesced in them after they were committed. Notwithstanding all of the foregoing, the courts below essentially determined that Home Town was barred from arguing that Ms. Paliath was acting outside the scope of her authority with Home Town when she engaged in her intentionally tortious conduct.

Home Town's appeal to this Court arises from a judgment rendered against it in Montgomery County Common Pleas Court and in favor of Ms. Auer in the original amount of One Hundred Thirty Five Thousand Dollars (\$135,000.00). (Appendix "App." at p. 35). As is explored in greater detail below, on March 26, 2012, an improperly-charged jury returned a verdict against Home Town after a several day trial. The jury did so reluctantly, as plainly evidenced by the question it posed to the trial court whereby it sought a way *not* to visit the sins of Ms. Paliath upon Home Town (Transcript "Tr." at 1007). Having been improperly instructed, however, that *if* it found Ms. Paliath committed fraud then Home Town "...is vicariously liable and you *must* find in favor of Plaintiff Torri Auer..." (Tr. at 989-990) and against Home Town, the resultant verdict could hardly have been otherwise. The jury also rendered a verdict against Ms. Paliath for Two Hundred Fifty Five Thousand, Two Hundred Dollars (\$255,200.00), and against Ms. Paliath's ex-husband Hari Paliath for Four Hundred Twenty Seven Thousand Dollars (\$427,000.00). It is not disputed that the judgment against Home Town was entered through the application of vicarious liability principles. Stated differently, Home Town was adjudged liable to Ms. Auer *solely* because of its relationship to Ms. Paliath and not because of any independent wrong it was accused of committing.

On appeal, the Montgomery County Court of Appeals affirmed the imposition of vicarious liability against Home Town by means of an Opinion dated February 8, 2013.<sup>1</sup> *Auer v. Paliath*, 2013-Ohio-391, 986 N.E.2d 1052 (2<sup>nd</sup> Dist.), appeal accepted, 2013-Ohio-39, 986 N.E.2d 1052. (App. at p. 4). The Court of Appeals ruled that *as a matter of law* a real estate broker such as Home Town cannot argue that the acts of its salespersons were outside the scope of their authority where those acts, no matter how self-serving and egregious, and whether or not known of by the broker, produce a commission shared in by the broker. (Opinion “Op.”, ¶ 46). Reasoning from this flawed premise, the Court of Appeals brushed aside Home Town’s numerous objections to the trial court’s instruction to the jury on the issue of vicarious liability and deemed any flaws in that charge to necessarily be “harmless”. (Op., ¶ 52). By this appeal Home Town seeks the reversal of the judgment entered against it and the rejection by this Court of the erroneous reasoning and analysis employed by the Court of Appeals to affirm that judgment.

## **B. Factual Background**

The claims in the Complaint filed below arise from a series of commercial real estate transactions involving investment properties located in Dayton. These transactions all closed between October 5, 2007 and December 19, 2007. For the Court’s convenience, these properties will generally be referred to herein by their street name (e.g., “the Belton Street property” or “Belton”) except that three (3) of the properties are on Richmond Avenue; these will be differentiated by their street number,

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<sup>1</sup> Ms. Paliath, through counsel, filed a separate appeal that was subsequently dismissed for want of prosecution.

with the first being 1111 Richmond, the second being 1115 Richmond, and third being 1119 Richmond.<sup>2</sup> Home Town does not dispute the fact that it received commissions from each of these sales which it shared with Ms. Paliath as per the terms of her independent contractor agreement.

The Plaintiffs named in the Complaint are Appellees Torri Auer, her ex-husband Thomas Auer, and a California-based entity they created called "Rapid Realty Solutions, Inc.". Ms. Auer is the lone Appellee herein because the judgment against Home Town was rendered only in her favor. The original Plaintiffs sued Jamie Paliath, who they alleged did business in the name of various entities including The Investment Genie Realty Group aka TIG Realty, The Investment Genie Realty Group, LLC, and Miami Valley Home Improvement, LLC (Complaint, ¶ 3). The Plaintiffs also alleged Ms. Paliath operated a property management company called A-1 Property Management Company. (*Id.*, ¶ 6).<sup>3</sup> Hari Paliath, Ms. Paliath's ex-husband, was also sued and alleged to have also been an owner of Miami Valley Home Improvement. (Complaint, ¶¶ 14, 15, 20 and 22).

The Complaint also named Home Town as a defendant. As to Home Town, the Complaint alleges that Ms. Paliath was an agent of Home Town when she first met Torri Auer (*Id.*, ¶ 2), and that Home Town failed to properly supervise Ms. Paliath while she

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<sup>2</sup> 1111 and 1115 Richmond each consist of a four (4) unit apartment building. The transactions closed on the same day and are often referred to in the record as 1111-1115 Richmond, including in the Jury Interrogatories. See, e.g., Jury Interrogatory Nos. 1 and 2.

<sup>3</sup> These entities themselves were not sued even though they were the parties with which Ms. Auer contracted to manage or rehabilitate the properties. Additionally, the Paliath-controlled entity named Miami Valley Custom Homes was the seller of 1119 Richmond. That entity also was not sued.

was an agent there. (*Id.*, ¶ 24). As noted previously, however, at trial the liability of Home Town was made entirely dependent upon its relationship with Ms. Paliath through the application of the doctrine of vicarious liability.

Ms. Paliath came to the attention of Ms. Auer in September of 2007 through an internet website called "Bid4Assets". (Tr. at 199; 349). Ms. Auer, a resident of California, was interested in acquiring investment properties. (*Id.* at 198). Ms. Auer became interested in a duplex listed by Ms. Paliath and arranged a visit to Dayton to see that property and to meet Ms. Paliath. (*Id.* at 199-200; 689). Ms. Auer met Ms. Paliath and her husband during this September of 2007 visit. (*Id.* at 200). Their meetings were held at a location Ms. Paliath used to operate all the businesses Home Town knew nothing about. Ms. Auer and Ms. Paliath agree that it was during this initial visit that they drove by or entered various of the properties at issue in this case. (*Id.* at 202; 693-695). They also agree they discussed Ms. Auer's investment goals. (*Id.* at 201-202; 690). During this visit, Ms. Paliath pitched the idea of she and Ms. Auer buying and rehabbing properties together. (*Id.* at 352). Ms. Paliath disclosed to Ms. Auer her interest in entities known as Miami Valley Home Improvement and in A-1 Property Management and advised Ms. Auer that if they started a company together, and if Ms. Auer fund the acquisition of properties, Ms. Paliath would not charge a commission when the properties were resold. (*Id.* at 352). Gem City Investment Group was thus jointly created by Ms. Auer and Ms. Paliath effective September 10, 2007. (*Id.*; see also Defendant's Exhibit II). Significantly, this was prior to the purchase contracts of any of the properties thereafter acquired. (*Id.* at 355).

Jamie Paliath was a real estate salesperson associated with Home Town from August 17, 2006 until December 7, 2007. On this former date, Ms. Paliath executed an independent contractor agreement with Home Town (Home Town Exhibit I) pursuant to which she obligated herself to refrain from doing anything that would damage Home Town's goodwill and reputation, or to cause the public to lose confidence in Home Town. She also obligated herself to conduct herself in accordance with all applicable Codes of Ethics as well as all local, state, and federal laws governing real estate brokerage.<sup>4</sup> On the latter date, her license was returned to the State of Ohio by Home Town, enabling her to associate her with another broker. (Tr. at 55). There is no question, however, but that during the time Ms. Paliath was a Home Town agent she deceived Home Town by illegally and improperly engaging in other enterprises that directly competed with Home Town and she failed to disclose to Home Town her involvement in other endeavors that actually or potentially were inconsistent with her duties as a Home Town salesperson. The evidence is undisputed that while associated with Home Town, Ms. Paliath established and was operating "The Investment Genie Realty Group" (aka TIG Realty)(*Id.* at 83-84) and was marketing properties to Ms. Auer using her "Investment Genie" e-mail address almost a month *before* departing from Home Town (*Id.* at 854-955; 359 and Plaintiff's Exhibits 5 and 7). Similarly, and again without the knowledge of Home Town, Ms. Paliath operated "A-1 Property Management" (*Id.* at 160) which contracted in October of 2007 to manage certain of the properties Ms. Auer came to acquire. ((*Id.* at 267-269 and Plaintiff's Exhibit 24)

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<sup>4</sup> This would perforce include not violating the prohibitions of Ohio R.C. 4735.18, including §4735.18(A)(1) (prohibiting making knowing misrepresentations) and (A)(6) (proscribing dishonest or illegal dealing and misconduct).

(Harvard); *Id.* at 277 and Plaintiff's Exhibit 23 (Belton)). Separate and apart from being flatly inconsistent with her association with Home Town, Ms. Paliath's operation of these entities directly contravened the mandates of R.C. Chapter 4735 which require a broker's involvement in the operation of a real estate or property management firm. Unbeknownst to Home Town, Ms. Paliath was the owner of Miami Valley Custom Homes (*Id.* at 82), the entity that sold one of the subject properties in December of 2007. R.C. 4735.18(A)(5) prohibits a salesperson from being an undisclosed principal in a real estate transaction, but Ms. Auer claims Ms. Paliath's role with that entity was not disclosed to her. Tim Stammen, an owner and broker at Home Town confirmed that Home Town lacked any knowledge of Ms. Paliath's other corporate entities until after Ms. Paliath departed from Home Town. (*Id.* at 49-50; 55-56).

At trial, that Ms. Paliath's nefarious activities could not possibly be considered within the scope of her agency with Home Town was confirmed by Ms. Auer's own expert, Judith Lancaster (*Id.* at 513-516). Ironically, Ms. Lancaster was a broker at Home Town who Ms. Paliath convinced to leave and serve as her broker so as to enable "The Investment Genie" and "A-1 Property Management" to operate lawfully. (*Id.* at 512). Ms. Lancaster, based on her own experience at Home Town, confirmed that Home Town was "very strict" about ensuring that all purchase contracts, disclosure forms, and other documents related to a property transaction were properly completed. (*Id.* at 507). She acknowledged, however, that when a duplicitous salesperson like Ms. Paliath affirmatively conceals or does not disclose to a broker her nefarious activities or her affiliations with entities involved in a transaction no amount of supervision could be expected to detect them. (*Id.* at 506-509). Ms. Lancaster also confirmed Home Town's

lack of knowledge as to the activities of Ms. Paliath that were outside the scope of her agency. (*Id.* at 513).

The evidence is also undisputed that Ms. Paliath was Ms. Auer's *only* contact or connection to Home Town. Ms. Auer had no contact with Mr. Stammen or any other broker at Home Town. (Tr. at 355). Ms. Auer never visited Home Town's office; on her September of 2007 visit to Dayton, Ms. Auer met Ms. Paliath at Ms. Paliath's office located at 433 Troy Street in Dayton, where, as Ms. Paliath told Ms. Auer, Ms. Paliath "...had her own office outside of Keller Williams...". (Tr. at 360). That address, not in any way coincidentally, was also the address for Miami Valley Home Improvement, Miami Valley Custom Homes, TIG Realty (The Investment Genie) and A-1 Property Management.

As to the transactions themselves, the first two transactions involved properties located at 117 Belton Street and 929-931 Harvard Boulevard in Dayton, which closed the same day. As to these properties Ms. Auer alleged Ms. Paliath "induced her" to purchase them (Complaint, ¶ 5), and "...that as a further inducement...Ms. Paliath indicated that she would manage these properties for Plaintiff, Torri Auer, through Defendant, Jamie Paliath's property management company using the name of A-1 Property Management. (*Id.*, ¶ 6). As noted above, during Ms. Auer's initial trip to Dayton she viewed the property located at 117 Belton Street. (*Id.* at 693; 203). Belton was a single family residence which was listed for sale on Bid4Assets website for \$25,000. (*Id.* at 691-692). Ms. Auer agreed to purchase the Belton Street property for \$20,000. She did so, according to Ms. Auer, because Ms. Paliath represented that the Belton Street property was "rent ready". (Tr. at 203). The Belton Street transaction

closed on October 5, 2007. (*Id.* at 283 and Plaintiff's Exhibit 150). The purchase price was \$20,000. (*Id.*) Home Town received a commission of \$180 from the sale. The parties agree the property was rented at that time, and remained rented thereafter. (*Id.* at 202; 693). Within two weeks of the closing, Ms. Auer entered into a Property Management Agreement with "A-1 Property Management". (Tr. at 277 and Plaintiff's Exhibit 23). Well before trial the Belton Street property burned to the ground. (*Id.* at 235).

Via a contract dated September 25, 2007, Ms. Auer agreed to purchase the property located at 929-931 Harvard Boulevard. (Plaintiff's Exhibit 149). The Harvard Blvd. property was a duplex. (Tr. at 692). Ms. Auer toured one side of the Harvard Blvd. property with Ms. Paliath during Ms. Auer's initial visit to Dayton. (Tr. at 202; 693). That side "looked okay". (*Id.* at 202). The other side was rented at that time. (*Id.*) Ms. Paliath stated the property was "rent ready", as evidenced by the fact that a tenant was already in place. (*Id.* at 203). According to Ms. Paliath, the other side was rented within a week of when Ms. Auer acquired it. (*Id.* at 707). The asking price for the Harvard Blvd. property was \$45,000 (*id.* at 300); Ms. Auer purchased it for \$40,000. The transaction closed on October 5, 2007, the same date the Belton Street transaction closed. (*Id.* at 278-279 and Plaintiff's Exhibit 149). On October 17, 2007, Ms. Auer and "A-1 Property Management" entered into a property management agreement whereby "A-1" would manage the Harvard Blvd. property for one (1) year in exchange for 10% of the gross amount of rents received. (Plaintiff's Exhibit 24; Tr. at 266). Home Town received a commission of \$665 from the sale.

