

2000

# Linda Brown v. Robert L. Miller, Owna Miller, Gerald E. Richards, Wardley Better Homes and Gardens and Steven B. Goff : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Steven B. Smith, Darwin H. Bingham; Scalley & Reading; attorneys for appellant.

Dana T. Farmer, David L. Knowles; Smith, Knowles & Hamilton; attorneys for appellee.

---

## Recommended Citation

Brief of Appellee, *Brown v. Miller*, No. 2000079 (Utah Court of Appeals, 2000).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/2511](https://digitalcommons.law.byu.edu/byu_ca2/2511)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE UTAH COURT OF APPEALS**

---

LINDA BROWN,	)	
	)	
Plaintiff/Appellee,	)	APPEAL NO. 2000079-CA
	)	
vs.	)	PRIORITY 15
	)	
ROBERT L. MILLER, OWNA MILLER,	)	Civil Case No. 960900289 CN
GERALD E. RICHARDS, WARDLEY	)	
BETTER HOMES & GARDENS and	)	
STEVEN B. GOFF,	)	<b>ORAL ARGUMENT REQUESTED</b>
	)	
Defendants/Appellant.	)	

---

**BRIEF OF APPELLEE, LINDA BROWN**

---

APPEAL FROM JUDGMENT OF SECOND DISTRICT COURT IN  
AND FOR WEBER COUNTY, JUDGE PARLEY R. BALDWIN

---

DANA T. FARMER, No. 8371  
DAVID L. KNOWLES, No. 5615  
SMITH, KNOWLES & HAMILTON, P.C.  
4723 Harrison Blvd., Suite 200  
Ogden, Utah 84403  
Attorneys for Appellee, Linda Brown

STEVEN B. SMITH, No. 5797  
DARWIN H. BINGHAM, No.  
SCALLEY & READING, P.C.  
261 East 300 South, Suite 200  
Salt Lake City, UT 84111  
Attorneys for Appellant Wardley  
Better Homes and Gardens

**FILED**

SEP 18 2000

COURT OF APPEALS

---

**IN THE UTAH COURT OF APPEALS**

---

LINDA BROWN,	)	
	)	
Plaintiff/Appellee,	)	APPEAL NO. 2000079-CA
	)	
vs.	)	PRIORITY 15
	)	
ROBERT L. MILLER, OWNA MILLER,	)	Civil Case No. 960900289 CN
GERALD E. RICHARDS, WARDLEY	)	
BETTER HOMES & GARDENS and	)	
STEVEN B. GOFF,	)	<b>ORAL ARGUMENT REQUESTED</b>
	)	
Defendants/Appellant.	)	

---

**BRIEF OF APPELLEE, LINDA BROWN**

---

APPEAL FROM JUDGMENT OF SECOND DISTRICT COURT IN  
AND FOR WEBER COUNTY, JUDGE PARLEY R. BALDWIN

---

DANA T. FARMER, No. 8371  
DAVID L. KNOWLES, No. 5615  
SMITH, KNOWLES & HAMILTON, P.C.  
4723 Harrison Blvd., Suite 200  
Ogden, Utah 84403  
Attorneys for Appellee, Linda Brown

STEVEN B. SMITH, No. 5797  
DARWIN H. BINGHAM, No.  
SCALLEY & READING, P.C.  
261 East 300 South, Suite 200  
Salt Lake City, UT 84111  
Attorneys for Appellant Wardley  
Better Homes and Gardens

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	1
DETERMINATIVE STATUTES .....	1
NATURE AND FACTS OF THE CASE.....	1
COURSE OF PROCEEDINGS AND DISPOSITION BELOW ....	2
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I.    Wardley's is liable for all damages awarded by the jury because Richards' fraud was committed in the furtherance of Wardley's interest and ratified by Wardley .....	4
A.    The jury entered a single verdict against Richards and allocated that verdict between Richards and Wardley.....	6
B.    The punitive damages award is supported by substantial evidence of ratification by Wardley .....	7
C.    Wardley ratified and approved Richard's fraudulent representations .....	8
1.    Wardley failed to marshal the evidence .....	8
2.    Substantial evidence of ratification exists .....	9

II.	At the close of Brown’s case in chief, counsel agreed to instruct the jury on a damages formula but did not stipulate to a cap on damages .....	12
III.	The verdict was not set aside because Wardley did not move for a directed verdict and because there is substantial evidence to support the verdict .....	14
	CONCLUSION .....	15
	REQUEST FOR ORAL ARGUMENT .....	15
	MAILING CERTIFICATE .....	16
ADDENDA		
A.	Rule 51, Utah Rules of Civil Procedure	
B.	Special Verdict Form	

