ORIGINAL

THE SUPREME COURT OF OHIO

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

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Proposition of Law:

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STATEMENT OF THE FACTS

PROCEDURAL HISTORY

On or about October 24, 2008 Appellee filed a complaint against Jamie Paliath for fraud in the inducement relating to the sales of various rental properties located in the city of Dayton, Ohio. Appellee also filed the action against Appellant for its failure to supervise Jamie Paliath thereby invoking the claim of vicarious liability.

A jury trial eventually commenced on March 19, 2012 and the jury returned an appropriate verdict on March 26, 2012 and the Court Entered Judgment Entry on March 29, 2012 in the amount of $135,000 against Appellant, $255,200.00 against Jamie Paliath, and a remitter regarding the judgment of Thomas Auer being reduced from $103,000.00 to $24,250.00.

An Appeal was filed by Appellant to the Second District Court of Appeals from the Trial Court's Decision. The Second District Court upon a thorough twenty-nine page Opinion, upheld all aspects of the Trial Court's Decision except for the Trial Court's award of $15,000.00 to Appellee for the "Belton Street" property (one of the particular rental properties involved in the action).

Appellant has now appealed the matter herein.

FACTS

Appellee would concur with the premise of the facts presented by Appellant. Jamie Paliath sold various rental properties to Appellee in Dayton, Ohio. At all times relevant, Jamie Paliath was working as real estate sales person and Appellant was the real estate broker. For every one of the real estate sales in this action, Appellee was the purchaser, Jamie Paliath was the salesperson and Appellant was the broker. It is further agreed by Appellant, as supported by the facts and their own brief, that Appellant obtained a commission for the sales completed by Jamie Paliath. There is no question that a benefit has been bestowed upon Appellant as a result of its relationship with Jamie Paliath and the sales of rental properties to Appelee.

The facts which are also pertinent to this action and which are the crux of Appellee's claim against Appellant are the evidence supporting the point that Appellant provided no supervision or training to Jamie Paliath.

Tim Stamen was Appellant's sole witness and his testimony established the fact that there was minimal supervision from his office if any.

Tim Stamen testified page 73,

"Q. I want to use the second page of the document, sir. Again, do you, at your company, have any

rules related to independent contractors selling real estate to, to other individuals that they in fact own themselves?

A. As long as it's disclosed, no.

Q. And do you do anything, again, to police those kinds of situations?

A. In the paperwork we're given. And we have no way to police, you know, outside, you know, if people are making deals behind our backs or whatever, we have no way to police that.

Q. So, you don't have any mandatory, random audits at your -- back in '07, dealing with, dealing with potential self dealing or with employees having construction companies or rehab companies?

A. We have no control over what they own outside of our office.

Q. And you don't ask, am I correct?

(Tr.Page 74)

Let me rephrase.

A. Yes.

Q. You didn't ask in '07?

A. I don't remember.

Q. Okay.

A. You know, I might have known this, and from what I'm seeing here, you know, nothing raised an issue. I mean, if I want to sell my property to someone else and I disclose that I'm a broker, there's nothing wrong with that.

Q. Do you have any process in force now?

A. We -- to -- for what?

Q. To determine, to spot check your independent contractors.

A. You mean what they own outside of --

Q. No, sir. What they --

A. We check every file.

Q. Sure. Okay?

A. Yes, they have particular paperwork that they -- have to be turned in on every deal. We go through every one of those, we check every file. And the state of Ohio spot checks us.

(Tr.Page75)

Q. But, again, in terms of, and I'm not talking about making sure people have signed documents and things like that. I'm talking about their self interest in the transaction itself.

A. I have no control over their self interest."

It's clear that Appellant did not monitor matters properly . See also p 53 Stamen testified "I have no control over what they do outside of my office" There was no further testimony to support a claim of proper supervision and training. It was just the excuse of Appellant could not control the sales person outside of the office.