The Complaint then turns to a property located at 2259 Emerson Avenue in Dayton. As to Emerson, the Complaint alleges that Ms. Auer and Ms. Paliath formed a company called "Gem City Investment Group, Inc." to purchase the property. (*Id.*, ¶s 8, 9 and 11). Notably, however, "Gem City Investment Group, Inc." was never made a party to this case. Regardless, by September 14, 2007, "Gem City Investment Group" was incorporated in Ohio and acquired the Emerson Avenue property. (Tr. at 354 and Home Town Exhibit II). Emerson was a 12 unit apartment building. (Tr. at 93). Ms. Auer and Ms. Paliath drove past and walked through the Emerson property prior to its purchase. (*Id.* at 204, 316 and 708). According to Ms. Paliath, Emerson was as "bad on the inside as any building I've ever been in" and was "completely gutted" (*Id.* at 708-709); a somewhat more charitable Ms. Auer acknowledged Emerson when she first saw it was "not in good repair" and "wasn't rentable". (*Id.* at 316). Gem City Investment Group purchased Emerson for \$73,000. (*Id.* at 210; 218). Thomas Auer, Ms. Auer's ex-husband, funded the purchase. (*Id.* at 89; 309). On October 17, 2007, Gem City Investment Group and Miami Valley Home Improvement, LLC executed a home improvement agreement whereby the latter entity was to rehab the Emerson property for a total price of \$103,000. (*Id.* at 307 and Defendant's Exhibit I). Mr. Auer was again the source of these funds; Ms. Auer and Ms. Paliath guaranteed his repayment. (*Id.* at 89-90; 309). The great bulk of the dispute relative to Emerson involves the alleged failure by Ms. Paliath or her entities to rehab the property.

Finally, the Complaint turns to 1111-1115 Richmond Avenue and 1119 Richmond Avenue. As to 1111-1115 Richmond the Complaint at paragraph 20 alleges in relevant part:

20. On or about December 14, 2007 the Plaintiff, Torri Auer, herein purchased through the real estate brokerage of Defendant, Keller Williams dba Hometown Realty, the properties at 1111-1115 Richmond Avenue for a price of \$40,000.00 per property with an additional sum of \$47,000.00 to be paid to Miami Valley Home Improvement Corporation, a Defendant herein, for rehabilitation of both properties.<sup>5</sup>

In December of 2007, following Ms. Paliath's departure from Home Town, "Rapid Realty Solutions" did in fact acquire two (2) buildings each containing four units located at 1111 and 1115 Richmond Avenue in Dayton. (Tr. at 100; 256; 547). Ms. Auer and Ms. Paliath had driven past and looked at these properties during Ms. Auer's initial visit to Dayton. (*Id.* at 202; 727-728). 1111 Richmond was listed for \$45,000 as of November 7, 2007. (*Id.* at 326). "Rapid Realty Solutions" ultimately acquired each of the properties for \$40,000 apiece. (*Id.* at 100). Even prior to formally acquiring the properties, Ms. Auer contracted with Miami Valley Home Improvement to rehab these properties at a cost per property of \$23,500. (*Id.* at 100-101; 232 and Plaintiff's Exhibit 11; 332 and Defendant's Exhibit T). Ms. Auer's main complaint as to these properties was that they were not rehabbed in accordance with the contract she signed with Miami Valley Home Improvement. (*Id.* at 332-333).

As to 1119 Richmond, the Complaint erroneously alleges that on or about December 19, 2007, Ms. Auer purchased said property "...and said property has not been rehabilitated nor has it been rented by Defendant, Jamie Paliath". (Complaint, ¶

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<sup>5</sup> Again, although this paragraph of the Complaint refers to Miami Valley Home Improvement as "a Defendant herein", a review of the Complaint demonstrates neither it nor Ms. Paliath's other entities were actually named as defendants as, among other things, Ohio Civ.R. 10(A) requires the names and addresses of the parties to be listed on the complaint.

22). Rapid Realty was the buyer, not Ms. Auer. Regardless, this four (4) unit apartment building was purchased by means of a contract dated November 16, 2007. (Tr. at 66 and Plaintiff's Exhibit 5). The purchase price was \$60,000. (*Id.* at 214; 243). The transaction closed on December 19, 2007, well after Ms. Paliath had departed from Home Town. (*Id.* at 261 and Plaintiff's Exhibit 146).

In sum, therefore, the Complaint depicted and decried the entirety of the multi-faceted scheme concocted by Ms. Paliath that she began to implement in her first meeting with Ms. Auer. The Plaintiffs condemned not only the original acquisition of the subject properties, claiming them to have been procured by Ms. Paliath's false representations, but also the failure of Ms. Paliath and the entities she controlled to both manage and rehabilitate them thereafter. The trial court appropriately determined that under no circumstances could Home Town be liable for any alleged failure to manage the properties after they were sold or to rehabilitate them (Tr. at 850-853) and at no point has Ms. Auer challenged this determination. As to Ms. Auer's claim of false representations having been made to her to induce the purchases, the jury was asked to determine damages on a property-by-property basis. Then, as to the potential liability of Home Town, the trial court instructed the jury that it must find against Home Town if it found Ms. Paliath committed fraud.

As noted previously, the jury's question to the trial judge during the deliberation process plainly demonstrated their discomfort with ascribing liability to Home Town. But, given the admonition that the jury "must" find against Home Town if it found Ms. Paliath "committed fraud", the resultant verdict against Home Town was all but inevitable. As to Home Town, the jury awarded Ms. Auer \$15,000 in damages for having been induced

to purchase the Belton Street property, \$68,800 in damages for having been induced to purchase 1111-1115 Richmond, and another \$51,400 in damages as to 1119 Richmond. No damages were awarded in relation to the Emerson and Harvard properties.

The trial court's erroneous instruction on the issue of vicarious liability was one of two grounds upon which Home Town appealed to the Montgomery County Court of Appeals. The Montgomery County Court of Appeals affirmed the judgment against Home Town, although it reduced the amount of the judgment by \$15,000 by determining Ms. Auer's proof of damages in relation to the purchase of the Belton Street property was legally insufficient such that a directed verdict should have been entered as to that property. (Op., ¶ 66). In the course of affirming, however, the Court of Appeals ruled that *as a matter of law* a real estate broker such as Home Town cannot argue that the intentionally tortious acts of its salespersons were outside the scope of their authority where those acts produce a commission shared in by the broker. (Op., ¶ 46).

Reasoning from this flawed premise, the Court of Appeals brushed aside Home Town's numerous objections to the trial court's instruction to the jury on the issue of vicarious liability and deemed any flaws in that charge to necessarily be "harmless". (Op., ¶ 52).

On March 22, 2013, Home town filed its Notice of Appeal to this Honorable Court (App. at p. 1), as well as its Memorandum in Support of Jurisdiction. On June 5, 2013, this Court granted jurisdiction to hear the case and allow Home Town's appeal.

### III. LEGAL ARGUMENT

**Proposition of Law:** The respondeat superior liability of an Ohio real estate broker for the intentionally 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. Introduction

The Opinion of the Court of Appeals mandating broker liability to third parties no matter how self-serving and duplicitous a salesperson's actions may be toward the broker utterly lacks either precedential or statutory support. To the contrary, applicable case authorities from this Court reveal the Court of Appeals improperly and unwisely carved out an industry-wide exception to this Court's prior rulings. Moreover, this industry-wide exception is nowhere justified or supported by the statutory scheme enacted by the General Assembly to govern the conduct of profession in question. While en route to its ill-advised ruling the Court below observed that authoritative interpretation from this Court as to the statutes in question was absent (Op., ¶ 24). This action, therefore, presents this Court the opportunity to fill that void in the course of addressing the erroneous conclusions ultimately reached by the Court of Appeals occasioned by it.

The importance of this issue to Home Town and to the real estate industry in Ohio is impossible to understate. That Ms. Paliath was engaging and had engaged in various pursuits outside of her role as a Home Town agent as of her initial dealings with Ms. Auer is undisputed. As of that time Ms. Paliath had already formed and was operating Miami Valley Home Improvement and Miami Valley Custom Homes, the latter of which owns the 433 Troy Street office where she engaged in her dealings with Ms.

Auer. (Tr. at 803). By September 14, 2007, well before any contracts for the subject properties were entered into (*Id.* at 355), Ms. Paliath and Ms. Auer formed “Gem City Investment Group”, the eventual purchaser of the Emerson property. And, at some indeterminate time while still at Home Town, agent Ms. Paliath formed The Investment Genie (TIG) Realty and A-1 Property Management, the broker-less entities operating contrary to the mandates of R.C. Chapter 4735. By October 17, 2007 “A-1” is contracting to manage the Harvard and Belton properties (Defendant’s Exhibits D and H), and collecting rents, (Tr. at 514) and by at least November 8, 2007 Ms. Paliath is communicating with Ms. Auer using her “Investment Genie” e-mail account. (Tr. at 359; 854). All of these illicit activities were taking place well prior to Ms. Paliath’s departure from Home Town in early December of 2007. Again, Ms. Auer’s *own expert* testified these activities were outside the scope of her agency with Home Town. At the risk of making a gross understatement, Ms. Paliath’s loyalty to Home Town during this timeframe and whether she was acting within the scope of her agency with Home Town are seriously open to question. Notwithstanding all of the foregoing, the jury below was instructed that:

“[i]f you find that Defendant Jamie Paliath committed fraud with respect to the sale of 1117 Belton Street, 929 and 931 Harvard Boulevard, 2259 Emerson Avenue, 1111 and 1115 Richmond Avenue, and 1119 Emerson (sic) Avenue, to Plaintiff Torri Auer, then Defendant Keller Williams Home Town Realty of Vandalia is vicariously liable *and you must find in favor of Plaintiff Torri Auer and against Defendant Keller Williams Home Town Realty of Vandalia in the amount of Plaintiff Torri Auer’s damages.*” (*Id.* at 989-990; emphasis supplied).

In its February 8, 2013 Opinion, the Court of Appeals erroneously determined any flaws in the trial court’s vicarious liability instruction were “harmless”. (Op., ¶ 52)

Accepting a view espoused by Appellee, the Court of Appeals 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 conjunction with that real estate transaction are within the scope of the salesperson's employment, *as a matter of law*". Op., ¶¶ 21-23. (emphasis supplied). Stated differently, it was of no moment to the Court of Appeals that the challenged jury instruction was flawed because Home Town, as a matter of law, was vicariously liable for Ms. Paliath's fraudulent conduct and Home Town was not permitted to argue that her actions were outside the scope of her agency even though Ms. Auer's *own evidence* supported such a contention. No limiting principles to the appellate court's analysis exist, meaning that the court's ruling truly promulgated a rule of law intended to have industry wide application. It is not uncommon, for example, for a broker to have numerous salespeople associated with them, the liability for whom the broker now stands as a virtual insurer. The vast majority of licensed salespeople in Ohio are, like Ms. Paliath, independent contractors as opposed to employees, meaning that the broker has only a limited ability to control the manner and means of the salesperson's work. Given the dramatically increased potential for civil liability occasioned by the Court of Appeals' ruling no prudent broker has incentive to expand and take on additional salespeople because doing so carries with it additional and unacceptable risk; to the contrary brokers are likely to shed salespeople because doing so, no matter how distasteful it may be, lowers the potential for liability to be imposed. Moreover, it is no answer to state this unpalatable situation can be addressed by tightening or strengthening the terms and conditions by which the

services of the salesperson are engaged; this case itself demonstrates that a salesperson willing to engage in fraudulent conduct will do so remorselessly without regard to whatever their contract with the broker may deem to be unacceptable conduct. And lastly, it is no answer to suggest that a broker can adequately protect itself by simply insuring or increasing the amount of insurance it maintains; perhaps perversely, the more egregious the misconduct committed by the salesperson the *less likely* the consequences of the misconduct can be insured against. Neither the interest of the broker, the salesperson, or the public at large is served by these results. This unprecedented, unfair, and ill-advised ruling must be reversed by this Honorable Court.

**B. The Court of Appeals' Opinion is Inconsistent With Applicable Statutes and Precedent From This Court**

By statute, a "real estate salesperson" must be associated with a "real estate broker". R.C. 4735.01(C). A "real estate broker" is defined as a person or entity that engages in certain specified activities for others, such as negotiating the sale or purchase of real estate. R.C. 4735.01(A). By associating with a real estate broker, the real estate salesperson is permitted to engage in those activities. These statutes do not, however, mandate that the "association" between a broker and salesperson be one of employer/employee. In fact, the Montgomery County Court of Appeals ruled in *Burton Minnick Realty, Inc. v. Leffel*, 2nd Dist. No. 2680, 1990 WL 140527 (Sept. 28, 1990) that a principal/agent relationship created through an independent contractor agreement fully complied with these statutes, a distinction of import herein because almost by definition the principal in an independent contractor arrangement has significantly less control over the manner and means by which a task may be

accomplished than does an employer. R.C. Chapter 4735 does not, however, specify or delimit the scope of a salesperson's agency or employment, nor does it mandate automatic vicarious liability for salesperson's misdeeds. In stark contrast to the draconian rule of automatic civil liability mandated by the Court of Appeals' ruling, R.C. 4735.18(B) specifies that disciplinary sanctions against a broker may only be imposed for the actions of a salesperson when the broker had knowledge of the salesperson's action that constituted sanctionable conduct.

Additionally, the Court of Appeals somehow considered it outcome-determinative for civil liability purposes that a commission can only be collected "in the name of a broker" pursuant to R.C. 4735.21. (Op., ¶ 46) But this fact, standing alone, means nothing more than the *process* by which commissions are collected is being properly observed; it in no way signifies a broker's tacit acquiescence in the unknown or unknowable fact that the salesperson's actions in bringing about a transaction may have been the very antithesis of the broker's policies, violated the salesperson's agreement with the broker, or violated the applicable statutes themselves. Either overlooked or ignored by the Court of Appeals was a separate mandate of R.C. 4735.21. To collect a commission, a salesperson cannot act only "in the name of a broker"; the salesperson must affirmatively act "with the consent of the licensed real estate broker", and a broker obviously cannot consent to unethical and fraudulent practices it knows nothing about.

