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Millennia Investment Corporation v. Attorneys' Title Guaranty Fund, Inc., and Granie Title and Insurance Agency, Inc. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MILLENNIA INVESTMENT)	
CORPORATION, a Utah corporation,)	
)	
Plaintiff/Appellant,)	
)	Case No. 20010401-SC
vs.)	
)	
ATTORNEYS' TITLE GUARANTY FUND,)	Subject to Assignment to the
INC., a Colorado corporation, and GRANITE)	Utah Court of Appeals
TITLE AND INSURANCE AGENCY, INC.,)	
a Utah corporation,)	
)	Priority No. 10
Defendants/Appellees.)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM AN INTERLOCUTORY ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY
HONORABLE J. DENNIS FREDERICK, DISTRICT JUDGE
CIVIL NO. 000902574**

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FILED
UTAH SUPREME COURT

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PAT BARTHOLOMEW

IN THE UTAH SUPREME COURT

MILLENNIA INVESTMENT CORPORATION, a Utah corporation,

Plaintiff/Appellant,

vs.

ATTORNEYS' TITLE GUARANTY FUND, INC., a Colorado corporation, and GRANITE TITLE AND INSURANCE AGENCY, INC., a Utah corporation,

Defendants/Appellees.

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PRELIMINARY STATEMENT

In resolving this appeal, the Court need only consider one question: Did ATGF present evidence to the trial court sufficient to establish, as a matter of law, that ATGF was entitled to judgment on Millennia's claim under Utah Code Ann. § 31A-23-308? The answer to this question is clearly "no." ATGF repeatedly declares that section 31A-23-308 is arbitrary, but ATGF's argument is almost entirely devoid of citations to the trial court record. ATGF thus failed to satisfy its burden as the party seeking summary judgment and as the party seeking to have a statute declared unconstitutional.

The Court should also note that ATGF has not disputed many of the key points Millennia made in its opening brief. ATGF does not dispute that title insurers profit by marketing their policies through agents who provide escrow services, or that without section 31A-23-308, title insurers might escape liability for their agents' mishandling of escrowed funds. Similarly, ATGF does not dispute either that the common law often imposes liability on a principal regardless of the principal's direct knowledge of the agent's activities or that ATGF had the same knowledge of Granite Title's activities as does any principal. Finally, ATGF does not dispute that it could have prevented the losses that occurred in this case.

Section 31A-23-308 is perfectly reasonable. In enacting section 31A-23-308, the legislature determined that the doctrine of *respondeat superior* should be supplemented to ensure that title insurers, who profit from their agents' escrow activities, do not escape liability for their agents' mishandling of escrowed funds. There is absolutely

nothing wrong with this determination. The statute should therefore be enforced as written, and the summary judgment dismissing Millennia's statutory claim should be reversed.

RESPONSE TO APPELLEE'S STATEMENT OF FACTS

In reading ATGF's Statement of Facts, the Court should remember the unique procedural posture of the case and the resulting disadvantage to Millennia. To the extent that ATGF provides evidentiary support for its interpretation of the facts, ATGF relies almost entirely on affidavits or depositions that were submitted only in opposition to Millennia's motion for summary judgment below. Accordingly, because those affidavits and depositions were not submitted in support of ATGF's own motion, and because the case below has not proceeded to trial, Millennia has never had a proper opportunity to dispute those affidavits and depositions.

Rather than unnecessarily refuting ATGF's factual presentation, however, Millennia reminds the Court that this appeal concerns the granting of ATGF's motion, which ATGF asserted was based entirely on three facts: (1) ATGF did not know about the White Property transaction; (2) Granite Title did not ask ATGF to issue title insurance on the property involved; and (3) title insurance agents are not the only ones providing escrow services in Utah. (See Mem. in Support of ATGF's Mot. for Partial Summ. J., Add. Ex. 2, at iv-v, R. 291-92.) Thus, the issue before this Court is whether those three facts are sufficient to entitle ATGF to judgment as a matter of law. And those three facts clearly are not sufficient.

ARGUMENT

I. THE INTERLOCUTORY APPEAL IS NOT MOOT.

The Court can summarily reject ATGF's claim that the appeal is moot because Millennia did not challenge an alleged ruling that "even if section 31A-23-308 is constitutional, it does not apply to the facts of this case." (Appellee's Br. at 13.)

A. Millennia has challenged all pertinent aspects of the ruling dismissing Millennia's claim under section 31A-23-308.

1. The trial court did not dismiss the claim on the basis that section 31A-23-308 did not apply even if constitutional.

ATGF cites paragraph B(3) of the Order as the ruling Millennia supposedly did not challenge. (See Appellee's Br. at 13 (citing Order ¶ 3, R. 1031).) That ruling, however, does not state that section 31A-23-308 would not apply even if it were constitutional. Instead, paragraph B(3) states the *opposite*: that the statute is unconstitutional as written, and that because it is unconstitutional, it must be "read" and "construed" to add certain limitations that do not appear in the statute itself.