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Bell v. Elder</i> , 782 P.2d 545, 547 (Ct. App. 1989) .....	9
<i>Bennion v. LeGrand Johnson Construction Co.</i> , 701 P.2d 1078, 1083 (Utah 1985).....	7
<i>Cambelt Int'l Corp. v. Dalton</i> , 745 P.2d 1239, 1242 (Utah 1987) .....	8
<i>Dejavue, Inc v. U.S. Energy Corp</i> , 993 P.2d 222, 226 (Ut. Ct. App. 1999) .....	8
<i>Fitz v. Synthes</i> , 990 P.2d 391, 393 (Utah 1999) .....	8
<i>Grandi v. LeSage</i> , 399 P.2d 285, 293 (N.M. 1965) .....	11
<i>Henderson v. Meyer</i> , 533 P.2d 290 (Utah 1975) .....	8
<i>Hodges v. Gibson Products, Co.</i> , 811 P.2d 151 (Utah 1991) .....	11
<i>Interiors Contracting, Inc., v. Smith, Halander &amp; Smith</i> , 881 P.2d 929, 933 (Ct. App. 1994) .....	9
<i>Johnson v. Rogers</i> , 763 P.2d 771 (Utah 1988) .....	6
<i>Kesler v. Rogers</i> , 542 P.2d 354 (Utah 1975) .....	14
<i>Kortmeier v. Ferbend &amp; Ferbend, Ltd.</i> , 1990 U.S. Dist. LEXIS 19164 .....	11
<i>Meleski v. Pinero Int'l Restaurant, Inc.</i> , 424 A.2d 784, 792 (Maryland 1981) .....	11
<i>Selvage v. J.J. Johnson &amp; Assoc.</i> , 910 P.2d 1252, 1257 (Ct. App. 1996) .....	9

	<b><u>Page</u></b>
<b><u>CASES</u></b>	
<i>Smith's Food &amp; Drug Centers, Inc. v. Argentine Bellgarde</i> , 958 P.2d 1208, 1214 (Nev. 1998) .....	11, 12
<i>Stanger v. Sentinal Security Life Ins. Co.</i> , 669 P.2d 1201 (Utah 1983).....	7
<i>Sullivan v. Evans-Morris-Whitney, Co.</i> 180 P. 435 (1919) .....	6
<i>Wardman-Justice Motors v. Petrie</i> , 39 F.2d 512 (DC Cir.) .....	11
<i>Weyeth Hardware &amp; Manufacturing, Co. v. James- Spencer-Bateman, Co.</i> , 47 P. 604 (1897).....	6
<i>Wright v. Westside Nursery</i> , 787 P.2d 508, 514 (Ut. Ct. App.1990) .....	8

	<b><u>Page</u></b>
<b><u>STATUTES AND RULES</u></b>	
Article VIII §5 of the Constitution of Utah .....	1
Utah Code Annotated §78-2-2(4) and §78-2a-3(j) (1996) .....	1
Rules 3 and 4 of the Utah Rules of Appellate Procedure (2000) .....	1
Rule 51, Utah Rules of Civil Procedure .....	1, 13
Rule 60(a), Utah Rules of Civil Procedure .....	7

## **JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Article VIII §5 of the Constitution of Utah; Utah Code Annotated §78-2-2(4) and §78-2a-3(j) (1996); and Rules 3 and 4 of the Utah Rules of Appellate Procedure (2000).

## **STATEMENT OF THE CASE**

### **DETERMINATIVE STATUTES**

Rule 51, Utah Rules of Civil Procedure governs objections to jury instructions and appellate review of such objections. A complete copy of the rule is attached as Addenda A.