Absent explicit statutory guidance specific to the real estate profession a resort to the common law is appropriate. There, however, explicit holdings by this Court not only fail to support the Court of Appeals ruling but rather show the sheer inappropriateness of it. This Court in *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d

1170 explicitly *rejected* the notion that respondeat superior liability for tortious acts is appropriate when an employee acts outside the scope of their employment. Reviewing its prior pronouncements, this Court stated:

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 is employed \*\*\*.' *Id.* at ¶ 42, quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991).

Thus, this Court in *Groob* held that acting within the scope of employment is an absolute prerequisite to respondeat superior liability, and that "merely being aided by [one's] employment status is not enough". *Id.* at ¶ 58.

Furthermore, this Court has stated repeatedly that the scope of one's employment invariably involves questions of fact for a jury's determination because 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); *see also City of Akron v. Holland Oil Co.*, 102 Ohio St.3d 1228, 2004-Ohio-2834, ¶ 10, 809 N.E.2d 666. (Pfeifer, J., dissenting) ("This court has never defined 'scope of employment' because it is a question of fact and each case is *sui generis*"). In prior cases the court below had appropriately recognized the fact-intensive nature of this inquiry and stated that the issue of a person's scope of employment was ordinarily a question of fact. *E.g., Webb v. Higgs*, 2nd Dist. No. 2011-CA-22, 2012-Ohio-3291. Indeed, years before the court below had acknowledged *in this very context* that one's "scope of employment" was a factual question and that the respondeat superior liability of a real estate broker was dependent upon the action being within the scope of the salesperson's authority. *Commercial Business Systems v.*

*Aztec Partnership*, 2nd Dist. No. 16363, 1997 WL 674659 (Oct. 31, 1997). Here, however, the Court of Appeals apparently felt comfortable in ignoring this Court's precedent as well as its own and establishing a definitive "scope of employment" not only for Home Town but for *an entire profession*, and doing so on a record where in Appellee's own evidence attests to the manifest and self-serving departure by Ms. Paliath from the scope of her professional duties and her contractual obligations to Home Town. Indeed, a less appetizing set of facts by which to judicially create an industry standard mandating broker liability is difficult to envision. And rather than the following this Court's holding in *Groob* and its own prior precedent, the Court of Appeals premised its ruling upon authority which the Court even acknowledged was either not binding<sup>6</sup> or distinguishable<sup>7</sup> and useful to the Court of Appeals only for "the general

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<sup>6</sup> The Court below relied upon Opinion 2006-1 of this Court's Board of Commissioners on Grievances and Discipline. Pursuant to this Court's Rules for the Government of the Bar, that Board may issue only "informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions directed to it." The Opinion in question related to whether judges or magistrates could simultaneously be real estate salespersons.

<sup>7</sup> In *Bunch v. Tom Althaus Realty, Inc.*, 55 Ohio App.2d 123, 379 N.E.2d 613 (10<sup>th</sup> Dist. 1977) the Tenth District Court of Appeals analyzed the narrow question of a broker's liability to a client where a salesperson accepts an earnest money deposit check in conjunction with a proposed transaction. *Bunch* plainly cannot be contorted to support the result reached below. Indeed, the Court of Appeals seemed to acknowledge this.

principles they espouse”. (Op., ¶ 46).<sup>8</sup> In sum, therefore, there is *no* authority either in statute or caselaw to support the overreach engaged in by the Court of Appeals, the effect of which threatens to cripple an entire profession. If left undisturbed, the unlawful, fraudulent misconduct of a “rogue” agent can unquestionably bring about the collapse and demise of a broker and, by extension, other salespersons associated with the broker, no matter how badly the broker has itself been actively deceived and no matter how many policies, procedures, statutes, or contractual provisions the rogue salesperson has violated along the way. The appellate court’s ruling renders such matters irrelevant, which is simply improvident and unjust inasmuch as a salesperson’s commission of fraudulent acts cannot be said to be serving the interests of their broker.

**C. The Trial Court’s Jury Instruction on Vicarious Liability was Inadequate and Misleading, Constituting Reversible Error**

The genesis of this controversy is, of course, the flawed jury instruction given by the trial court on the issue of vicarious liability. In *Groob* this Court reiterated that a trial court must give jury instructions that correctly and completely state the law, and that an inadequate jury instruction that misleads the jury constitutes reversible error. Similarly, in a prior decision by the Second District Court of Appeals, that court appropriately stated:

The trial court has an “imperative duty” to instruct the jury with the law with respect to the theories of relief applicable to the facts of the case.

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<sup>8</sup> Ironically, earlier in the Opinion the Court of Appeals cited with favor a case and various statutes from other jurisdictions to buttress its ultimate holding. (Op. at ¶¶ 32-33). These very authorities, however, run counter to that holding. The authorities cited by the Court of Appeals specify that a broker cannot insulate itself from liability by utilizing independent contractors instead of employees; they do not eliminate the requirement that the independent contractor or employee must be within the scope of their agency or employment for broker liability to exist.

Providing the jury with a general charge that is correct is not sufficient; it must also provide the jury with the law specifically adapted to the case so that the jury will not misconstrue the law that they apply to the facts as they find them. (internal citations omitted).

*Parker v. Copey's Butcher Shop*, 2nd Dist. No. 2820, 1992 Ohio App. LEXIS 6496, \*5, (Dec. 14, 1992).

Because of its importance to the disposition of this matter, Home Town has reproduced the objected-to vicarious liability charge in its entirety. As to this critical issue, the trial court instructed as follows:

The plaintiff also alleges that Defendant Keller Williams Hometown Realty of Vandalia was the real estate broker responsible for supervising Defendant Jamie Paliath at the time the real estate at issue in this case - - at the time of the real estate sales at issue in this case.

A real estate broker is vicariously liable for intentional torts committed by a salesman acting within the scope of their authority. A salesman is required to work under the supervision of a licensed broker and (*sic*) all of her activities relating to real estate transactions.

Vicarious liability means that the broker, in this case, Defendant Keller Williams Hometown Realty of Vandalia, is bound by action taken on its behalf by a realtor, in this case Defendant Paliath, while acting within the scope of her authority. A real estate agent is not within the scope of her agency when she clearly and completely departs from the services or jobs 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 act.

If you find that Defendant Jamie Paliath committed fraud with respect to the sale of 1117 Belton Street, 929 and 931 Harvard Boulevard, 2259 Emerson Avenue, 1111 and 1115 Richmond Avenue, and 1119 Emerson Avenue, to Plaintiff Torri Auer, then Defendant Keller Williams Hometown Realty of Vandalia is vicariously liable and you must find in favor of Plaintiff Torri Auer and against Defendant Keller Williams Hometown Realty of Vandalia in the amount of Plaintiff Torri Auer's damages.

If you find that Defendant Jamie Paliath did not commit fraud with respect to the sale of 1117 Belton Street, 929-931 Harvard Boulevard, 2259 Emerson Avenue, 1111 and 1115 Richmond Avenue and 1119 Richmond to Plaintiff Torri Auer, then your verdict must be in favor of Defendant Keller Williams Hometown Realty of Vandalia and against Plaintiff. (Tr. at 988-990).

There are at least 4 major flaws in this jury instruction, as well as smaller number of lesser ones. The first major flaw in the instruction is that the trial court failed to inform the jury of what it was being asked to do, which was to determine whether Ms. Paliath was acting within the scope of her authority with Home Town in some or all of her dealings with Ms. Auer. Instead of doing so, and thereby supplying the jury with an understanding of what it was to determine, the trial court merely supplied the jury with erroneous and incomplete legal principles "without the legal structure within which to reach its factual conclusions". *Parker, supra; compare Groob, supra* at ¶ 35 ("You may find KeyBank responsible only if plaintiffs have proven by a preponderance of the evidence that the acts of Carol Sapinsley in wrongfully interfering with the business relationship between plaintiff and Sheve was within the scope of employment with KeyBank"). *Groob* also displays a second fatal weakness to this objected to charge, being that it failed to inform the jury that it was incumbent upon the Plaintiffs to prove Ms. Paliath was within the scope of her authority; the charge itself was silent on the burden of proof even though there is no presumption that the wrongful act of the agent was the act of the principal and authority to do the act must be demonstrated. *Finley v. Schuett*, 8 Ohio App.3d 38, 455 N.E.2d 1324 (1<sup>st</sup> Dist. 1982). Indeed, the presumption is to the contrary; where, as here, the tort is considered unlawful and malicious, such an act is generally *not* considered within the scope of the agent's employment. *Id.* By

contrast, Ohio Jury Instruction CV 537.07(1) expressly conditions a jury finding for a plaintiff upon proof by the greater weight of the evidence, and informs the jury to find for the jury if plaintiff failed in its burden of proof.

Compounding these errors was the third major flaw in the objected-to charge, being the trial court's incorporation of inapplicable language from cases discussing a wholly separate aspect of the broker/salesperson relationship into the charge and thereby misleading the jury into concluding that the scope of a real estate agent's authority is necessarily all-inclusive. There is simply no other plausible interpretation of the trial court's admonition and charge that "a salesman is required to work under the supervision of a licensed broker and (in?) *all of her activities* relating to real estate transactions." (Tr. at 989; emphasis supplied). To the extent the trial court defined the scope of Ms. Paliath's authority at all, it did so in a prejudicially encompassing way, being "all of her activities".

This aspect of the trial court's charge faithfully parroted a sentence from a prior Second District decision, being *Commercial Business Systems, supra*, which in turn relied upon *Fulton v. Aszman*, 4 Ohio App.3d 64, 446 N.E.2d 803 (12<sup>th</sup> Dist. 1982). These cases, however, and especially the language from them utilized by the trial court, speak to the issue of why a broker may be estopped from denying that a salesperson was an agent in the first place, not the entirely separate and distinct issue of whether an agent was within the scope of his or her authority. See *Fulton, supra*, Syllabus ¶ 3. ("Under R.C. Chapter 4735, a real estate salesman can have no independent contractor status, as he is required to be under the supervision of a licensed real estate broker in all of his activities relative to the sale of real property"); *Commercial Business Systems,*

*supra* (“Vicarious liability is appropriate because a real estate salesman has no independent status or right to conclude a sale and ‘can only function through the broker with whom he is associated’.”) citing *Wolf v. Hyman*, 104 Ohio App. 32, 143 N.E.2d 633 (1<sup>st</sup> Dist. 1957). Thus, the trial court’s charge improperly merged the legal issue of why vicarious liability in this context may be justified as a policy matter with the separate legal issue of the scope of an agent’s authority, and to make matters worse, did so immediately after instructing the jury that a broker “is” (as opposed to “may be”) liable for a salesman’s acts within the scope of their authority. But as this Court held in *Groob*, merely being aided by one’s employment status is not enough to permit respondeat superior liability. *Groob, supra*, at ¶ 58.

Instead of improperly engrafting this language from the cases into the charge and equating it with an agent’s scope of authority, the trial court should have followed and utilized the applicable instructions from O.J.I. 537.07, as indeed Home Town requested be done. (Tr. at 906). Those instructions include proposed charges on “scope of employment” (or agency), which the court below had acknowledged is ordinarily a question of fact for a jury to decide. *Webb, supra*, at ¶ 5, citing *Grubb v. Sec. Natl. Bank and Trust Co.*, 2nd Dist. No. 06-CA-30, 2007-Ohio-1034, ¶ 9. In *Webb*, the court below articulated the three part test it has applied in such matters, which substantially resembles O.J.I. 537.07(9). The trial court was obviously familiar with O.J.I. 537.07 as it used a portion of that section (O.J.I. 537.07.12) to inform the jury of what could be considered a manifestly self-serving frolic by an agent. (Tr. at 989).

Moreover, as has been eloquently explained by the Ohio Association of Realtors, instructing the jury that a salesperson is required to be supervised by a broker in “all of

her activities” is also flatly inconsistent with the verity that most real estate salespersons in Ohio are independent contractors as opposed to employees. As independent contractors, a broker does not have the right to control the manner and means of the salesperson’s work. For this reason a liability-imposing paradigm such as that encompassed in the trial court’s instruction (*i.e.* broker liability absent a determination or knowledge or ratification of the wrongful act) places an unfair and unreasonable risk of liability upon brokers statewide. *Compare* R.C. 4735.18(B) (permitting disciplinary sanctions against a broker only where the broker had knowledge of the salesperson’s improper actions).

The final major flaw in the trial court’s charge has been referenced already, being its mandatory directive to the jury to find against Home Town if the jury determined Ms. Paliath “committed fraud”. (Tr. at 989-990). Conspicuously absent from this unequivocal mandate is any reference to the scope of authority issue, thereby compelling a finding against Home Town as a matter of law upon the jury’s determination of wrongdoing by Ms. Paliath. Although a jury instruction “should also be adapted to the case and so explicit as not to be misunderstood or misconstrued by the jury” (*Yeager v. Carpenter*, 3rd Dist. No. 14-09-19, 2010-Ohio-3675, ¶ 30 (citations omitted)), the aforesaid portion of the trial court’s charge explicitly, but erroneously, permitted liability to be imposed upon Home Town exclusively based upon a finding against Ms. Paliath, which in turn explains the jury’s question to the trial court and the discomfort in finding against Home Town implicit in it. (Tr. at 1007).

Taken individually or collectively,<sup>9</sup> these flaws in the trial court's instruction rendered it inadequate, confusing, misleading and reversible error. *Groob, supra*.