There is no testimony or evidence which debunks this lassiez fare approach to handling a new realtor in Apellant's office who just recently obtained her license to sell real estate. Judith Lancaster testified regarding a real estate broker's duty to supervise.

(Tr.Page 468)

"Q. Tell us how you understand that term as it relates to broker salesperson.

A. My understanding is that the IRS allows sales agents in a brokerage to be designated independent contractors, and that means that there is no need to withhold Social Security or pay certain other things -- taxes on that sales agent, that a sales agent is responsible for their own taxes.

Q. What, if any, relationship does that have to the responsibility of a broker to supervise the day-to-day workings of a salesperson?

A. I have never believed that it had any connection to my -- to my obligation for supervision.

Q. So if someone is to use the term "independent contractor" as it relates to a salesperson, in your mind, that deals with a tax issue, correct?

A. Yes.

Q. What, if any, impact does that have on the obligation of a broker to supervise a salesperson?

A. None to me.

Q. Which means they have the obligation to supervise?

A. Yes."

She further testified regarding the office of Appellant and the disproportionate amount of salespersons to one broker.

(Tr.Page 470)

"Q. Drawing your attention back to the Keller Williams office. How many brokers were there -- broker managers were there in this office?

A. I only knew that they had a broker, Mr. Stammen, but I'm sure there were other people like me who were broker licensees.

Q. And how many salespeople were in this office.

A. At the time that I was there, I believe there were nearly 80.

Q. 8-0?

A. Uh-huh.

Q. Okay.

A. (Witness nods head affirmatively.)"

Appellant argues that it was found to be liable because of its association with Jamie Paliath but the evidence supports the fact that they also lacked any of the requisite supervision of Jamie Paliath. Further this Court upon reviewing the jury instructions for the Trial Court will find that the law was properly incorporated.

(Tr.Page 989)

"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 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."

Appellant and all the other interested parties argue that the Second District Court of Appeal's Opinion will somehow set the real estate industry on its ear if it is upheld. The reality is that the Opinion should be upheld because real estate brokers have a duty to supervise and to ensure that the general public is protected from the misdeeds of it agent/employee. The facts in this case support the position that a real estate broker cannot reap the benefits without expecting any consequences when said broker doesn't take any initiative to control a new salesperson or at the very least monitor her activities in a more competent fashion. The argument can be made that if this Opinion is not upheld, then the real estate industry will encourage more underhanded behavior because real estate brokers can merely point to the fact that they can't control what their sales people do outside of their office. Further to reverse would discourage protecting the consumer as responsibility and fiduciary duties would be considered a low priority.

ARGUMENT

Proposition of Law:

In the state of Ohio, when a real estate salesperson acts in the name of a real estate broker in regards to a real estate transaction for which he or she was hired and the real estate broker collects a commission for said transaction, the real estate broker is responsible for the salesperson's actions relating to said transaction because it is within the scope of the salesperson's employment or agency.

The Second District Court of Appeals correctly applied the law to the facts and circumstances of this case. The Trial Court did not commit any error in its jury instructions regarding vicarious liability. The Second District Court of Appeals aptly applied this Court's Decision of *Osborne v Lyles* 63 Ohio St 3d 326 (1992) in which this Court held:

"However, it is commonly recognized that whether an employee is acting within the scope of his employment is a question of fact to be decided by the jury.*Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 74 O.O.2d 427, 344 N.E.2d 334. **Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law.** As the Supreme Court of California has recently stated, "[o]rdinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; **it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences**

are possible.' * * * "*Mary M. v. Los Angeles* (1991), 54 Cal.3d 202, 213, 285 Cal.Rptr. 99, 105, 814 P.2d 1341, 1347, quoting *Perez v. Van Groningen & Sons, Inc.* (1986), 41 Cal.3d 962, 968, 227 Cal.Rptr. 106, 109, 719 P.2d 676, 679.