Utah Code Ann. § 31A-23-308 *violates the due process clause* of the Utah Constitution, Article I, Section 7 because the statute imposes liability on someone other than the party at fault (here, the title company) which had no knowledge of and could not be expected to have prevented the actionable conduct. To *construe* § 31A-23-308 in a constitutionally permissible manner requires that the statute be read to require that the title company have some knowledge and/or control over the fraudulent acts of the title insurance agent before liability is imposed. Thus, the statute *must be read* to require that the title company issue or distribute a commitment, accept an order for title insurance, or otherwise participate in the transaction before being held liable.

(Order ¶ B(3), Add. Ex. 1, R. 1031 (underlining in original, italics added).)

Thus, the trial court's construction of the statute in the second and third sentences of paragraph B(3) was driven by the court's determination (stated in the first sentence) that the statute "violates the due process clause" if applied according to its plain language. Even ATGF acknowledges this. (See Appellee's Br. at 37-38 ("[E]ven if the trial court in this case read an exception into section 31A-23-308, it did so only after recognizing that ATGF's 'due process claims ... raise significant doubt about the constitutionality [of the statute].").)

2. Millennia challenged both the ruling that the statute was unconstitutional as written and the ruling that the statute had to be interpreted to require the insurer's direct involvement.

Moreover, Millennia plainly challenged both aspects of paragraph B(3). In fact, Millennia spent *ten full pages* in its brief doing so. (See Appellant's Br. at 32-38, (section entitled "The Trial Court Erred in Concluding that Section 31A-23-308 Violates Article I, Section 7"); *id.* at 38-42 (section entitled "The Trial Court Erred in Construing Section 31A-23-308 to Require the Title Insurer to Participate Directly in a Transaction Before Being Held Liable.")) Millennia's statement of issues also makes clear that the appeal is not limited to the purely academic question of the statute's constitutionality; instead, the issue is "[w]hether the trial court erred in granting partial summary judgment dismissing [Millennia's] claim against [ATGF] for liability under

Utah Code Ann. § 31A-23-308."¹

Finally, *ATGF admits that Millennia challenged the ruling in paragraph (B)(3)*. In its brief, ATGF quotes paragraph B(3) in its entirety and states that "*Millennia attacks this ruling* and scolds the trial court" for making it. (Appellee's Br. at 36-37 (emphasis added).) Thus, having admitted that Millennia "attacked" the ruling, it is simply ludicrous for ATGF to simultaneously assert that Millennia is not challenging that ruling in this appeal.²

B. Any mootness challenge would be inappropriate because this is an interlocutory appeal and no final rulings have been made below.

Because this is an interlocutory appeal, the Court need not even address the mootness issue. An issue on appeal is moot only if granting the requested relief "cannot affect the rights of the litigants." State v. Sims, 881 P.2d 840, 841 (Utah 1994) (quotation omitted). In the present case, the litigation is still pending below, and all rulings are "subject to revision at any time." Utah R. Civ. P. 54(b). Thus, it is pure speculation for ATGF to imply that the litigation will ultimately be disposed of on the

¹ Millennia's interlocutory appeal petition also clearly addressed these issues. The issue was described as "Did the trial court err in granting partial summary judgment dismissing Millennia's claim against ATGF under Utah Code Ann. § 31A-23-308?" (Pet. for Permission to Appeal Interlocutory Order at 4), and section II of the argument asserted that "Section 31A-23-308 Does Not Require that the Title Insurer Directly Participate in the Actual Transaction for Liability to Attach." (Pet. at 14.)

² ATGF's mootness argument is based entirely on one sentence in Millennia's brief, which appeared in a footnote in the statement of facts. To present an argument based on this one sentence, while ignoring the entire rest of the brief, is disingenuous.

basis of any allegedly unappealed ruling.³ The cases ATGF relies upon are thus inapplicable, because those cases involved appeals from final judgments.

II. SECTION 31A-23-308 DOES NOT VIOLATE THE UTAH CONSTITUTION'S UNIFORM OPERATION OF LAWS PROVISION.

ATGF's claim that section 31A-23-308 violates article I, section 24 fails because (1) ATGF has presented no evidence that the statute treats title insurers differently from any similarly situated entity, and (2) the evidence ATGF presented below, that entities besides title agents provide escrow services, is simply insufficient to establish as a matter of law that section 31A-23-308 imposes an arbitrary or unreasonable classification. ATGF fails to rebut Millennia's argument that the legislature properly enacted section 31A-23-308 to ensure that because title insurers profit from the escrow services provided by their title agents, they should protect the public from the losses that result when those agents mishandle escrowed funds. It is also perfectly plausible to conclude that the legislature did not include anyone else within section 31A-23-308 *because there was no one else in a similar position*, i.e., there was no one else who profits from another's escrow activities while (potentially) not already subject to liability under the common law. Further, ATGF is really arguing that section 31A-23-308 is unconstitutional because it does not go as far as it could, which is not a proper basis for striking down a statute.