#### IV. CONCLUSION

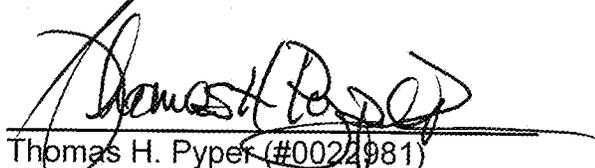
Home Town, as the Appellant herein, has an obvious interest in securing a reversal and obtaining a new trial before a properly-instructed jury; it faces a crippling and potentially ruinous damage award and has been improperly mulcted in damages for the actions of Ms. Paliath it had no knowledge of or ability to prevent. Of equal importance, however, are the implications of the Court of Appeals' erroneous ruling upon an entire industry and profession already staggered by a sluggish economy. In an Opinion supported neither by precedent nor prudence, the Montgomery County Court of Appeals deemed strict and absolute respondeat superior liability for a broker to be appropriate and summarily barred brokers from advancing any argument that the salesperson was acting outside the scope of their authority when the salesperson engaged in intentionally tortious conduct. By so doing Ohio real estate brokers have, by judicial fiat, been stripped of a defense to potentially ruinous civil liability available to every other employer or principal across the State. In the course of reaching this misguided result, the Court of Appeals deemed harmless the numerous flaws in the

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<sup>9</sup> The venial sins of the objected-to instruction include the trial court's unhelpful and potentially confusing inclusion of the term "intentional torts" in the charge without explaining or defining that term, as well as the trial court's oblique reference to Home Town being bound by "action taken" by Ms. Paliath. (Tr. at 989). As to the latter, it is to be noted that the trial court never explicitly advised or instructed the jury of the court's determination that differentiated the damages ostensibly flowing from the sales of the properties from those ostensibly flowing from rehabbing or managing them and absolving Home Town of liability for the latter. *Cf.* Tr. at 979-980 (giving overview of claims to jury). Absent any such advice or instruction, the jury was at best left to *infer* that the "action taken" could *not* include a failure to manage or rehab the properties.

lone jury instruction pertaining to the vicarious liability of Home Town and improperly enjoined the jury to find against Home Town if it found against Ms. Paliath. For all of the foregoing reasons, as well as for the reason set forth by the amicus submissions being filed in support of Home Town, the Court of Appeals' decision must be reversed and this matter remanded to the trial court for a new trial.

Respectfully submitted,



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**V. PROOF OF SERVICE**

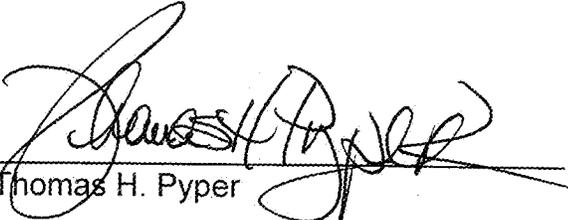
This is to certify that a true and exact copy of the Merit Brief of Appellant has been duly served upon all parties or counsel of record, as set forth below, via regular U.S. Mail, postage prepaid, on this 8th day of August, 2013.

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ORIGINAL

IN THE SUPREME COURT OF OHIO

**TORRI AUER**

Plaintiff-Appellee,

vs.

**JAMIE PALIATH, et al**

Defendants-Appellants.

: Case No.:

**13-0459**

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

: Court of Appeals

: Case No.: CA25158

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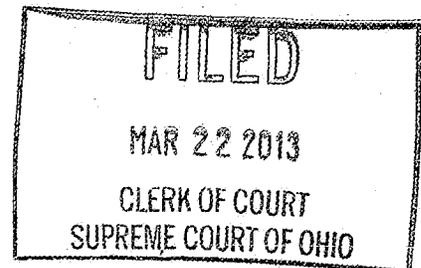
**NOTICE OF APPEAL OF APPELLANT  
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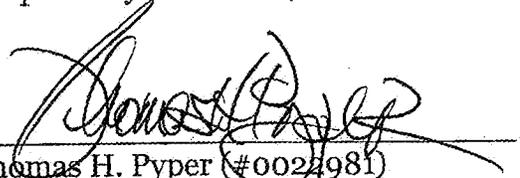
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**NOTICE OF APPEAL OF APPELLANT**  
**KELLER WILLIAMS HOME TOWN REALTY**

Now comes Appellant Keller Williams Home Town Realty ("KWHTR") and hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Final Entry of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. CA25158 on February 8, 2013. This case is one of public or great general interest. KWHTR is simultaneously filing a Memorandum in Support of Jurisdiction.

Respectfully submitted,



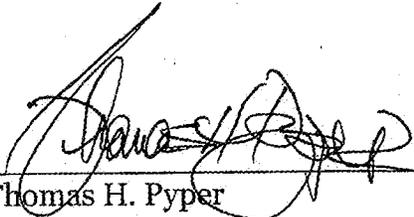
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal has been duly served upon the following by ordinary U.S. mail, postage prepaid, this 22<sup>nd</sup> day of March, 2013.

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Thomas H. Pyper



FROELICH, J.

{¶ 1} Torri Auer<sup>1</sup> brought suit against real estate salesperson Jamie Paliath, real estate broker Keller Williams Home Town Realty, and others based on alleged fraud by Paliath in the sale of several rental properties to Auer and in Paliath's management and rehabilitation of those properties. After a jury trial in the Montgomery County Court of Common Pleas, Paliath was found liable to Torri Auer in the amount of \$135,200 for fraud in the inducement of Auer's purchases of the properties. (The jury found additional damages against Paliath for other claims.) The jury also awarded \$135,200 to Auer from Home Town Realty, based on the broker's vicarious liability for Paliath's actions in connection with Auer's purchases of the properties.<sup>2</sup> Court costs were assessed against both Paliath and Home Town Realty.

{¶ 2} Home Town Realty appeals from the trial court's judgment, claiming that (1) the company should have been granted a direct verdict due to the plaintiffs' failure to establish damages and (2) the trial court erred in its jury instructions on vicarious liability. Paliath also filed a notice of appeal (Case No. 25165), but that case has been dismissed for lack of prosecution. Accordingly, our Opinion concerns only the issues raised by Home Town Realty.

I.

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<sup>1</sup>Auer's former husband, Thomas Auer, and Rapid Realty Solutions, Inc. were also named plaintiffs. Hari Paliath, Paliath's ex-husband, was named as an additional defendant. These parties are not relevant to this appeal.

<sup>2</sup>The trial court's judgment awards \$135,000, rather than \$135,200, to Auer from Home Town Realty. This appears to be a typographical error.

{¶ 3} Torri Auer's claims against Home Town Realty arise from a series of real estate transactions that occurred between October 5, 2007 and December 19, 2007, when Paliath was a real estate salesperson for Home Town Realty, a real estate brokerage firm.

{¶ 4} Upon completing her real estate course work, Jamie Paliath began working as a licensed real estate salesperson for Home Town Realty of Vandalia, LLC, which operated as Keller Williams Home Town Realty. Paliath's contract with Home Town Realty, dated August 17, 2006, provided that Paliath would be employed as an independent contractor to assist clients with the purchase and sale of real estate. Paliath could determine her own business hours and choose her "own target clients, marketing techniques and sales methods;" Home Town Realty was not required to pay her taxes, insurance, licensing fees, and other expenses she might incur as a salesperson. Paliath's income consisted of commissions earned on real estate transactions in which Home Town Realty represented a client as buyer or seller, and all commissions were to be disbursed through Home Town Realty in accordance with Keller Williams' policies and guidelines. According to real estate broker Timothy Stammen, owner of Home Town Realty, Paliath received 70 percent of earned commissions and Home Town Realty received 30 percent.

{¶ 5} In September 2007, Torri Auer, a California resident, contacted Paliath regarding a duplex in Dayton that she had found on an internet website, Bid4Assets. Auer traveled to Ohio to view the property. Auer informed Paliath that she was interested in owning investment property to support herself and her children; she opted not to purchase that duplex because it was too expensive.

{¶ 6} Paliath drove Auer to see several other properties, including 929-931 Harvard Boulevard, 117 Belton Street, 2259 Emerson Avenue, 1111-1115 Richmond Avenue, and

1119 Richmond Avenue. The Harvard property was a duplex, the Emerson property had 12 units, the Belton property was a single-family home, and the three Richmond properties had 4 units each. Auer went inside one half of the Harvard duplex, and she saw a photograph of the inside of the Belton property. Auer did not see the inside of the Richmond properties. Paliath told Auer that a lot of work had been done on the Belton property, that it was rented, and that it could rent for \$400 per month.

{¶ 7} In late September 2007, Auer contracted to purchase the Harvard property for \$40,000 and the Belton property for \$20,000, based in part on representations that the properties were worth twice those prices. Auer also contracted with A-1 Property Management, a company created by Paliath, to manage the Harvard and Belton properties. At the closing for both properties, Home Town Realty received a commission of \$665 for the sale of the Harvard property and \$180 for the sale of the Belton property.

{¶ 8} Auer and Paliath together created the Gem City Investment Group, which bought the Emerson property for \$73,000 in November 2007. The company also signed a contract with Miami Valley Home Improvements, LLC, another company created by Paliath, to rehabilitate the Emerson property for \$103,000.

{¶ 9} On November 16, 2007, Auer's company, Rapid Realty Solutions, contracted to purchase 1111 and 1115 Richmond Avenue from Kermali Holdings, LLC for \$40,000 each. Paliath had represented to Auer that there was a list of people waiting to rent the units, that the property could be rehabilitated by January 2008, and that the properties could quickly be sold for \$90,000 each. The sale of the properties closed on December 14, 2007; Paliath was the sole real estate salesperson involved, and Home Town Realty received commissions from the sales. Auer contracted with Miami Valley Home

Improvements to rehabilitate the properties for \$23,500 each, with the work scheduled to be completed by January 30, 2008.

{¶ 10} On November 16, 2007, Rapid Realty Solutions also contracted to purchase 1119 Richmond Ave for \$60,000. The seller of this building was Miami Valley Custom Homes, Inc., another company created by Paliath. Paliath, through Miami Valley Custom Homes, had purchased the property for between \$8,000 and \$9,000 shortly before selling the property to Auer. Rapid Realty Solutions closed on the purchase on December 19, 2007. Home Town Realty was listed as the broker for the transaction, and it received \$3,600 at settlement.

{¶ 11} Home Town Realty returned Paliath's real estate salesperson license to the State of Ohio on December 7, 2007. Paliath arranged to continue as a real estate salesperson under her own company, The Investment Genie Realty Group (TIG Realty), with Judith Lancaster as her broker. Paliath operated her real estate management and rehabilitation companies from the same office.

{¶ 12} Paliath managed Auer's properties until October 2008, and Miami Valley Home Improvements spent the money Auer had provided for the rehabilitation of the Emerson property and two of the Richmond Avenue properties. Some of the units had tenants between the closings and October 2008, but Auer received no income from the properties. In August 2008, only one out of the 27 total units was rented.

{¶ 13} In October 2008, Auer visited each of the properties with Lancaster, Janice Kemmer (a licensed realtor who worked for TIG Realty, assisting with property management and rentals), and Darrin Carey (Kemmer's son, a real estate investor who rehabilitates properties and rents them). Auer asked Carey to evaluate the work that

needed to be done and the current condition of the properties. All of the properties were in disrepair and needed a substantial amount of work.

{¶ 14} On October 24, 2008, Auer brought suit against Paliath, Home Town Realty, and others, claiming fraud in the inducement in the sale of the properties, among other claims. The matter proceeded to trial in March 2012.

{¶ 15} At the conclusion of Auer's case, Home Town Realty requested a directed verdict. First, the broker argued that it had an independent contractor relationship with Paliath. Home Town Realty acknowledged that it had a fiduciary duty as a broker to account for the money in the real estate transactions, but it claimed that the evidence established that it had complied with that duty. It further argued that it did not breach any duty to supervise Paliath. Second, Home Town Realty stated that the measure of damages was the difference between the represented value of the property and the actual value at the time of the transaction. Home Town Realty asserted that Auer had failed to prove the actual value of the properties at the time of the purchases. The court denied the motion regarding Home Town Realty's duty as a broker, and it took the issue of damages under advisement.

{¶ 16} Prior to closing arguments, Home Town Realty renewed its motion for a directed verdict on damages. The trial court denied the motion. The broker also objected to the trial court's proposed jury instructions on vicarious liability.

{¶ 17} Following closing arguments, the court instructed the jury concerning Home Town Realty's liability. It began by defining vicarious liability and scope of employment. The trial court concluded that portion of the jury instructions by stating that, if the jury finds that Paliath "committed fraud" with respect to the sale of the Belton Street, Harvard

Boulevard, Emerson Avenue, and Richmond Avenue properties to Auer, then Home Town Realty "is vicariously liable" and the jury must find in favor of Auer and against Home Town Realty in the amount of Auer's damages. The court further instructed that if the jury finds that Paliath did not commit fraud with respect to the sale of those properties to Auer, then the verdict must be in favor of Home Town Realty and against Auer. Home Town Realty objected to the instruction that the jury must find Home Town Realty vicariously liable if it finds that Paliath "committed fraud."

{¶ 18} During deliberations, the jury sent a written question to the trial judge, asking "If we sign for Plaintiff Torri Auer with respect to interrogatory #2 (fraudulent inducement to purchase real estate) are we required to find for plaintiff Torri Auer against Keller Williams?" The trial court responded with a written instruction to refer to the jury instructions previously given. The jury ultimately found for Auer and against Paliath on Auer's claim of fraudulent inducement to purchase the pieces of real estate, as follows: (1) \$15,000 for 117 Belton Street, (2) \$0 for 929-931 Harvard Boulevard, (3) \$0 for 2259 Emerson Avenue, (4) \$68,800 for 1111-1115 Richmond Avenue, and (5) \$51,400 for 1119 Richmond Avenue, for a total of \$135,200. The jury also found for Auer and against Home Town Realty in the amount of \$135,200.<sup>3</sup>

{¶ 19} Because the jury did not award any damages against Paliath and Home

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<sup>3</sup>Home Town Realty notes that judgment was entered in favor of Auer individually regarding the Richmond Avenue properties, even though Rapid Realty Solutions was the actual purchaser. See Home Town Realty's appellate brief, fn. 2 (noting "discrepancies" in the trial court's judgment entry) and pp. 13-14 (discussing the evidence at trial regarding damages for the Richmond Avenue properties). However, Home Town Realty did not raise the issue as an assignment of error, and we will not address it.