The willful and malicious character of an employee's act does not always, As a matter of law, remove the act from the scope of employment. *Stranahan Bros. Catering Co., v. Coit* (1896), 55 Ohio St. 398, 410, 45 N.E. 634, 637; *Wiebold Studio, Inc., v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246, 19 OBR 398, 484 N.E.2d 280. "When an employee diverts from the straight and narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is so divergent that its very character severs the relationship of employer and employee***" Id. AT 250, 19 OBR at 403, 484 N.E.2d at 287, citing *Amstutz v. Prudential Ins. Co. of America* (1940), 136 Ohio St. 404, 16 O.O. 572, 26 N.E.2d 454. See, also, *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 548 N.E.2d 991, wherein the court held that a corrections officer's unjustified use of force against an inmate does not automatically take his actions outside the scope of his employment, and the state may be held liable under the theory of respondeat superior." (emphasis added)

The Second District Court was correct in holding that as a matter of law Appellant was vicariously liable for the actions of Jamie Plaliath. The facts are undisputed that she was working for Appellant when she sold the rental properties to Appellee Auer. Appellant does not dispute nor can they contest the findings of the Second District Court of Appeals regarding the sales therein. Upon reviewing paragraphs 47 through 52 of the Second District Court of Appeals Opinion , the Court will find that the un-refuted facts are somewhat simple relating to the sales of the rental properties by Jamie Palia-

th to Appellee Auer.

The facts are clear that Appellant received a commission for all of the sales of the rental properties in this action. Appellant received commissions for the sales of the properties: 117 Belton Street in the amount of $180.00 to be split with Jamie Paliath, 1119 Richmond Avenue Dayton, Ohio in the amount of $3,600.00 to be split with Jamie Paliath and 1111 Richmond Avenue Dayton, Ohio in the amount of $2,400.00 to be split with Jamie Paliath. (See Plaintiff's Exhibits 146, 147 and 150) (See transcript p 64-65 testimony of Tim Stamen p 687 testimony of Jamie Paliath)

Appellant received various benefits from the actions of Jamie Paliath specifically the commissions. Appellant cannot dispute the fact that their company documents are incorporated throughout the transactions from the signing of the contract for the sale of the rental properties to the closing of the rental properties. All of these activities were done on behalf of Appellant. Appellant cannot claim that Jamie Paliath's action severed their relationship because she was doing her job as a real estate sales person on behalf of Appellant. The Second District Court held in *Webb v Higgs* (2012) 2012 Ohio 3297 :

"It is well established that an employee who commits a tort must be acting in the scope of his employment in order for his employer to be held liable under the doctrine of respondeat superior. *Grubb v. Security National Bank and Trust Co.*, 2d Dist. Clark No. 06-CA-1034, 2007-Ohio-1034, ¶ 9. Whether an employee is acting in the scope of his employment ordinarily is a question of fact for a jury to decide. Id. at ¶ 10. The scope-of-employment issue becomes a question of law, however, when reasonable minds can reach only one conclusion. Id This court

has applied a three-part test, recognizing that "a servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master."*Cooke v. Montgomery Cty.*, (2004) 158 Ohio App.3d 139, 2004-Ohio-3780, 814 N.E.2d 505, ¶20."

The basic premise for a real estate sales person is to sell real estate. The real estate broker is the person or entity who oversees the sale of said real estate. The sale is in large part to serve the master, as the real estate broker obtains a commission therein. This is a simplistic overview of the real estate salesperson and the real estate broker relationship but it points out the important tenets of the scope of employment therein. Upon reviewing the evidence in this case, reasonable minds can only surmise that Jamie Palaith was acting within the scope of her employment as a matter of law.

Appellee directs this Court's attention to the holding of the Seventh District Court of Appeals in *Carter v R&B Pizza Co. Inc.* (2010) 2010 Ohio 5937 and its application of *Osborne v Lyles* (1992) 63 Ohio St 3d 326:

" The evidence in this case was not complicated. There simply was not sufficient evidence to support the jury's verdict. Even when construing the evidence in the light most favorable to appellee, reasonable minds could only conclude that appellant was within the scope of her employment. Thus, the trial court should have granted appellant either a directed verdict or a JNOV."

