

IN THE SUPREME COURT OF OHIO

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

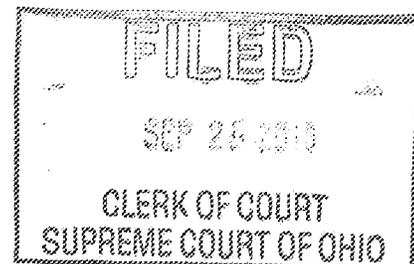
**REPLY BRIEF OF APPELLANT
 KELLER WILLIAMS HOME TOWN REALTY**

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I. ARGUMENT

A. Introduction

Appellee's Merit Brief is a remarkable filing. Despite its relative brevity, Appellee's Brief is largely devoted to an issue not even before the Court in this appeal. As she did at the intermediate appellate level, Appellee in her Brief fulminates wildly about some supposed "failure to supervise" the actions of rogue agent Jamie Paliath by Home Town. Unsurprisingly, however, Appellee neglects to inform this Court that the trial court did not permit the jury to consider any such theory, that she never objected to the rejection of this theory by the trial court, that she failed to preserve any claimed error by the trial court by cross-appealing thereon, or that her own expert debunked the validity of such a theory by acknowledging that a mendacious con artist like Jamie Paliath can evade even "very strict" policies employed by a broker to detect or prevent improprieties committed by such a salesperson. That Appellee felt constrained to devote the bulk of her Merit Brief erecting and then pummeling a strawman argument not even before the Court betrays her lack of confidence in prevailing on the issues that actually *are* before the Court.

The balance of Appellee's Brief fares no better, seeking as it does to justify an indefensible rule mandating strict liability for Ohio real estate brokers in general and Home Town in particular. As Appellee would have it, insofar as it pertains to the vicarious liability of Home Town it matters not at all that unbeknownst to Home Town Jamie Paliath duped and deceived it, violated her agreement with it, and actually competed against it by operating her own real estate and property management firms while affiliated with it, all of which her expert acknowledges was beyond the scope of her relationship with Home Town. Not since Dorothy was admonished by Professor Marvel to pay no attention to the

man behind the green curtain has such an audacious misdirection ploy been attempted. Appellee's stratagem and the arguments she offers to support it simply collapse upon close inspection.

B. Appellee's "Failure to Supervise" Theory Is Not Even Before The Court

As noted above, an extraordinary percentage of Appellee's Merit Brief appears devoted to an issue or legal theory not even before this Honorable Court in this appeal. Appellee's Brief, as especially the so-called "Facts" section, at various points hints darkly that Home Town was lax in its monitoring of Ms. Paliath. Indeed, Appellee goes so far as to suggest that this supposed laxity represents the "crux" of her claim against Home Town. (Brief at 2). Any such contention is positively excluded by the record before this Court, which instead shows the rejection of this theory by the trial court and Appellee's utter failure to preserve the issue for appellate review. In point of fact, it is so plainly evident that such a theory is *not* before this Court that Appellee's apparent fixation upon can satisfactorily be explained only by some misplaced desire of Appellee to belittle Home Town in the eyes of the Court for whatever incidental benefit Appellee believes may be gained by doing so.

Appellee's original Complaint did, in fact, allege without elaboration that Home Town failed to supervise Ms. Paliath. (Complaint, ¶ 24). At trial, however, the Court expressly advised the parties that no negligence-based legal theory would be presented to the jury and that Home Town's liability, if any, would arise vicariously from Ms. Paliath's having committed an intentional tort. (Tr. at 850-853). Appellee voiced no objection at that time. Moreover, Appellee did not object to the *absence* of any jury instruction based upon some "failure to supervise" theory either before the jury instructions were given (*id.* at

904-905) or after they were given. (*Id.* at 1006). As has been noted by Home Town throughout, the lone theory upon which the jury was instructed was the erroneous instruction that Home Town was vicariously liable if Jamie Paliath “committed fraud”. (*Id.* at 989). And, as is self-evident from the record, Appellee at no time cross-appealed or otherwise preserved for appellate review the preclusion of her “failure to supervise” theory from the jury’s consideration.

Appellee’s murmurings about some vague notion of Home Town “failing to supervise” Ms. Paliath has no place in the oral argument to be held before this Court. Indeed, that Appellee would even raise the topic is ironic given that it was her expert, Judith Lancaster, who testified that Home Town was “very strict” (Tr. at 507) about ensuring that all purchase contracts, disclosure forms, and other documents related to a property transaction were completed properly. Moreover, Ms. Lancaster freely confirmed that when a duplicitous salesperson like Jamie Paliath conceals her illicit activities like Ms. Paliath did, no amount of supervision could be expected to detect them. (*Id.* at 506-509). Regardless, it is clear beyond peradventure that Appellee’s “failure to supervise” theory is not before the Court.