Town Realty regarding 929-931 Harvard Boulevard and 2259 Emerson Avenue, we will not discuss those properties further.

II.

{¶ 20} Home Town Realty raises two assignments of error. We begin with the second assignment of error, which states:

THE TRIAL COURT ERRED IN ITS INSTRUCTION AS TO THE  
POTENTIAL VICARIOUS LIABILITY OF HOME TOWN.

{¶ 21} Home Town Realty's second assignment of error claims that the trial court's instruction to the jury on Home Town Realty's vicarious liability for the actions of Paliath was erroneous, ambiguous, misleading, and prejudicial. It specifically challenges the court's instruction that, if the jury finds that Paliath "committed fraud" with respect to the properties, then "Defendant Keller Williams Home Town Realty of Vandalia is vicariously liable and you must find in favor of Plaintiff Torri Auer and against Keller Williams Home Town Realty of Vandalia in the amount of Plaintiff Torri Auer's damages."

{¶ 22} The Ohio Association of Realtors, which has filed a brief as amicus curiae, supports Home Town Realty's challenge to the trial court's jury instructions. The OAR asserts that Paliath was an independent contractor, as a matter of law, and that the trial court should never have instructed the jury on vicarious liability. The OAR contends that, at the least, the trial court should have allowed the jury to determine whether Paliath was an independent contractor. Alternatively, the OAR claims that, even assuming that Paliath was not an independent contractor, the trial court erred in failing to instruct the jury that it had to find that Paliath was acting within the scope of her employment before determining whether Home Town Realty was vicariously liable. The OAR asserts that Paliath's actions,

as a "rogue salesperson" acting outside of the broker's knowledge, were not within the scope of her employment.

{¶ 23} In response to Home Town Realty and the Ohio Association of Realtors, Auer emphasizes that the trial court's instruction was consistent with *Commercial Business Sys. v. Aztec Partnership*, 2d Dist. Montgomery No. 16363, 1997 WL 674659 (Oct. 31, 1997), and that Home Town Realty received a commission for the sale of the Belton Street and Richmond Avenue properties. Auer argues that Paliath was not an independent contractor, that Home Town Realty acted as the broker in receiving the commissions, and that Home Town Realty was vicariously liable for Paliath's actions in connection with the sale of these properties.

{¶ 24} The Ohio Supreme Court has not addressed the nature of the legal relationship between real estate brokers and real estate salespersons, and that relationship is not clearly defined by R.C. Chapter 4735. Under R.C. Chapter 4735, the term "real estate broker" includes "any person, partnership, association, limited liability company, limited liability partnership, or corporation \* \* \* who for another \* \* \* and who for a fee, commission, or other valuable consideration" engages in various activities regarding real estate, including selling, purchasing, leasing, renting, listing, auctioning, buying, managing, and advertising real estate. R.C. 4735.01(A). A real estate salesperson generally means "any person associated with a licensed real estate broker to do or to deal with any acts or transactions set out or comprehended by the definition of a real estate broker, for compensation or otherwise." (Emphasis added.) R.C. 4735.01(C). See R.C. 4735.01(I) for exceptions to the definitions of real estate broker and real estate salesperson.

{¶ 25} Under R.C. 4735.21, no real estate salesperson may collect any money in

connection with any real estate transaction, except as in the name of and with the consent of the licensed real estate broker under whom the salesperson is licensed.

{¶ 26} We have addressed the relationship between real estate brokers and real estate salespersons, with differing results based on the circumstances presented. In *Burton Minnick Realty, Inc. v. Leffel*, 2d Dist. Clark No. 2680, 1990 WL 140527 (Sept. 28, 1990), the principal issue concerned the validity of a covenant not to compete which was included in the contract between a real estate broker and its former salesperson. The salesperson contended that the covenant was unenforceable because the salesperson had contracted with the broker as a independent contractor, which the salesperson asserted was an invalid relationship under R.C. Chapter 4735. The salesperson argued, citing *Fulton v. Aszman*, 4 Ohio App.3d 64, 446 N.E.2d 803 (12th Dist.1982) and R.C. 4735.09, that a salesperson may not work independently of a licensed broker. R.C. 4735.09(A), pertaining to applications for a salesperson license, requires, among other things, that the application is "to be accompanied by the recommendation of the real estate broker with whom the applicant is associated or intends to be associated, \* \* \*." *Aszman* held that "a real estate salesman is given no right to conclude a sale. He is an associate of a licensed real estate broker, who by definition is the one who sells. It will also be observed that a licensed real estate salesman has no independent status. He is an associate of a licensed real estate broker and can only function through the broker with who he is associated." *Aszman* at 71.

{¶ 27} We agreed with the salesperson's argument that a salesperson cannot act independently of a broker. However, we did not agree that the salesperson's "independent contractor status does not satisfy the statutory requirement that she be associated with a

broker.” We reasoned in *Burton*:

Leffel interprets *Aszman* and the statute as mandating that the only acceptable relationship under the statute is that of employer-employee, and argues that the agreement, in that it creates something other than an employer-employee relationship, is void. Neither the statute nor *Aszman* support such a result. An independent contractor can be associated with a broker and satisfy the statute. Since the contract specifies that Burton-Minnick agreed to provide training, work facilities, and commissions to Leffel, it is obvious that the parties understood that Leffel would not be working independently of the broker, although she was an independent contractor. Since this association complies with the statute, the contract creating the relationship is not void. Therefore, we reject this argument.

{¶ 28} In another case involving a dispute between a real estate broker and a real estate salesperson regarding commissions, we noted, without discussion, that it was “undisputed” that the real estate salesperson was an independent contractor. *Hall v. Nisonger*, 2d Dist. Darke No. 1385, 1996 WL 144191 (Mar. 29, 1996).

{¶ 29} Subsequently, in *Commercial Business Sys. v. Aztec Partnership*, 2d Dist. Montgomery No. 16363, 1997 WL 674659 (Oct. 31, 1997), we addressed whether a real estate broker could be vicariously liable for the fraudulent conduct of her former sales agent. The broker argued that she should not have been found vicariously liable because the salesperson’s conduct was outside the scope of the agency relationship. (We find no indication that the broker asserted that her salesperson was an independent contractor.) We affirmed the trial court’s finding, after a bench trial, that the broker was vicariously

liable, stating:

A real estate broker will be held vicariously liable for intentional torts committed by salesmen acting within the scope of their authority. *Zell v. Ohio Superintendent of Real Estate* (1992), 79 Ohio App.3d 297, 607 N.E.2d 99. Vicarious liability is appropriate because a real estate salesman has no independent status or right to conclude a sale and "can only function through the broker with whom he is associated." *Wolf v. Hyman* (1957), 104 Ohio App. 32, 35, 143 N.E.2d 633. A salesman is required to be under the supervision of a licensed broker in all of his activities related to real estate transactions. *Fulton v. Aszman* (1982), 4 Ohio App.3d 64, 71, 446 N.E.2d 803.

In *Zell*, the court imposed vicarious liability on a brokerage firm for a salesman's tortious conduct when it found that he had acted on behalf of the firm. The court found significant the fact that a newspaper advertisement had clearly indicated to the sellers that the salesman was acting on behalf of the firm. Moreover, the court concluded that the salesman was acting within the scope of his employment even though he had contacted the sellers at their home rather than at the firm. Just like the real estate salesman in *Zell*, Lawson [the salesperson] acted on behalf of Montgomery [the broker] when he contacted Commercial about Aztec's purchase offer. Montgomery had introduced Sheibenberger [the client] to Lawson and had indicated to Sheibenberger that Lawson would be acting on her behalf. Contrary to Montgomery's assertion that Lawson acted outside the scope of employment

because the listing agreement had expired before the transaction had occurred, Sheibenberger testified that Lawson had made an offer and inspected the properties in December while the listing agreement was still in effect. (May 17, Tr. at 29).

Because there was evidence establishing that Lawson acted within the scope of employment, the trial court reasonably concluded that Montgomery was vicariously liable for his tortious conduct.

{¶ 30} It may appear, at first blush, that *Commercial Business Sys.* represents a departure from our prior case law. However, our cases are not inconsistent. Rather, we have recognized that a real estate salesperson may lawfully be "associated with" a licensed real estate broker, as required by R.C. Chapter 4735, as an independent contractor. The contractual relationship between a real estate broker and a real estate salesperson may specify that the real estate salesperson is an independent contractor, and that relationship may be valid with respect to the disputes between those two parties. Whether a real estate salesperson is associated with a broker as an employee or an independent contractor depends on the particular circumstances surrounding the relationship.

{¶ 31} We have treated the relationship between real estate brokers and their real estate salespersons as a principal-agent relationship, however, when the issue involves a real estate broker's or real estate salesperson's conduct concerning third parties. Because a real estate salesperson is required to be under the supervision of a licensed real estate broker in all of his or her activities related to real estate transactions, we have held that a real estate broker cannot insulate him or herself from liability for intentional torts committed within a real estate salesperson's scope of employment.

{¶ 32} This hybrid approach is not unique. Other states that have mandated supervisory control by a real estate broker have established different standards for the liability of a real estate broker depending on the parties and issues involved in the dispute. In California, for example, “[a] real estate broker and a real estate salesperson licensed under that broker may contract between themselves as independent contractors or as employer and employee, for purposes of their legal relationship with and obligations to each other.” *Reagan v. Keller Williams Realty, Inc.*, Cal.App. 2 Dist. No. B192890, 2007 WL 2447021 (Aug 30, 2007); West’s Ann.Cal.Bus. & Prof.Code 10032. However, “[i]t is settled that for purposes of liability to third parties for torts, a real estate salesperson is the agent of the broker who employs him or her. The 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. \* \* \* Thus, for purposes of tort liability, a real estate agent-broker relationship may not be characterized as that of an independent contractor when the salesperson is acting within the scope of employment.” (Internal citations omitted.) *Reagan* at \*9-10.

{¶ 33} The State of Connecticut defines a real estate salesperson as “a person affiliated with any real estate broker as an independent contractor or employed by a real estate broker to list for sale, sell or offer for sale, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, \* \* \*.” Conn.Gen.Stat. Ann. 20-311(2). The statute further explicitly provides that, “[i]n any action brought by a third party against a real estate salesperson affiliated with a real estate broker as an independent contractor, such broker shall be liable to the same extent as if such affiliate had been employed as a real estate salesperson by such broker.” Conn.Gen.Stat. Ann. 20-312a. Other states have

similar statutes. *E.g.*, Del.Code Ann. 2937(d) ("\* \* \* Notwithstanding any other provision of this chapter, the employer of the licensee is vicariously liable as the employer would be under the doctrine of respondeat superior whether the licensee is employed by the broker or brokerage organization as an employee or as an independent contractor.").

{¶ 34} The situation before us involves allegations of fraudulent misrepresentations by a real estate salesperson, Paliath, to a third party buyer of property, Auer. Under these circumstances, the liability of the real estate broker, Home Town Realty, is governed by *Commercial Business Sys.* (intentional torts as to third parties concerning real estate transactions) and not *Burton* (contractual dispute between the real estate broker and real estate salesperson). We need not decide whether Paliath was an independent contractor with respect to her relationship with Home Town Realty, as that issue is irrelevant to whether Home Town Realty was properly held vicariously liable for Paliath's tortious conduct in the sale of the properties to Auer.

{¶ 35} We therefore turn to whether the trial court properly instructed the jury with respect to Home Town Realty's vicarious liability. The trial court instructed the jury regarding Home Town Realty as follows:

The Plaintiff also alleges that Defendant Keller Williams Hometown Realty of Vandalia was the real estate broker responsible for supervising Defendant Jamie Paliath at the time of the real estate sales at issue in this case.

A real estate broker is vicariously liable for intentional torts committed by salesmen acting within the scope of their authority. A salesman is required to be under the supervision of a licensed broker in all of her

activities related to real estate transactions.

Vicarious liability means that the broker, in this case Defendant Keller Williams Hometown Realty of Vandalia, is bound by action taken on its behalf by a realtor, in this case Defendant Paliath, while acting within the scope of her authority.

A real estate agent is not 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.

If you find that Defendant Jamie Paliath committed fraud with respect to the sale of 117 Belton Street, 929-931 Harvard Blvd, 2259 Emerson Avenue, 1111-1115 Richmond Avenue and 1119 Richmond to Plaintiff Torri Auer, then Defendant Keller Williams Hometown Realty of Vandalia is vicariously liable and you must find in favor of Plaintiff Torri Auer and against Defendant Keller Williams Hometown Realty of Vandalia in the amount of Plaintiff Torri Auer's damages. If you find that Defendant Jamie Paliath did not commit fraud with respect to the sale of 117 Belton Street, 929-931 Harvard Blvd, 2259 Emerson Avenue, 1111-1115 Richmond Avenue and 1119 Richmond to Plaintiff Torri Auer, then your verdict must be in favor of Defendant Keller Williams Hometown Realty of Vandalia and against Plaintiff.

{¶ 36} As a threshold matter, Auer claims that Home Town Realty waived its

objections to the jury instructions because it never submitted any written jury instructions relating to vicarious liability, did not object to the interrogatories, and "did not object to the Trial Court's response regarding jury instructions as noted in the transcript."