The Trial Court further applied the same principals in favor of Appellant when it determined that as

"a matter of law" that Appellant was not liable for any damages that Appellee Auer incurred for matter relating to rehabbing the rental properties in question. (See tr 851-852)

When the facts are straightforward, as they are in this case, then scope of employment is a matter of law and the judgment should not be disturbed. The relationship of the real estate salesperson and the real estate broker are clear that the broker has a responsibility to third parties. A real estate broker will be held liable for intentional torts committed by salesman acting within the scope of their authority. *Zell v Ohio Superintendent of Real Estate* (1992) 79 Ohio App 3d 297 The Second District Court of Appeals held in *Commercial Business Systems v. Aztec Partnership (1997) 1997 Ohio App Lexis 4785* :

" A real estate broker will be held vicariously liable for intentional torts committed by salesman acting within the scope of their authority. 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. A salesman is required to be under the supervision of a licensed broker in all of his activities related to real estate transactions."

Appellant argues that Aztec is not applicable but it follows the sentiment of *Fulton v. Aszman* (1982) 4 Ohio App 3d 64 regarding the basic point that a real estate sales person only functions through his real estate broker. This Court through its Board of Commissioners on Grievances and Discipline trough Opinion 2006-1 cites to *Fulton v Aszman*. Appellant has implied that the aforementioned case has no validity because it not binding however, said case certainly allows this Court to have guidance to import the relationship between a real estate salesperson and a real estate

broker to be one in which the salesperson is dependent upon the broker.

Appellant throughout has argued the status of Jamie Palaith being a "rogue" salesperson. Appellant does not even argue that it took on a supervisory role of any sort. The evidence supports the fact that there was; little training, minimal supervision and no control. . The testimony by Tim Stamen establishes the fact that as the broker, Appellant really did not assert any type of a supervisory role. "I have no control over what they do outside of my office". (See transcript p 53) The testimony of Jamie Paliath established further the lack of any supervision for someone with a brand new license to sell real estate was given an orientation meeting of approximately thirty minutes and not much else regarding training or supervision. (See transcript 844-847, 873-874)

CONCLUSION

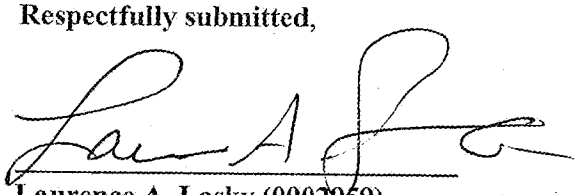
The Trial Court gave proper jury instructions in this action and the Opinion of the Second District Court of Appeals is correct. Jamie Paliath was acting within the scope of her employment as a matter of law as the facts are undisputed and no other inferences can be drawn relating to the sale of the rental properties in question. Conversely the Trial Court appropriately as a matter of law held that Appellant was not liable for the damages relating to rehabbing the rental properties because that was outside the scope of Jamie Paliath's employment.

Appellant and the other "interested parties" have claimed that the Second District Court of Appeals and the Trial Court erred in the jury instruction and the Opinion therein. Claims have been made that the real estate industry will be impacted in such a way that potentially the incentive for becoming a real estate broker will somehow be limited. An argument to the contrary would be that to reverse and remand this action would only encourage lackadaisical attitudes toward managing sales personnel and consumers would suffer the most. Real estate brokers would merely state that the matters were out of their control and there would be no incentive to supervise competently.

This case boils down to a matter of responsibility. A broker must take some affirmative steps to insure that brand new sales persons are watched closely and supervised accordingly. When the only concern is how much the commission is, then further action is required by the real estate broker. The facts are

straightforward in this case. Appellant failed to supervise or even monitor Jamie Paliath as required by law.

Respectfully submitted,



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I hereby certify that a copy of the foregoing was served upon the following via ordinary U.S. Mail, this 3rd day of September, 2013.

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