C. APPELLEE’S ADMITTEDLY “SIMPLISTIC” LIABILITY ANALYSIS IS FLATLY INCONSISTENT WITH APPLICABLE PRECEDENT

The balance of Appellee’s Merit Brief actually *does* address an issue before this Court, being the propriety of the Court of Appeals’ ruling mandating strict vicarious liability for brokers whenever an affiliated salesperson commits an intentional tort that

produces a commission shared in by the broker.¹ Not unexpectedly, Appellee applauds the ruling of the court below and posits ominously that a reversal thereof by this Court would encourage “lackadaisical attitudes” by real estate brokers across the state. (Brief at 14). In point of fact, however, the complete opposite is true – if the Court of Appeals’ ruling is allowed to stand why should brokers even enforce their ethical rules, “very strict” policies against haphazard or maleficent practices, and the terms of the agreements with salespersons prohibiting unlawful or illicit conduct when they are strictly liable anyway? Appellee’s haste to praise the approach adopted by the court below renders her policy argument simply too clever by half.²

Stripped of its excess verbiage, Appellee’s argument is simply that real estate salespeople sell real estate, so it does not matter how badly the broker has itself been actively deceived nor does it matter how many policies, procedures, statutes, ethical rules, or contractual provisions the rogue salesperson has violated along the way. The complete absence of authority, either in caselaw or statute, for such a sweeping overreach was addressed at length in Home Town’s original Brief and need not be repeated herein. For present purposes, it suffices to say that Appellee’s approach is flatly inconsistent with the numerous and oft-repeated pronouncements of this Court admonishing that no authoritative definition of “scope of employment” is possible because each case is *sui generis*. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 344 N.E.2d 334

¹ Conspicuous by its absence from Appellee’s Brief is any effort whatsoever to defend the misleading and erroneous jury instruction given on the issue of Home Town’s vicarious liability that was discussed and dissected at pages 21-27 of Home Town’s Brief. As Appellee’s Brief notes only and in passing that the instruction was “proper” (Brief at 14), there is simply nothing to reply to on this point.

² Home Town would hasten to add that it is simply demonstrating the absence of logic in Appellee’s argument and not suggesting brokers in Ohio would suddenly become scofflaws.

(1976); *Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513, 92 N.E.2d 677 (1950); *Tarlecka v. Morgan*, 125 Ohio St. 319, 181 N.E. 450 (1932).

Facts, it is often said, are stubborn things. Here, the only “benefit” of the approach championed by Appellee is that it enables her to ignore and avoid the stubborn but undisputed facts that unalterably lead to the conclusion that Ms. Paliath embarked on a self-serving scheme to enrich herself at the expense of others, including Home Town. Again, Appellee’s *own expert* testified that Ms. Paliath’s many nefarious undertakings such as her unlawful real estate and property management firms, as well as her property renovation firm were outside the scope of her authority at Home Town. Under Appellee’s approach, however, a jury question *was not even presented* on Ms. Paliath’s scope of employment notwithstanding her having actively concealed her illicit activities and competed against Home Town while affiliated with it. As Home Town noted in its original Brief, a less appetizing set of facts by which to judicially promulgate a rule of law mandating broker liability is hard to envision.

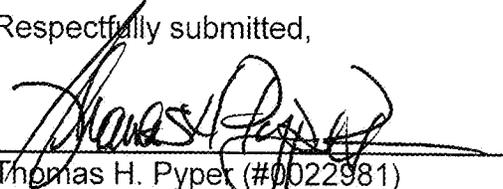
Finally, it bears noting that under the admittedly simplistic (Brief at 11) analysis forwarded by Appellee and adopted by the Court of Appeals, a broker such as Home Town is simply rendered powerless to defend its own interests no matter how egregious the conduct of a salesperson may have been. That a particular salesperson was affiliated with a broker and that the broker may have collected a commission from a transaction is practically the stuff of judicial notice. Under the Court of Appeals’ approach, once these facts are established a broker is rendered a mere bystander, stripped of any ability whatsoever to defend its practices or argue the salesperson’s conduct was flatly prohibited. The broker would thus be reduced to mere observer status at trial even though

its very livelihood and continued existence is thrown into question. For such a result to be imposed by judicial fiat is both unwise and unjust.

II. CONCLUSION

Nothing set forth in Appellee's Brief justifies the affirmance of the unjust and ill-advised ruling of the Court of Appeals under review. Appellee's "failure to supervise" theory is clearly not before the Court, and serves mainly as a pretext to enable Appellee to blindly strike out at Home Town as if it were a piñata. And, to the extent Appellee addresses the issues before this Court at all, her argument consists of an admittedly simplistic analysis hopelessly at odds with well-settled authorities from this Court eschewing sweeping generalities in favor of a fact-intensive analysis uniquely suited for a jury's consideration. For these reasons, as well as for the reasons more fully explicated in Home Town's original Brief, and the Amicus filings submitted in support of Home Town the judgment of the courts below must be reversed and this matter remanded for a new trial before a properly-instructed jury.

Respectfully submitted,



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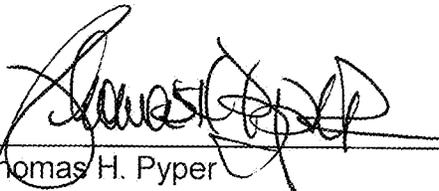
This is to certify that a true and exact copy of the Reply Brief of Appellant has been duly served upon all parties or counsel of record, as set forth below, via regular U.S. Mail, postage prepaid, on this 25th day of September, 2013.

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