³ Notably, Millennia moved to have the April 16 Order certified as final, but ATGF opposed Millennia's request, and the trial court denied the motion. (See Mot. for Rule 54(b) Certification, R. 982-93; Minute Entry Ruling, April 16, 2001, R. 1023

A. ATGF's failure to present evidence dealing with *title insurers* renders it impossible for ATGF to prove that the statute unfairly discriminates against title insurers or otherwise violates the equal protection rights of title insurers.

1. Because the statute operates on title insurers, not on title agents, the constitutional analysis must focus on whether material differences exist between title insurers and entities not subject to the statute.

Because the evidence ATGF presented below did not address title insurers at all, but instead addressed only title agents, there was no basis for the trial court to rule that section 31A-23-308 violates a title insurer's right to the uniform operation of laws. For a statute to violate article I, section 24 by imposing a liability on title insurers, there must be someone analogous or "similarly situated" to a title insurer who is not subject to that liability. The very *essence* of an equal protection or uniform operation challenge is that one group of persons is impacted a certain way by a statute while another group is not.⁴ Indeed, the terms "*equal* protection" and "*uniform* operation" connote comparisons. Yet ATGF has presented no evidence that there is someone analogous to a title insurer who is not subject to the liability of section 31A-23-308, nor has ATGF presented evidence that there was no rational basis to distinguish between title insurers and persons not subject to the statute.

(denying motion "for the reasons specified in the opposing memoranda.".)

⁴ See, e.g., John E. Nowak & Ronald D. Rotunda, Constitutional Law § 14.1, at 634 (6th ed. 2000) (emphasis added) ("Equal protection is the guarantee that *similar* people will be dealt with in a *similar* manner."); Crider v. Board of County Comm'rs, 246 F.3d 1285, 1288 (10th Cir. 2001) (quotation omitted) ("[A] violation of equal protection occurs when the government treats someone differently than another who is

Attempting to evade this point, ATGF implies that because the statute supposedly uses an "arbitrary" classification, the statute violates ATGF's equal protection/uniform operation rights *even if there is a legitimate basis for distinguishing between title insurers and other entities*. (See Appellee's Br. at 29 ("differences between those impacted by the law [do] not remedy the fact that the law's impact is based on an arbitrary classification").) ATGF's reasoning begs the question, however, for if a statute legitimately imposes liability on one group but not another, then the classification used to achieve that legitimate result is by definition not arbitrary. Put another way, if a classification results in liability being imposed in a proper way, then that classification "bears a reasonable relationship to the achievement of a legitimate legislative purpose." Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884, 890 (Utah 1988).

ATGF is simply wrong when it argues that the pertinent classification is between title agents and other escrow providers. In proposing this classification, which is not stated in the statute itself, ATGF is asking the Court to ignore the actual operation of the statute, even though the Utah Constitution requires uniform "operation" of laws, and even though this Court's equal protection/uniform operation analysis focuses on the treatment afforded by a statute.⁵

similarly situated.'")

⁵ See, e.g., Blue Cross & Blue Shield of Utah v. State of Utah, 779 P.2d 634, 637 (Utah 1989) (emphasis added) (purpose of uniform operation provision is to prevent classifications "in such a manner that those who are similarly situated with respect to the purpose of a law are *treated differently by that law*"); Mountain Fuel Supply, 752 P.2d at 887 (emphasis added) ("The essence of equal protection is that

Because the proper focus of the uniform operation analysis is on a statute's operation, the only proper classification to be analyzed is the classification between title insurers and other entities. Section 31A-23-308 does not classify title agents and other escrow providers in its operation, i.e., it does not impose a liability on title agents while exempting other escrow providers from that liability.⁶ Instead, the statute imposes liability on title insurers and no one else. The classification between title insurers and others is thus the proper focus of ATGF's challenge. Cf. Blue Cross, 779 P.2d at 638 ("[W]e conclude that we must accept [the classifications imposed by the operation of the statute] for the purpose of analyzing the constitutionality of the premium tax").⁷

legislative classifications *resulting in differing treatment for different persons* must be based on actual differences that are reasonably related to the legitimate purposes of the legislation."); Malan v. Lewis, 693 P.2d 661, 671 (Utah 1984) (emphasis added) ("[T]he statutory classification *and the different treatment given the classes* must be based on differences that have a reasonable tendency to further the objectives of the statute.").

⁶ Further, the language of section 31A-23-308 does not reveal an intent to "classify" between title agents and other escrow providers. Instead, the only intent shown by the statute is the intent to hold title insurers liable for the losses caused by their agents.