{¶ 37} Prior to closing arguments, the trial court and counsel reviewed a preliminary version of the jury instructions. At that time, counsel for Home Town Realty voiced an objection to the vicarious liability instruction on that ground that, "[i]nstead of giving the tools to the jury to decide the issues, [the jury instruction] decides it for them, and we think that the better approach is to read the section on intentional torts by employees, I believe 537, instead of writing it out in this fashion." (Counsel had not provided a written proposed instruction on vicarious liability.) The court overruled the objection. During a review of the final revisions to the jury instructions, Home Town Realty again voiced its objections to the vicarious liability instruction. And at the conclusion of the reading of the jury instructions, the court asked counsel if they had any additions, corrections, or deletions to the instructions as read. Counsel for Home Town Realty responded, "Your Honor, other than what we've discussed, no objection. Thank you." Home Town Realty's objection to the instruction on vicarious liability was sufficiently preserved for appeal.

{¶ 38} Home Town identifies four "major flaws" in the court's instruction on vicarious liability. First, it asserts that the court failed to inform the jury that it was being asked to determine whether Paliath was acting within the scope of her employment. Second, Home Town Realty states that the court's jury instruction failed to inform the jury that Auer had the burden to prove that Paliath was acting within the scope of her employment. Third, the broker claims that the trial court's jury instruction misled the jury into believing that "the scope of a real estate agent's authority is necessarily all-inclusive," i.e., that the scope of

employment included all of Paliath's activities. Finally, Home Town Realty argues that the trial court's directive to find against the broker if Paliath "committed fraud" also lacked any reference to the fact that the broker's liability was limited to actions taken by Paliath within the scope of her employment.

{¶ 39} "A trial court must give jury instructions that correctly and completely state the law." *Groob v. Key Bank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 32. "Under the doctrine of respondeat superior, a principal or employer may generally be held liable for tortious acts committed by its agents or employees if such acts occur within the scope of the employment relationship." *Pierson v. Rion*, 2d Dist. Montgomery No. 23498, 2010-Ohio-1793, ¶ 44, citing *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994).

{¶ 40} For an act to fall within the scope of employment, it must be "calculated to facilitate or promote the business for which the [employee or agent] was employed." *Osborne v. Lyles*, 63 Ohio St.3d 326, 329, 587 N.E.2d 825 (1992). In general, if an act is committed within the scope of employment, it will be authorized, either expressly or impliedly, by the employer. *Anousheh v. Planet Ford, Inc.*, 2d Dist. Montgomery Nos. 21960 & 21967, 2007-Ohio-4543, ¶ 45. Intentional and willful acts by an agent or employee "to vent his own spleen or malevolence against the injured person" are generally outside the scope of employment. *Osborne*, 63 Ohio St.3d at 329, 587 N.E.2d 825. Stated differently, "an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." *Groob* at ¶ 42, citing *Byrd v. Faber*, 57 Ohio St.3d 56, 59, 565 N.E.2d 584 (1991).

{¶ 41} We find no fault with the trial court's jury instructions on the definitions of

vicarious liability and scope of employment. The portion defining when a person departs from the scope of employment tracks the language of Ohio Jury Instruction 537.07(11). Although some of the language was tailored to the real estate broker/ real estate salesperson scenario, the instructions defining vicarious liability and scope of employment were adequate representations of the law. *Accord Commercial Business Sys. v. Aztec Partnership*, 2d Dist. Montgomery No. 16363, 1997 WL 674659 (Oct. 31, 1997); *Osborne*, 63 Ohio St.3d at 330, 587 N.E.2d 825 (1992); *State ex rel. Atty. Gen. of Ohio v. State Line Agri, Inc.*, 2d Dist. Darke No. 2010 CA 11, 2011-Ohio-2191, ¶¶ 15-17. In addition, given the unique hybrid relationship that real estate brokers and real estate salespersons have under R.C. Chapter 4735 and common law, the court appropriately did not ask the jury to determine whether Paliath was an employee or an independent contractor of Home Town Realty.

{¶ 42} Home Town Realty argues that the trial court's jury instruction improperly removed from the jury the question of whether Paliath was acting within the scope of her employment with Home Town Realty when she committed fraud in the sale of the properties to Auer. Whether an employee is acting within the scope of his employment is generally a question to be decided by the trier of fact. *Osborne* at 330. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." *Id.*

{¶ 43} Auer responds that, as a matter of law, Paliath was acting within the scope of her authority with Home Town Realty when she sold the properties to Auer. Auer cites to Opinion 2006-1 of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, which stated that "[a] licensed real estate salesperson is the agent of a

licensed real estate broker for whom he works as a matter of law when commissions are collected in the name of the broker." *Id.*, citing *Bunch v. Tom Althaus Realty, Inc.*, 55 Ohio App.2d 123, 129, 379 N.E.2d 613 (10th Dist.1977).

{¶ 44} The Board of Commissioners on Grievances and Discipline relied on *Bunch*, which concerned whether a real estate broker was responsible for the return of a deposit received by a real estate salesperson associated with the broker when the deposit was never received by the broker due to a criminal act by the salesperson. The trial court in *Bunch* had "analyzed the case strictly on common law agency principles and excused the broker on the basis that the purchaser was put on notice that the salesman may have been exceeding his authority and that further inquiry from the broker would have disclosed the salesman's actual authority." *Bunch* at 128.

{¶ 45} The Tenth District reversed, noting that while the principles of law set forth by the trial court are ordinarily valid common law principles, they do not apply to this situation due to R.C. 4735.21 (prohibiting collection of money by real estate salespersons in connection with any real estate brokerage transaction). *Bunch* at 128. The appellate court stated:

The question is whether the intent of this statute is to make the collection of the deposit a transaction of the broker irrespective of whether the broker has actually authorized the salesman to collect the money, thus altering the common law liability of a principle [sic] for the unauthorized acts of his agent. We find that R.C. 4735.21 makes the real estate salesman the agent of the licensed real estate broker for whom he is working as a matter of law when commissions are collected by the salesman in the name of the

broker. Barnes had authority to collect deposits in the name of Tom Althaus Realty, Inc. The deposit was collected in the name of and on the contract form of his broker for the sale of property listed by the broker. A broker cannot limit or place conditions upon his consent for a salesman to collect commissions in his name so that the burden is placed upon a purchaser to ascertain the actual authority that the salesman has from the broker to accept commissions.

The case does not turn on whether Barnes violated instructions given him by the broker in regard to handling deposits nor whether Barnes was an independent contractor rather than an employee of Althaus for other purposes. Thus, the issue of whether plaintiff as a prudent man ought to have inquired further to determine the actual authority of Barnes was immaterial. The broker is responsible for the return of \$7,500 deposit collected by his salesman in his name, even though the broker has never received the deposit because of the criminal act of the salesman.

*Id.* at 129.

{¶ 46} The Board of Commissioner's advisory opinion is not binding authority and *Bunch* is factually distinguishable. Nevertheless, we agree with the general principles they espouse. Under R.C. 4735.21, a real estate salesperson cannot complete a real estate transaction outside of his or her association with a licensed real estate broker. As a result, 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.

{¶ 47} In this case, Paliath contracted with Home Town Realty as a real estate salesperson to assist clients with the purchase and sale of real estate. Paliath advised and assisted Auer in the purchase of the Belton Street, Harvard Boulevard, and Richmond Avenue properties, and her fraudulent conduct involved misrepresentations regarding those properties.

{¶ 48} Reviewing the properties separately, the evidence at trial established that Home Town Realty was listed as the real estate broker on the purchase contract, the agency disclosure statement, and the settlement statement for the Belton Street sale. Home Town Realty received a commission check of \$180 from the title company that conducted the closing. Based on this evidence, it was established, as a matter of law, that Paliath acted within the scope of her employment as a real estate salesperson with Home Town Realty in relation to Auer's purchase of the Belton property.

{¶ 49} Similarly, Paliath's actions with respect to the 1111-1115 Richmond Avenue properties were taken as a real estate salesperson assisting Auer with the purchase of the properties. Home Town was listed as a broker on the purchase contract, the agency disclosure statement, and the settlement statement for 1111 Richmond Avenue, and it received a commission of \$2,400 following the closing. Paliath signed the deposit receipt portion of the purchase contract as an associate of Home Town Realty. Auer signed Home Town Realty's "Do Not Call"/"Do Not Spam" Policy. The evidence thus demonstrated, as a matter of law, that Paliath was acting in the scope of her employment regarding the sale of 1111 Richmond Avenue.

{¶ 50} The purchase of 1119 Richmond Avenue differs from the others only in the respect that Auer purchased 1119 Richmond Avenue from Miami Valley Custom Homes, Inc., a company created by Paliath. Paliath acknowledged that she was the owner of the property and that she had purchased the property for between \$8,000 and \$9,000 shortly before selling the property to Auer for \$60,000.

{¶ 51} Miami Valley Custom Homes signed an exclusive right-to-sell contract with Home Town Realty for 1119 Richmond Avenue, which Paliath initialed for Miami Valley Custom Homes and signed for Home Town Realty. The agency disclosure statement for Auer's purchase of the property indicates that Paliath was the salesperson and Home Town Realty was the broker for the transaction, and that Paliath would be acting as a "dual agent;" Paliath signed the form as the seller. Paliath signed the lead-based paint disclosure form and home warranty service agreement as the salesperson for Home Town Realty. Home Town Realty was the named broker on the contract to purchase the property and the settlement statement, and it received a commission for the sale. We note that Timothy Stammen was asked whether Home Town Realty had "any rules related to independent contractors selling real estate to \* \* \* other individuals that they in fact own themselves." Stammen responded, "As long as it's disclosed, no." Judith Lancaster agreed that Paliath had a fiduciary duty to disclose her interest in the property.

{¶ 52} Accordingly, as to the Belton Street property and the three Richmond Avenue properties, Paliath was acting within the scope of her employment, as a matter of law, when she advised and assisted Auer with the purchases of these properties. We therefore conclude that any error in the trial court's failure to instruct the jury that Paliath was required to act within the scope of her employment with Home Town Realty in order

for the broker to be liable for Paliath's actions concerning the sale of those properties was harmless.

{¶ 53} Home Town Realty's second assignment of error is overruled.

III.

{¶ 54} Home Town Realty's first assignment of error states:

THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT IN FAVOR OF HOME TOWN INASMUCH AS MS. AUER FAILED TO ADDUCE ANY COMPETENT PROOF OF DAMAGES.

{¶ 55} Home Town Realty's first assignment of error claims that Auer failed to present evidence of the actual value of the properties at the time she purchased them. The broker thus claims that the trial court should have entered a directed verdict in Home Town Realty's favor.

{¶ 56} Civ.R. 50(A)(4) provides:

When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶ 57} A motion for a directed verdict challenges the sufficiency of the evidence; this is a question of law, not of fact. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25. "[T]he court must determine whether any evidence exists on every element of each claim or defense for which the party has the burden to go forward."

*Id.* We review de novo the trial court's ruling on a motion for a directed verdict. *Ward v. Govt. Emps. Ins. Co.*, 2d Dist. Montgomery No. 24884, 2012-Ohio-2970, ¶ 13.

{¶ 58} "Where there is fraud inducing the purchase or exchange of real estate, Ohio courts have held that the proper measure of damages is the difference between the value of the property as it was represented to be and its actual value at the time of purchase or exchange. This is known as the 'benefit of the bargain' rule. \* \* \* Courts have also held that the cost of repair or replacement is a fair representation of damages under the benefit of the bargain rule and is a proper method for measuring damages." (Citations omitted.) *McCoy v. Good*, 2d Dist. Clark No. 06 CA 34, 2007-Ohio-327, ¶ 21, quoting *Brewer v. Brothers*, 82 Ohio App.3d 148, 154, 611 N.E.2d 492 (12th Dist.1992). See *Molnar v. Beriswell*, 122 Ohio St. 348, 171 N.E. 593 (1930), syllabus. Expert testimony is not always required to establish the amount of damages. See *id.*

{¶ 59} The trial court instructed the jury: "With respect to the sales of the real estate at issue, the measure of damages in this case is the difference between the represented value and the actual value at the time of the transaction." The court did not further define "represented value" or "actual value" for the jury.

{¶ 60} As stated above, Home Town Realty asserted that Auer failed to present evidence of the actual value of the properties when the transactions occurred. During the trial in March 2012, Auer was asked about the current value of the properties, and she testified that the properties were worthless. She indicated that the Belton Street house had burned down, and that the City of Dayton was planning to tear down the Richmond Avenue buildings. Home Town Realty focuses on this specific testimony to argue that there was no evidence of the value of the properties at the time of the transactions.

{¶ 61} Upon review of the evidence, we find that Auer presented sufficient evidence of the actual value of the Richmond properties at the time of the sales to allow the issue of damages for those properties to go to the jury. According to the evidence at trial, on November 5, 2007, Kermali Holdings, LLC purchased 1111 Richmond Avenue for \$25,000 and 1115 Richmond Avenue for \$24,195. Paliath was the agent for Kermali Holdings in the transactions. On November 16, 2007, Auer's company, Rapid Realty Solutions, contracted to purchase 1111 and 1115 Richmond Avenue for \$40,000 each, based in part on Paliath's representations to Auer that Paliath had a list of people waiting to rent units, that the property could be rehabilitated by January 2008, and that the properties could quickly be sold for \$90,000 each. On December 6, 2007, Auer obtained appraisals for 1111 and 1115 Richmond Avenue from Tina Hoffacker of First Priority Appraisals, LLC, who was a friend of Paliath. The appraisals valued the properties at approximately \$90,000. Auer's purchases of 1111 and 1115 Richmond Avenue closed on December 14, 2007; Paliath acted as a dual agent for Auer and Kermali Holdings. Auer testified that when she later attempted to refinance the properties based on the appraisals, the bank "laughed at my appraisals," said that the properties were not worth what Auer had paid, and would not lend her money for the properties. (Tr. 217, 276) Darrin Carey informed Auer in October 2008 that it would take at least \$40,000 per building to render them habitable. (Tr. 235.)