⁷ ATGF claims that being "similarly situated" is not a separate requirement to demonstrate unconstitutionality, but rather the term used to describe merely the result of the three-step analysis this Court has described in its cases. ATGF cites no authority for this proposition, however. Cf. Crider, 246 F.3d at 1288 (emphasis added) (citation and internal punctuation omitted) ("To state a valid equal protection claim, therefore, Paradise Lane Owners *must allege facts sufficient to establish that they are similarly situated to Storage Tek*.")

Further, ATGF again has its analysis backward. This Court has repeatedly stressed that the uniform operation of laws provision functions to ensure similar treatment *for those who are similarly situated*, and the different "tests" that have been described in various cases are simply methods the Court has used to achieve that result. It would be erroneous to suggest that a statute can be struck down under the uniform

2. Because ATGF has failed to present any evidence regarding title insurers, ATGF cannot show that its constitutional rights would be violated by enforcing the statute against it.

ATGF's failure to present evidence going to the validity of the classification between title insurers and others is fatal to its uniform operation claim. ATGF asserts that the differences between title insurers and "other employers of escrow agents" are not related to the purpose of the statute (Appellee's Br. at 33), but this argument fails for two reasons.

First, of course, ATGF cites no evidence to support its argument. In fact, there is no evidence to suggest that any "other employers of escrow agents" even exist. Second, ATGF's premise that "none of the qualities unique to title companies make a certain class of escrow agents any more or less trustworthy, careful, or reckless" (id.), even if true, does not establish unconstitutionality, because the reliability of escrow agents is not the only purpose furthered by section 31A-23-308. ATGF acknowledges that one of the legitimate purposes of section 31A-23-308 is to "protect the public from losing [its] money deposited in escrow because it was mishandled or intentionally

operation provision even if the complaining party does not show that the statute provides different treatment for those who are similarly situated.

Ultimately, however, it does not matter whether "similarly situated" is considered a separate element. Millennia's point is simply that the analysis must focus on title insurers, regardless of how the "test" is phrased. Thus, ATGF, as a title insurer, cannot prevail on a uniform operation challenge unless it can show that title insurers are treated differently from other entities for no legitimate reason.

misappropriated."⁸ (Appellee's Br. at 19.) This purpose is achieved not only by preventing the mishandling or misappropriation of funds, but *also by ensuring a viable source of recovery when funds are mishandled or misappropriated*. Imposing liability on title insurers for losses caused by their agents clearly furthers this legitimate purpose, and ATGF has neither identified anyone in a similar position who is not subject to such liability, nor shown that there are no "actual differences [between title insurers and those similarly situated persons] that are reasonably related to the legitimate purpose of the legislation." Mountain Fuel Supply, 752 P.2d at 887.

B. Even if title agents were the proper focus of the analysis, summary judgment should still be reversed because the evidence ATGF presented is insufficient to establish that the statute is unconstitutional.

Even if ATGF were correct that the analysis should focus on the classification that section 31A-23-308 supposedly draws between title agents and other escrow providers, reversal would still be required. ATGF's evidence regarding title agents consists entirely of only one "fact": title agents are not the only ones who provide escrow services. This is simply not enough to prove that distinguishing between title agents and other escrow providers is arbitrary and irrational.

⁸ As pointed out in Millennia's opening brief, section 31A-23-308 furthers other purposes as well. By imposing liability for the loss of funds placed in escrow with a title agent, one obvious purpose of the statute is to protect persons who place funds in escrow with title agents. Another purpose, as stated by the legislature, is to encourage "self regulation" and "loss prevention" of the insurance industry. Utah Code Ann. § 31A-1-101(8), (9). Yet another purpose, revealed by the statute's placement in the

Because the presumption that a statute is constitutional is so strong, a statute will be upheld against a uniform operation challenge if "facts *can reasonably be conceived* which would justify the distinctions or differences in state policy as between different persons." Baker v. Matheson, 607 P.2d 233, 244 (Utah 1979) (emphasis added) (citing Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911)). In Millennia's opening brief, Millennia posited several reasonably conceivable differences between title agents and other escrow providers that could justify distinguishing between the two. Most importantly, it can "reasonably be conceived" that title agents pose a greater risk of defalcation than other escrow providers, that title agents are the only escrow providers who commonly work through limited agency relationships, or that other providers are subject to different regulations that are sufficient to protect the public from loss. ATGF fails to refute these justifications for distinguishing among escrow providers.

ATGF asserts that there are no relevant differences between title agents and other providers, but ATGF once again fails to cite evidence to support its position. In fact, ATGF's nineteen-page "uniform operation" argument contains exactly one citation to the trial record. (See Appellee's Br. at 15-34.) ATGF's argument thus amounts to mere speculation, which is not enough to justify overturning a properly enacted statute.