{¶ 62} The jury awarded \$68,800 in damages related to the purchases of 1111 and 1115 Richmond Avenue. The evidence regarding the purchase price for the properties in November 2007, when they were bought by Kermali Holdings, supplied a basis for determining the properties' actual value. The jury could have also reasonably considered

the information regarding the property provided in the appraisals and the cost of needed repairs to determine the actual value in 2007. The trial court properly denied Home Town Realty's motion for a directed verdict as to 1111 and 1115 Richmond Avenue.

{¶ 63} Auer purchased 1119 Richmond Avenue for \$60,000 on December 19, 2007. Before purchasing the property, Paliath told Auer that the building had been rehabbed and that it was fully rented; Paliath indicated that the property was worth \$90,000, but Auer could buy it for \$60,000. Paliath admitted at trial that, a few weeks before she sold the property to Auer, she had purchased the property for between \$8,000 and \$9,000; Paliath did not dispute Auer's counsel's representation that the purchase price was approximately \$8,500. Paliath testified that she did "a lot of work to that property" prior to the sale to Auer, but the jury was not required to credit that testimony. This evidence was sufficient proof of damages regarding 1119 Richmond Avenue. Indeed, the difference between the amount paid by Paliath and the sale price paid by Auer appears to have formed the basis for the jury's award of \$51,400. The trial court did not err in denying Home Town Realty's motion for a directed verdict regarding this property.

{¶ 64} We cannot conclude, however, that Auer presented sufficient evidence of damages with regard to 117 Belton Street. Auer purchased 117 Belton Street for \$20,000 on October 5, 2007. Prior to the purchase, Paliath represented to Auer that the property was "rent ready" and that it would produce \$400 per month; the Belton property was rented at the time of closing. Paliath also told Auer that "Harvard was worth eighty and Belton was worth forty, if [Auer] bought them both then [she] could have them for half of what they were worth so that they, [Auer] knew they would cash flow." (Tr. 373.) Auer testified that she believed Paliath's representation that the properties were worth twice the price she

paid. (Tr. 372.) Auer stated, "That's the only reason I would have purchased them." (Tr. 373.)

{¶ 65} Auer presented substantial evidence that Paliath's representations about the Belton property were untrue. When Judith Lancaster went into 117 Belton in the spring of 2008, the front door would not close properly, and there was a hole in the back of the house where squirrels had eaten into the bathroom. Lancaster stated that, although there was a tenant, the property was not "rent ready." Auer, Lancaster, and Carey also testified to the condition of the Belton property as of October 2008. Their testimony indicated that, at that time, the kitchen was not rent ready, the basement had broken pipes, dirt on the floor, and moldy walls, and the back wall had been damaged. (Tr. 213-14, 476)

{¶ 66} While a jury may have reasonably concluded that Paliath misrepresented the condition of the Belton property and the income it could produce, Auer did not provide any evidence as to the actual value of the property in October 2007, when Auer purchased it. Nor was there any evidence of the cost of the repairs that were needed in order to render the property "rent ready;" such evidence might have provided a basis for the jury to determine the actual value of the property. The fact that Belton subsequently burned and is no longer standing does not support a conclusion that the residence had no or little value in October 2007. The trial court therefore erred in denying Home Town Realty's motion for a directed verdict due to lack of evidence of the actual value of the Belton property at the time of Auer's purchase.

{¶ 67} The first assignment of error is sustained as to the Belton Street property and overruled as to the Richmond Avenue properties.

#### IV.

{¶ 68} In light of our disposition of the first assignment of error, the trial court's judgment of \$15,000 in favor of Auer and against Home Town Realty with respect to the Belton Street property will be vacated. In all other respects, the trial court's judgment will be affirmed.

.....  
FAIN, P.J. and DONOVAN, J., concur.

Copies mailed to:

Laurence A. Lasky  
Thomas H. Pyper  
P. Christian Nordstrom  
John H. Burtch  
Robert J. Tucker  
Jamie A. Paliath  
Hon. Barbara P. Gorman



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CLERK OF COURTS  
MONTGOMERY CO. OHIO  
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

TORRI AUER, et al.

Plaintiff-Appellee

v.

JAMIE PALIATH, et al.

Defendant-Appellant

C.A. CASE NO. 25158

T.C. NO. 08CV9673

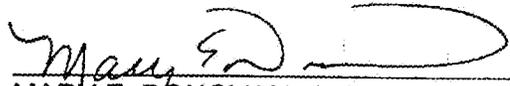
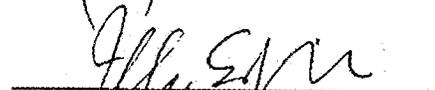
FINAL ENTRY

Pursuant to the opinion of this court rendered on the 8th day of February, 2013, the trial court's judgment of \$15,000 in favor of Torri Auer and against Keller Williams Home Town Realty, Inc. with respect to the Belton Street property is vacated. In all other respects, the trial court's judgment is affirmed.

Costs to be paid as follows: 20% by plaintiff-appellee; 80% by defendant-appellant.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

MIKE FAIN, Presiding Judge

  
MARY E. DONOVAN, Judge  
JEFFREY E. FROELICH, Judge

## Copies mailed to:

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Hon. Barbara P. Gorman  
Common Pleas Court  
41 N. Perry Street  
Dayton, Ohio 45422

IN THE COMMON PLEAS COURT, MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

TORRI AUER, et al.

Plaintiff,

vs.

JAMIE PALIATH, et al.

Defendant.

CASE NO. 08-CV-09673

Judge Barbara P. Gorman

JUDGMENT ENTRY

This action came on for trial before the Court and a duly impaneled jury on March 19, 2012, at which time the issues were duly tried and the jury rendered its verdict. In conformity with the verdict of the jury, it is **ORDERED AND ADJUDGED** that Plaintiff, Torri Auer, recover of the Defendant, Keller Williams Hometown Realty of Vandalia, the sum of \$135,000.00.

**IT IS FURTHER ORDERED AND ADJUDGED** that the Plaintiff, Torri Auer, recover of the Defendant, Jamie Paliath, the sum of Two Hundred Fifty-five Thousand Two Hundred Dollars and No/100 (\$255,200.00).

Plaintiff, Thomas Auer, was awarded as against the Defendant, Jamie Paliath, the sum of One Hundred Three Thousand Dollars and No/100 (\$103,000.00) by jury verdict. This amount was remitted by the Court to the lesser amount of Twenty-four Thousand Two Hundred Fifty Dollars and No/100 (\$24,250.00). As result, **IT IS FURTHER ORDERED AND ADJUDGED** that Plaintiff, Thomas Auer, recover of the Defendant, Jamie Paliath, the sum of Twenty-four Thousand Two Hundred Fifty Dollars and No/100 (\$24,250.00).

**IT IS FURTHER ORDERED**, pursuant to Civ.R. 54(D), that costs be assessed against Defendants, Jamie Paliath and Keller Williams Hometown Realty of Vandalia.

On March 26, 2012, Plaintiffs, Torri Auer and Thomas Auer, by and through counsel, Laurence A. Lasky, moved for a directed verdict against Defendant, Hari Paliath. The Court granted the Motion for directed verdict and, therefore, **IT IS FURTHER ORDERED AND ADJUDGED** that Plaintiffs, Torri Auer and Thomas Auer, recover of the Defendant, Hari Paliath, the sum of Four Hundred Twenty-seven Thousand Dollars and No/100 (\$427,000.00).

**SO APPROVED.**

**The Honorable Judge Barbara P. Gorman**  
Common Pleas Court Presiding Judge

Journalized this \_\_\_\_\_ day of March, 2012

\_\_\_\_\_  
Clerk of Court

\_\_\_\_\_  
By Deputy Clerk

/s/ Laurence A. Lasky  
**Laurence A. Lasky (0002959)**  
LASKY & SCHARRER  
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Attorney for Plaintiffs

THE DEFENDANT IS HEREBY ADVISED  
THAT THIS IS A FINAL APPEALABLE  
ORDER PURSUANT TO SECOND DISTRICT  
COURT OF APPEALS CIVIL RULE 58 (B).

Copies to: Katherine A. Klaeren, Esq.  
Paul M. Courtney, Esq.



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Case Title:** TORRI AUER vs JAMIE PALIATH  
**Case Number:** 2008 CV 09673  
**Type:** Entry Signed By Judge

So Ordered

A handwritten signature in cursive script that reads "Barbara P. Gorman".

Barbara P. Gorman

Electronically signed by bgorman on 2012-03-29 page 3 of 3

4735.01. Real estate broker definitions.

## Ohio Statutes

### Title 47. OCCUPATIONS - PROFESSIONS

#### Chapter 4735. REAL ESTATE BROKERS

*Includes all legislation filed with the Secretary of State's Office through 6/28/2013*

#### **4735.01. Real estate broker definitions**

As used in this chapter:

- (A) "Real estate broker" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, whether pursuant to a power of attorney or otherwise, and who for a fee, commission, or other valuable consideration, or with the intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration does any of the following:
- (1) Sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of any real estate;
  - (2) Offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of any real estate;
  - (3) Lists, or offers, attempts, or agrees to list, or auctions, or offers, attempts, or agrees to auction, any real estate;
  - (4) Buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate;
  - (5) Operates, manages, or rents, or offers or attempts to operate, manage, or rent, other than as custodian, caretaker, or janitor, any building or portions of buildings to the public as tenants;
  - (6) Advertises or holds self out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate;
  - (7) Directs or assists in the procuring of prospects or the negotiation of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate;
  - (8) Is engaged in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby the broker

undertakes primarily to promote the sale, exchange, purchase, rental, or leasing of real estate through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both, except that this division does not apply to a publisher of listings or compilations of sales of real estate by their owners;

- (9) Collects rental information for purposes of referring prospective tenants to rental units or locations of such units and charges the prospective tenants a fee.
- (B) "Real estate" includes leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold, and the improvements on the land, but does not include cemetery interment rights.
- (C) "Real estate salesperson" means any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker, for compensation or otherwise.
- (D) "Institution of higher education" means either of the following:
  - (1) A nonprofit institution as defined in section 1713.01 of the Revised Code that actually awards, rather than intends to award, degrees for fulfilling requirements of academic work beyond high school;
  - (2) An institution operated for profit that otherwise qualifies under the definition of an institution in section 1713.01 of the Revised Code and that actually awards, rather than intends to award, degrees for fulfilling requirements of academic work beyond high school.
- (E) "Foreign real estate" means real estate not situated in this state and any interest in real estate not situated in this state.
- (F) "Foreign real estate dealer" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, whether pursuant to a power of attorney or otherwise, and who for a fee, commission, or other valuable consideration, or with the intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration, does or deals in any act or transaction specified or comprehended in division (A) of this section with respect to foreign real estate.
- (G) "Foreign real estate salesperson" means any person associated with a licensed foreign real estate dealer to do or deal in any act or transaction specified or comprehended in division (A) of this section with respect to foreign real estate, for compensation or otherwise.
- (H) Any person, partnership, association, limited liability company, limited liability

partnership, or corporation, who, for another, in consideration of compensation, by fee, commission, salary, or otherwise, or with the intention, in the expectation, or upon the promise of receiving or collecting a fee, does, or offers, attempts, or agrees to engage in, any single act or transaction contained in the definition of a real estate broker, whether an act is an incidental part of a transaction, or the entire transaction, shall be constituted a real estate broker or real estate salesperson under this chapter.

- (l) (1) The terms "real estate broker," "real estate salesperson," "foreign real estate dealer," and "foreign real estate salesperson" do not include a person, partnership, association, limited liability company, limited liability partnership, or corporation, or the regular employees thereof, who perform any of the acts or transactions specified or comprehended in division (A) of this section, whether or not for, or with the intention, in expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration:
- (a) With reference to real estate situated in this state owned by such person, partnership, association, limited liability company, limited liability partnership, or corporation, or acquired on its own account in the regular course of, or as an incident to the management of the property and the investment in it;
  - (b) As receiver or trustee in bankruptcy, as guardian, executor, administrator, trustee, assignee, commissioner, or any person doing the things mentioned in this section, under authority or appointment of, or incident to a proceeding in, any court, or as a bona fide public officer, or as executor, trustee, or other bona fide fiduciary under any trust agreement, deed of trust, will, or other instrument that has been executed in good faith creating a like bona fide fiduciary obligation;
  - (c) As a public officer while performing the officer's official duties;
  - (d) As an attorney at law in the performance of the attorney's duties;
  - (e) As a person who engages in the brokering of the sale of business assets, not including the sale, lease, exchange, or assignment of any interest in real estate;
  - (f) As a person who engages in the sale of manufactured homes as defined in division (C)(4) of section 3781.06 of the Revised Code, or of mobile homes as defined in division (O) of section 4501.01 of the Revised Code, provided the sale does not include the negotiation, sale, lease, exchange, or assignment of any interest in real estate;
  - (g) As a person who engages in the sale of commercial real estate pursuant to the requirements of section 4735.022 of the Revised

Code.