ATGF also repeatedly asserts that there is nothing about the activities of various escrow providers to suggest that title agents have a greater "propensity" for dishonesty

"marketing practices" section of the Insurance Code, is to regulate the marketing of insurance products.

or mistakes. Once again, even though this may be correct, this does not demonstrate unconstitutionality because ATGF does not address whether customers of title agents and customers of other escrow providers are equally able to obtain compensation in case of error or fraud. ATGF's failure to show that customers of title agents have the same protections against loss as do customers of other escrow providers, when protecting against loss is an admitted purpose of statute, defeats ATGF's attempt to show that classifying between title agents and other providers is unconstitutional.

C. Greenwood's underinclusiveness analysis controls this case.

ATGF's attempts to distinguish the present case from Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991), are unavailing, because the challenge that ATGF makes herein is fundamentally identical to the challenge raised in Greenwood. In Greenwood, the plaintiffs complained that it was unfair to regulate pit bulls but not other dogs that might also cause the same harm:

Plaintiffs also argue that the ordinance is underinclusive and therefore violates equal protection because of the many breeds which are not included. Plaintiffs assert that all dogs can and do bite.

Greenwood, 817 P.2d at 821. The court, however, recognized that "a law is not made unconstitutional simply because it does not cover all possible evils," and that "the fact that other breeds which might also threaten public safety are not included in the ordinance does not make the law violative of equal protection." Id.

Like the plaintiffs in Greenwood, ATGF complains that it is unfair to regulate title agents (or title insurers) but not other escrow providers that might also cause the

same losses. ATGF argues that section 31A-23-308 violates equal protection because of the many types of escrow providers which are not included, and ATGF asserts that all escrow providers can and do cause escrow losses. Greenwood's reasoning therefore applies: Section 31A-23-308 is not made unconstitutional simply because it does not cover all possible evils, and the fact that other escrow providers which might also cause escrow losses are not included does not make the statute violative of equal protection.

The only distinction between the present case and Greenwood is that in Greenwood the trial court made factual findings. This difference has nothing to do with any differences in the type or validity of the constitutional challenge, but rather because the trial court in the present case (erroneously) granted summary judgment.⁹

Thus, ATGF's surprising claim that it "is not challenging section 31A-23-308 on grounds of underinclusiveness" (Appellee's Br. at 28) flies in the face of basic principles of constitutional law. ATGF has asserted throughout this case that section 31A-23-308 violates the constitution because it covers title agents but not similarly situated escrow providers. *That's exactly what underinclusiveness is.*¹⁰

⁹ If Millennia is successful on this appeal and the Order is reversed, ATGF can seek an evidentiary hearing below on its constitutional challenge (assuming it can present evidence that would support a ruling in its favor). Millennia is fully confident that the findings arising out of such a hearing would be analogous to the findings in Greenwood: that because of easier entry in the field, because of the limited agency relationships, or because of simple market share, title agents pose a greater risk of loss to the public than do other escrow providers.

¹⁰ ATGF compounds its misleading argument when it claims that it is not challenging on grounds of underinclusiveness, but only on the ground that "the classification upon which the statute is based is arbitrary." (Appellee's Br. at 28.) The only

III. SECTION 31A-23-308 DOES NOT VIOLATE THE UTAH CONSTITUTION'S DUE PROCESS PROVISION.

ATGF has also failed to demonstrate that section 31A-23-308 violates article I, section 7 of the Utah Constitution. ATGF does not dispute that it hired Granite Title, held Granite Title out to the public, and profited from Granite Title's escrow activities. Nor does ATGF deny that it could easily have prevented the losses by monitoring Granite Title's escrow activities and requiring Granite Title to obtain insurance, post a bond, or maintain sufficient assets. And ATGF presents no evidence suggesting that it would be unfair to hold ATGF liable for its agent's misdeeds. Accordingly, it was perfectly reasonable for the legislature to enact section 31A-23-308.

The evidence submitted to support ATGF's due process claim shows only that ATGF was unaware of the underlying transaction. ATGF's lack of specific knowledge, however, does not raise a constitutional bar to liability, because liability is often imposed on a principal regardless of whether the principal specifically knows about the agent's actions at issue, and ATGF does not suggest that imposing liability on a principal in those situations violates due process. ATGF claims that *respondeat superior* does not apply in the present case because of issues relating to the scope of Granite Title's agency, but ATGF does not argue that its knowledge of, or its ability to control, Granite Title's activities was any different from the knowledge and ability to control

arbitrariness that ATGF claims, however, is statute's supposed failure to include the other escrow agents. In other words, ATGF challenges the alleged classification as arbitrary precisely *because* the classification is underinclusive.

enjoyed by any other principal. Thus, the trial court erred in holding that section 31A-23-308 violates due process by imposing liability "on someone other than the party at fault ... which had no knowledge of and could not be expected to have prevented the actionable conduct." (Order ¶ B(3), R. 1031.)¹¹

ATGF again unsuccessfully attempts to analogize its situation to Mountain States v. Payne, 782 P.2d 464 (Utah 1989). Unlike the unwitting employee in Payne, however, ATGF had both the opportunity and the ability to prevent the losses that occurred in the present case, because ATGF was Granite Title's principal and retained the right and ability to monitor and control Granite Title's escrow activities.

ATGF's parental liability cases are also inapposite. The majority position is that parental liability statutes do not violate due process rights. See In re James D., 455 A.2d 966, 967-70 (Md. 1983) (citing eight cases holding such statutes constitutional). Further, ATGF's reliance on Corley v. Lewless, 182 S.E.2d 766 (Ga. 1971), is misleading because Corley has repeatedly been recognized as an aberration.¹² And the

¹¹ For similar reasons, the Court should reject ATGF's assertion that it does not matter whether liability is imposed on a principal or an agent, and that constitutionality instead depends on "whether the party who is purportedly liable has some *direct connection* to the wrong-doing . . . giving rise to the plaintiff's damages." (Appellee's Br. at 41 (emphasis added).) Presumably, ATGF intends "direct connection" to mean knowledge of or involvement in the specific wrongdoing. Adopting ATGF's proposed standard would thus be illogical and unnecessary for the reasons set forth in the text.

¹² See, e.g., Vanthournout v. Burge, 387 N.E.2d 341, 343 (Ill. App. Ct. 1979) ("Only in Corley v. Lewless . . . has a parental responsibility law been held unconstitutional."); Piscataway Twp., 431 A.2d at 320 n.7 (citing Corley) ("Only in Georgia has such a statute been struck down . . ."); In re James D., 455 A.2d at 967 ("So far as we have been able to determine only in Corley v. Lewless . . . has a statute placing liability

relationship between ATGF and Granite Title is nothing like the relationship between a parent and a child. Unlike a parent, ATGF expressly chose Granite Title to be its agent and profited from Granite Title's activities. Also, because ATGF had the right to terminate the agency, ATGF could impose whatever restrictions it wanted on Granite Title, and Granite Title would have been forced to comply with those restrictions or forfeit its position as ATGF's agent. Needless to say, parents do not often enjoy a similar ability to control their children.

ATGF also improperly relies upon Frankel v. Cone, 107 S.E.2d 819 (Ga. 1959), which held it unconstitutional to impose liability on the owner of an automobile if the vehicle was used in the owner's business. ATGF notes that Frankel found the statute unconstitutional because the owner would be liable "even if the vehicle was operated without notice to the owner or without the owner's express or implied consent." (Appellee's Br. at 41.) Frankel is distinguishable, however, because ATGF knew that Granite Title was acting as an escrow agent and consented to Granite Title so acting. In fact, ATGF *required* Granite Title to conduct closings as a condition of receiving compensation. (See Agency Agreement ¶ 8(D), R. 87, Add. Ex. 5.) Further, as with ATGF's parental liability cases, Frankel is an aberration, as the majority of states have long held that it is constitutional to impose liability upon a vehicle owner for a driver's negligence even if the owner was not at "fault."¹³

upon parents been struck down.").

¹³ See Buehlke v. Levenstadt, 214 P. 42 (Cal. 1923); Levy v. Daniels' U-Drive

Finally, section 31A-23-308 does not violate ATGF's due process rights simply because the statute imposes liability that ATGF might not face under ordinary *respondeat superior* principles. Significantly, ATGF presents no authority suggesting that merely going beyond ordinary *respondeat superior* renders a statute unconstitutional. Instead, Utah law is clear that a statute does not violate due process unless the statute is not "reasonably related to the achievement of any conceivable legislative objective." Division of Consumer Protection v. Rio Vista Oil, 786 P.2d 1343, 1350 (Utah 1990). Section 31A-23-308 clearly is reasonably related to the objective of protecting the public from the loss of funds placed in escrow. And because ATGF had the ability to protect against losses that would arise from Granite Title's mishandling of escrowed funds, there is nothing unfair or unreasonable about imposing liability on ATGF.

IV. SECTION 31A-23-308 SHOULD BE INTERPRETED ACCORDING TO ITS PLAIN LANGUAGE INSTEAD OF BEING CONSTRUED TO ELIMINATE MILLENNIA'S CLAIM.

Finally, the Court should reject ATGF's attempt to defeat Millennia's claim by having limitations read into section 31A-23-308 that do not appear in the statute itself.

A. Because section 31A-23-308 is clearly constitutional as written, there is no justification for torturing the plain language of the statute.