- (2) A person, partnership, association, limited liability company, limited liability partnership, or corporation exempt under division (I)(1)(a) of this section shall be limited by the legal interest in the real estate held by that person or entity to performing any of the acts or transactions specified in or comprehended by division (A) of this section.
- (J) "Disabled licensee" means a person licensed pursuant to this chapter who is under a severe disability which is of such a nature as to prevent the person from being able to attend any instruction lasting at least three hours in duration.
- (K) "Division of real estate" may be used interchangeably with, and for all purposes has the same meaning as, "division of real estate and professional licensing."
- (L) "Superintendent" or "superintendent of real estate" means the superintendent of the division of real estate and professional licensing of this state. Whenever the division or superintendent of real estate is referred to or designated in any statute, rule, contract, or other document, the reference or designation shall be deemed to refer to the division or superintendent of real estate and professional licensing, as the case may be.
- (M) "Inactive license" means the license status in which a salesperson's license is in the possession of the division, renewed as required under this chapter or rules adopted under this chapter, and not associated with a real estate broker.
- (N) "Broker's license on deposit" means the license status in which a broker's license is in the possession of the division of real estate and professional licensing and renewed as required under this chapter or rules adopted under this chapter.
- (O) "Suspended license" means the license status that prohibits a licensee from providing services that require a license under this chapter for a specified interval of time.
- (P) "Reactivate" means the process prescribed by the superintendent of real estate and professional licensing to remove a license from an inactive, suspended, or broker's license on deposit status to allow a licensee to provide services that require a license under this chapter.
- (Q) "Revoked" means the license status in which the license is void and not eligible for reactivation.
- (R) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are a part of a larger building or parcel of real

estate containing more than four residential units.

- (S) "Out-of-state commercial broker" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation that is licensed to do business as a real estate broker in a jurisdiction other than Ohio.
- (T) "Out-of-state commercial salesperson" includes any person affiliated with an out-of-state commercial broker who is not licensed as a real estate salesperson in Ohio.
- (U) "Exclusive right to sell or lease listing agreement" means an agency agreement between a seller and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:
  - (1) Grants the broker the exclusive right to represent the seller in the sale or lease of the seller's property;
  - (2) Provides the broker will be compensated if the broker, the seller, or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement to anyone other than to specifically exempted persons or entities.
- (V) "Exclusive agency agreement" means an agency agreement between a seller and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:
  - (1) Grants the broker the exclusive right to represent the seller in the sale or lease of the seller's property;
  - (2) Provides the broker will be compensated if the broker or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement, unless the property is sold or leased solely through the efforts of the seller or to the specifically exempted persons or entities.
- (W) "Exclusive purchaser agency agreement" means an agency agreement between a purchaser and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:
  - (1) Grants the broker the exclusive right to represent the purchaser in the purchase or lease of property;
  - (2) Provides the broker will be compensated in accordance with the terms specified in the exclusive agency agreement or if a property is purchased or leased by the purchaser during the term of the agency agreement unless the property is specifically exempted in the agency agreement.  
The agreement may authorize the broker to receive compensation from the

seller or the seller's agent and may provide that the purchaser is not obligated to compensate the broker if the property is purchased or leased solely through the efforts of the purchaser.

- (X) "Seller" means a party in a real estate transaction who is the potential transferor of property. "Seller" includes an owner of property who is seeking to sell the property and a landlord who is seeking to rent or lease property to another person.
- (Y) "Resigned" means the license status in which a license has been voluntarily and permanently surrendered to or is otherwise in the possession of the division of real estate and professional licensing, may not be renewed or reactivated in accordance with the requirements specified in this chapter or the rules adopted pursuant to it, and is not associated with a real estate broker.
- (Z) "Bona fide" means made in good faith or without purpose of circumventing license law.

**Cite as R.C. 4735.01**

**History.** Amended by 129th General Assembly File No.127, HB 487, 101.01, eff. 9/9/2012.

Amended by 129th General Assembly File No.28, HB 153, 101.01, eff. 9/29/2011.

Effective Date: 04-05-2002; 10-12-2006; 2008 HB562 09-22-2008

4735.18. Disciplinary actions.

**Ohio Statutes**

**Title 47. OCCUPATIONS - PROFESSIONS**

**Chapter 4735. REAL ESTATE BROKERS**

*Includes all legislation filed with the Secretary of State's Office through 6/28/2013*

**4735.18. Disciplinary actions**

- (A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission shall impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found to have been convicted of a felony or a crime of moral turpitude, and may impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:
- (1) Knowingly making any misrepresentation;
  - (2) Making any false promises with intent to influence, persuade, or induce;
  - (3) A continued course of misrepresentation or the making of false promises through agents, salespersons, advertising, or otherwise;
  - (4) Acting for more than one party in a transaction except as permitted by and in compliance with section 4735.71 of the Revised Code;
  - (5) Failure within a reasonable time to account for or to remit any money coming into the licensee's possession which belongs to others;
  - (6) Dishonest or illegal dealing, gross negligence, incompetency, or misconduct;
  - (7)
    - (a) By final adjudication by a court, a violation of any municipal or federal civil rights law relevant to the protection of purchasers or sellers of real estate or, by final adjudication by a court, any unlawful discriminatory practice pertaining to the purchase or sale of real estate prohibited by Chapter 4112. of the Revised Code, provided that such violation arose out of a situation wherein parties were engaged in bona fide efforts to purchase, sell, or lease real estate, in the licensee's practice as a licensed real estate broker or

salesperson;

- (b) A second or subsequent violation of any unlawful discriminatory practice pertaining to the purchase or sale of real estate prohibited by Chapter 4112. of the Revised Code or any second or subsequent violation of municipal or federal civil rights laws relevant to purchasing or selling real estate whether or not there has been a final adjudication by a court, provided that such violation arose out of a situation wherein parties were engaged in bona fide efforts to purchase, sell, or lease real estate. For any second offense under this division, the commission shall suspend for a minimum of two months or revoke the license of the broker or salesperson. For any subsequent offense, the commission shall revoke the license of the broker or salesperson.
- (8) Procuring a license under this chapter, for the licensee or any salesperson by fraud, misrepresentation, or deceit;
- (9) Having violated or failed to comply with any provision of sections 4735.51 to 4735.74 of the Revised Code or having willfully disregarded or violated any other provisions of this chapter;
- (10) As a real estate broker, having demanded, without reasonable cause, other than from a broker licensed under this chapter, a commission to which the licensee is not entitled, or, as a real estate salesperson, having demanded, without reasonable cause, a commission to which the licensee is not entitled;
- (11) Except as permitted under section 4735.20 of the Revised Code, having paid commissions or fees to, or divided commissions or fees with, anyone not licensed as a real estate broker or salesperson under this chapter or anyone not operating as an out-of-state commercial real estate broker or salesperson under section 4735.022 of the Revised Code;
- (12) Having falsely represented membership in any real estate professional association of which the licensee is not a member;
- (13) Having accepted, given, or charged any undisclosed commission, rebate, or direct profit on expenditures made for a principal;
- (14) Having offered anything of value other than the consideration recited in the sales contract as an inducement to a person to enter into a contract for the purchase or sale of real estate or having offered real estate or the improvements on real estate as a prize in a lottery or scheme of chance;
- (15) Having acted in the dual capacity of real estate broker and undisclosed

principal, or real estate salesperson and undisclosed principal, in any transaction;

- (16) Having guaranteed, authorized, or permitted any person to guarantee future profits which may result from the resale of real property;
- (17) Having advertised or placed a sign on any property offering it for sale or for rent without the consent of the owner or the owner's authorized agent;
- (18) Having induced any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu of it a new contract with another principal;
- (19) Having negotiated the sale, exchange, or lease of any real property directly with a seller, purchaser, lessor, or tenant knowing that such seller, purchaser, lessor, or tenant is represented by another broker under a written exclusive agency agreement, exclusive right to sell or lease listing agreement, or exclusive purchaser agency agreement with respect to such property except as provided for in section 4735.75 of the Revised Code;
- (20) Having offered real property for sale or for lease without the knowledge and consent of the owner or the owner's authorized agent, or on any terms other than those authorized by the owner or the owner's authorized agent;
- (21) Having published advertising, whether printed, radio, display, or of any other nature, which was misleading or inaccurate in any material particular, or in any way having misrepresented any properties, terms, values, policies, or services of the business conducted;
- (22) Having knowingly withheld from or inserted in any statement of account or invoice any statement that made it inaccurate in any material particular;
- (23) Having published or circulated unjustified or unwarranted threats of legal proceedings which tended to or had the effect of harassing competitors or intimidating their customers;
- (24) Having failed to keep complete and accurate records of all transactions for a period of three years from the date of the transaction, such records to include copies of listing forms, earnest money receipts, offers to purchase and acceptances of them, records of receipts and disbursements of all funds received by the licensee as broker and incident to the licensee's transactions as such, and records required pursuant to divisions (C)(4) and (5) of section 4735.20 of the Revised Code, and any other instruments or papers related to the performance of any of the acts set forth in the definition of a real estate broker;
- (25) Failure of a real estate broker or salesperson to furnish all parties involved in a

real estate transaction true copies of all listings and other agreements to which they are a party, at the time each party signs them;

- (26) Failure to maintain at all times a special or trust bank account in a depository located in this state. The account shall be noninterest-bearing, separate and distinct from any personal or other account of the broker, and, except as provided in division (A)(27) of this section, shall be used for the deposit and maintenance of all escrow funds, security deposits, and other moneys received by the broker in a fiduciary capacity. The name, account number, if any, and location of the depository wherein such special or trust account is maintained shall be submitted in writing to the superintendent. Checks drawn on such special or trust bank accounts are deemed to meet the conditions imposed by section 1349.21 of the Revised Code. Funds deposited in the trust or special account in connection with a purchase agreement shall be maintained in accordance with section 4735.24 of the Revised Code.
- (27) Failure to maintain at all times a special or trust bank account in a depository in this state, to be used exclusively for the deposit and maintenance of all rents, security deposits, escrow funds, and other moneys received by the broker in a fiduciary capacity in the course of managing real property. This account shall be separate and distinct from any other account maintained by the broker. The name, account number, and location of the depository shall be submitted in writing to the superintendent. This account may earn interest, which shall be paid to the property owners on a pro rata basis. Division (A)(27) of this section does not apply to brokers who are not engaged in the management of real property on behalf of real property owners.
- (28) Having failed to put definite expiration dates in all written agency agreements to which the broker is a party;
- (29) Having an unsatisfied final judgment or lien in any court of record against the licensee arising out of the licensee's conduct as a licensed broker or salesperson;
- (30) Failing to render promptly upon demand a full and complete statement of the expenditures by the broker or salesperson of funds advanced by or on behalf of a party to a real estate transaction to the broker or salesperson for the purpose of performing duties as a licensee under this chapter in conjunction with the real estate transaction;
- (31) Failure within a reasonable time, after the receipt of the commission by the broker, to render an accounting to and pay a real estate salesperson the salesperson's earned share of it;

- (32) Performing any service for another constituting the practice of law, as determined by any court of law;
  - (33) Having been adjudicated incompetent for the purpose of holding the license by a court, as provided in section 5122.301 of the Revised Code. A license revoked or suspended under this division shall be reactivated upon proof to the commission of the removal of the disability.
  - (34) Having authorized or permitted a person to act as an agent in the capacity of a real estate broker, or a real estate salesperson, who was not then licensed as a real estate broker or real estate salesperson under this chapter or who was not then operating as an out-of-state commercial real estate broker or salesperson under section 4735.022 of the Revised Code;
  - (35) Having knowingly inserted or participated in inserting any materially inaccurate term in a document, including naming a false consideration;
  - (36) Having failed to inform the licensee's client of the existence of an offer or counteroffer or having failed to present an offer or counteroffer in a timely manner, unless otherwise instructed by the client, provided the instruction of the client does not conflict with any state or federal law;
  - (37) Having failed to comply with section 4735.24 of the Revised Code.
- (B) Whenever the commission, pursuant to section 4735.051 of the Revised Code, imposes disciplinary sanctions for any violation of this section, 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 this section.
- (C) The commission shall, pursuant to section 4735.051 of the Revised Code, impose disciplinary sanctions upon any foreign real estate dealer or salesperson who, in that capacity or in handling the dealer's or salesperson's own property, is found guilty of any of the acts or omissions specified or comprehended in division (A) of this section insofar as the acts or omissions pertain to foreign real estate. If the commission imposes such sanctions upon a foreign real estate salesperson for a violation of this section, the commission also may suspend or revoke the license of the foreign real estate dealer with whom the salesperson is affiliated if the commission finds that the dealer had knowledge of the salesperson's actions that violated this section.
- (D) The commission may suspend, in whole or in part, the imposition of the penalty of suspension of a license under this section.

**History.** Amended by 129th General Assembly File No.28, HB 153, 101.01, eff. 9/29/2011.

Effective Date: 04-05-2002; 10-12-2006; 2008 HB130 04-07-2009

4735.21. Right of action - limits on salespersons.

## **Ohio Statutes**

### **Title 47. OCCUPATIONS - PROFESSIONS**

#### **Chapter 4735. REAL ESTATE BROKERS**

*Includes all legislation filed with the Secretary of State's Office through 6/28/2013*

#### **4735.21. Right of action - limits on salespersons**

No right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer. Nothing contained in this section shall prevent a right of action from accruing after the expiration of a real estate or foreign real estate license if the act giving rise to the cause of action was performed by a licensee prior to such expiration.

No real estate salesperson or foreign real estate salesperson shall collect any money in connection with any real estate or foreign real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of and with the consent of the licensed real estate broker or licensed foreign real estate dealer under whom the salesperson is licensed at the time the sales person earned the commission. Nor shall any real estate salesperson or foreign real estate salesperson commence or maintain any action for a commission or other compensation in connection with a real estate or foreign real estate brokerage transaction, against any person except a person licensed as a real estate broker or foreign real estate dealer under whom the salesperson is licensed as a salesperson at the time the cause of action arose.

A salesperson licensed under this chapter shall not sell, assign, or otherwise transfer the salesperson's interest in a commission or any portion thereof to an unlicensed person or entity. If a salesperson makes such assignment or transfer, the broker shall not pay the transferee or assignee any portion of the commission. No cause of action shall arise on behalf of any person against a broker for not paying an assignee or transferee any portion of such an assignment or transfer.

**Cite as R.C. 4735.21**

**History.** Amended by 129th General Assembly File No.28, HB 153, 101.01, eff. 9/29/2011.