As addressed in the "mootness" argument above, the trial court "construed" the statute to require knowledge or participation by a title insurer because the trial court felt

Auto Renting Co., 143 A. 163 (Conn. 1928); Robinson v. Bruce Rent-A-Ford Co., 215 N.W. 724 (Iowa 1927); Bridgeford v. U-Haul Co., 238 N.W.2d 443 (Neb. 1976); Downing v. New York City, 220 N.Y.S. 76 (N.Y. App. Div. 1927).

that otherwise, section 31A-23-308 would violate ATGF's due process rights. Section 31A-23-308 is clearly constitutional as written, however, so there was no basis for the trial court's tortured construction of the statute.

The Court can also reject ATGF's argument that the statute requires direct involvement by the title insurer simply because the statute imposes liability when a policy "of the title insurance company" is ordered or issued. The statute's requirement that a policy "of the title insurance company" be ordered does not involve the insurer in a transaction, because title insurers do not issue policies or accept commitment orders. As Millennia explained (and ATGF has failed to dispute), title agents, not title insurers, accept orders and issue policies, and title insurers do not know about policies when they are ordered or issued. Thus, there is no reason to conclude that including the phrase "of the title insurance company" in the statute implies a requirement that the insurer actually know about the transaction at issue. Instead, the language was apparently included to identify which insurer is liable if and when a title agent represents multiple insurers.

B. ATGF's "practical realities" argument fails.

Because title insurers do not accept orders, issue policies, or participate in transactions, interpreting section 31A-23-308 to require the insurer's direct participation makes little sense. Under this interpretation, the statute would almost never apply, and it is absurd to suggest that the legislature intended to enact a statute that provides no

protection whatsoever. ATGF's and the trial court's interpretation would thus deprive Utah's citizens of the protections the legislature obviously intended to provide.

Instead of disputing Millennia's argument that the trial court's construction of section 31A-23-308 renders the statute a nullity, ATGF argues that interpreting the statute according to its plain language would be difficult where a title agent writes policies for more than one insurer. ATGF presented this argument below, *but ATGF has never cited evidence establishing that any title agents write for more than one insurer*. ATGF attempts to remedy this problem on appeal by relying on certain advertisements that supposedly appear in a telephone directory, but this does not constitute evidence upon which a court can reliably base a statutory interpretation.

Further, even assuming that some title agents represent multiple insurers, the statute is still perfectly acceptable as written. In many or most cases (as in the present case) the settlement statement will identify the insurer to whom the title insurance premium is being paid. In other instances, the commitment or binder may identify the insurer. Or there may be other ways to determine which insurer's policy was involved in a given case.¹⁴

¹⁴ Because Granite Title issued policies only for ATGF, however (Horsley Aff. ¶ 4, R. 814-15), and because Granite Title specifically identified "Attorneys Title" as the insurer who would be issuing the title policy in the underlying transaction (Settlement Statement, R. 818), there is no question as to whose title insurance policy was ordered in the present case. Further, because the settlement statement expressly identified ATGF, ATGF's statement that "at no time did Millennia have any expectation that ATGF was in any way involved in the Transaction" is utterly false. (See Appellee's Br. at 40 n.8.)

The multiple-insurer problem is nothing new, nor is it particularly unique to the title insurance area. In fact, Utah law provides that when a multiple-insurer property or liability agent agrees to cover a particular risk and a loss occurs before the risk is placed with a particular insurer, a court may "equitably apportion the loss among all insurers with which the agent had binding authority as to the particular type of risk." Utah Code Ann. § 31A-23-305(3). ATGF has presented no reason to believe that a similar apportionment could not be done under 31A-23-308 if necessary.¹⁵

At most (assuming that citations to a phone book constitute evidence), ATGF has established that it may be difficult in some situations to apply section 31A-23-308 according to its plain language. ATGF's alternative interpretation, however, clearly departs from the language of the statute itself and would render it nearly impossible for the statute ever to apply. The purpose of statutory interpretation is to give effect to the intent of the legislature, and it is simply impossible to believe that the legislature went to the trouble of enacting section 31A-23-308 if it did not intend the statute to protect persons who lose their money when title agents mishandle escrowed funds.

C. Section 31A-23-308 is not limited to pure *respondeat superior* liability.

Finally, ATGF appears to suggest that section 31A-23-308 cannot apply unless the title agent's actions were within the scope of its agency. (Appellee's Br. at 42-44.)

¹⁵ One would also hope that if an agent was writing for three or four insurers, at least one of those insurers would be more responsible than ATGF and would monitor the agent's escrow activities or require the agent to post sufficient security to cover losses that may result from negligent or dishonest conduct.

ATGF did not raise this as a basis for summary judgment below, however, and the language of section 31A-23-308 certainly does not support such a restrictive interpretation. But perhaps most importantly, ATGF's argument makes no sense. It would be absurd to hold that the liability imposed by section 31A-23-308 is limited to the liability that already applies under *respondeat superior*. If the legislature wanted title insurers' liability to be limited to *respondeat superior*, there would have been no point in enacting the statute.

Even if the statute were construed as nothing more than a codification of *respondeat superior*, however, the summary judgment dismissing Millennia's claim should still be reversed, because ATGF has failed to present undisputed evidence establishing as a matter of law that Horsley was not acting as ATGF's agent in handling the escrowed funds. Horsley himself testified that he was acting on ATGF's behalf in the transaction, and ATGF admitted in pleadings filed against Horsley and Granite Title that Horsley was ATGF's agent and that Granite Title was obligated "as title agent for ATGF" to pay escrowed funds for closing costs and loan payoffs. (Aff. of Brian Coleman ¶ 10, R. 75; State Court Compl. ¶ 25, R. 84.) Thus, there clearly is evidence in the record that would support a ruling that Horsley was not acting as Millennia's agent. ATGF therefore is not entitled to summary judgment on that ground.

ATGF does not deny that a factual dispute exists concerning whether Horsley acted as ATGF's agent. Instead, ATGF relies on an alleged "finding" that Horsley was not acting as ATGF's agent and appears to assert that because Millennia supposedly did

not "appeal" that alleged finding, that finding now controls. There are several fatal flaws with ATGF's argument, however.

First, because the alleged finding is subject to reconsideration under Rule 54(b), any "permanent" reliance on that finding would be improper. More importantly, *ATGF misrepresents the alleged finding*. Contrary to ATGF's assertion, the trial court did not state that Horsley was not acting as ATGF's agent "on the transaction." (*Cf.* Appellee's Br. at 43.) Instead, the trial court found only that the actions of originating the loan, performing due diligence, and handling contact with the prospective borrowers were outside the scope of Horsley's agency. (*See id.*, quoting Order ¶ A(11) (emphasis added): "*Those actions* were not within the scope of Horsley's authority") Millennia's claim does not arise out of "those actions," however; it arises out of the mishandling of the escrowed funds, and the trial court did not find that Horsley and Granite were not acting on ATGF's behalf in handling the escrow account.

Further, to the extent that the language ATGF relies upon is even relevant, it does not constitute a "finding" because courts do not make factual findings in ruling on summary judgment motions; instead, courts simply determine whether the moving party has established a right to judgment as a matter of law. *See, e.g., Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 946 n.3 (Utah 1996). Moreover, the alleged finding is not relevant on the pending appeal because that finding was not made in connection with ATGF's summary judgment motion, but instead in the trial court's ruling on Millennia's summary judgment motion. This difference is critical, as one does not appeal

"findings"; one appeals orders. An order denying a summary judgment motion means only that the moving party must go to trial on its claims, so an order denying summary judgment is generally not appealable. See, e.g., Whalen v. Unit Rig, 974 F.2d 1248, 1251 (10th Cir. 1992) (emphasis added) ("[E]ven if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law . . . and appellate review of those motions if they were denied.").

Millennia has not acquiesced in the trial court's reasoning by not appealing the order in which that reasoning appears. In fact, Millennia has challenged the alleged finding *at every step of these appellate proceedings*. (See Pet. for Permission to Appeal Interlocutory Order at 4 n.4; Reply Mem. Supporting Pet. for Permission to Appeal Interlocutory Order at 3; Appellant's Br. at 10 n.3 (all pointing out that the trial court erred in stating that Horsley was not ATGF's agent).)

Finally, as a matter of law, "findings" made *against a party moving for summary judgment* are not binding in further proceedings. In a summary judgment motion, the evidence is strictly construed against the moving party. It would be unfair to hold that a party's failure to satisfy that steep evidentiary burden deprives that party of the right to even try to prove its case under the normal "preponderance of evidence" standard that governs at trial. See, e.g., Hopkins v. Garner & Glover Co., 504 S.E.2d 78, 80 (Ga. Ct. App. 1998) ("Since such 'finding' by the trial court went expressly to the denial of the defendant's motion for summary judgment as to the counterclaim, and not to the

grant of summary judgment for the plaintiff on such issue, then defendant was not bound by such 'finding' as the law of the case."); see also Kutner Buick v. American Motors Corp., 868 F.2d 614, 619 (3rd Cir. 1989) (party not entitled to jury instruction based on ruling made in denying opposing party's summary judgment motion).

CONCLUSION

Appellant Millennia therefore reiterates its request that this Court enter an order reversing the trial court's dismissal of Millennia's claim against ATGF for liability under Utah Code Ann. § 31A-23-308.

RESPECTFULLY SUBMITTED this 1st day of March, 2002.

ANDERSON & KARRENBERG

A handwritten signature in dark ink, appearing to read "Nathan Wilcox", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1stth day of March, 2002, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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