### **NATURE AND FACTS OF THE CASE**

This case involves the purchase of a residential home and attached indoor pool (“Home”) by the Plaintiff/Appellee, Linda Brown (“Ms. Brown”), from Defendants Robert and Owna Miller (“Millers”). Defendant/Appellant Wardley Better Homes & Gardens, Inc. (“Wardley”) acting through its agent, Defendant Gerry Richards, (“Richards”) represented the Millers. [R. 15-17] Richards and Wardley were represented by the same counsel at trial, however, only Wardley, through new counsel, appeals the jury’s verdict. Ms. Brown agreed to purchase the Home from the Millers for \$109,000.00. She conditioned this agreement upon satisfaction of five contingencies: 1) the sale of her home; 2) a satisfactory inspection of the Home; 3) acceptance of the Miller’s disclosures; 4) her ability to get financing; and 5) the Home appraising at or



above the asking price of \$109,000.00. [R. 15-17]

The facts as stated in Wardley's Brief are largely correct and accurate as to the chronology of events and general evidence presented at trial. It should be specifically noted, however, that the fraud claim was based upon a misrepresentation from Richards to Ms. Brown. Specifically, Richards indicated that the appraisal for the property had come in at \$103,138.00. Since this was less than \$109,000.00, Ms. Brown asked Richards why the appraisal was so low. Richards represented the appraisal did not include the value of the swimming pool and later informed Ms. Brown that the swimming pool would add \$15,000.00 to the value of the property. Therefore, in reliance upon Richards' statements that the property was worth \$118,000.00, Ms. Brown paid \$109,000.00.

#### **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

At trial, all claims were dismissed by stipulation except for a claim of fraud against Richards and Wardley; and a breach of contract claim against the Millers. During trial, the appraiser testified the Home was appraised at \$103,138.00 under the cost method and \$100,000.00 according to the more accurate comparative method. [426 Transcript, pp.20-21 The \$100,000.00 value was accepted by counsel for both sides as the more accurate value of the Home for purposes of calculating damages. [R. 278, 426 Transcript, pp. 148-151]. At the close of Ms. Brown's case in chief, counsel for Wardley failed to move for a directed verdict on the fraud and punitive damages claims. [R. 369]. However, Wardley did acknowledge that it was vicariously

liable for compensatory damages if the jury found Richard's representations were fraudulent, and argued the jury should be instructed that such liability would be the difference between the actual value of the Home (\$100,000.00) and the amount paid for the Home (\$109,000.00). [426 Transcript, p. 150] Counsel for Ms. Brown concurred that this was an accurate measure of damages and the Court ordered counsel that the jury should be advised of this damages formula by way of an instruction. [426 Transcript, pp. 159-160]

### **SUMMARY OF THE ARGUMENT**

This case requires the Court to do two things: (1) interpret the General Verdict Sheet; and (2) determine whether compensatory damages should be capped at \$9,000.00 by stipulation. Wardley interprets the General Verdict Sheet as containing two verdicts, one against Richards for compensatory and punitive damages, and the other against Wardley for punitive damages. However, a review of the record shows the jury awarded \$18,000.00 in compensatory and \$27,000.00 in punitive damages and allocated these between the responsible parties.

At the close of Ms. Brown's case in chief, the record reveals a stipulation between the parties for an instruction advising the jury to calculate compensatory damages as the difference between the amount paid for the Home and the actual value of the Home. This stipulation is unenforceable because the stipulated instruction did not go to the jury, and Wardley did not object to the damages instruction that was

submitted to the jury. Furthermore, Wardley's counsel did not argue damages to the jury and failed to contest the discrepancy between the stipulated instruction and the instruction given in its Motion for Judgment Notwithstanding the Verdict. Inasmuch as Wardley has not attempted to enforce the stipulation since the close of Ms. Brown's case in chief, it is prevented from doing so on appeal.

### **ARGUMENT**

I. Wardley is liable for all damages awarded by the jury because Richards' fraud was committed in the furtherance of Wardley's interest and ratified by Wardley.

In its principal memorandum, Wardley consistently claims a separate and distinct damage award was incorrectly entered against it by the jury<sup>1</sup>. In its Memorandum Decision on Wardley's motion for judgement notwithstanding the verdict, the trial court recognized the verdict was not two separate judgments for compensatory and punitive damages against Richards and Wardley, but a single judgment for \$18,000.00 compensatory damages and \$27,000.00 punitive damages<sup>2</sup>.

---

<sup>1</sup> "...the trial court refused to direct a verdict in Wardley's favor for any independent liability and even allowed the jury to render separate verdicts against Richards and Wardley. (Brief of Appellant, p. 7)  
"...the trial court failed to dismiss the claims against Wardley and allowed the jury to return a verdict against it" (Brief of Appellant, p. 8)  
"...Allowing the jury to return separate verdicts against Wardley and Ms. Brown(sic) when Wardley should have only been vicariously liable to Ms. Brown for Richards' wrongful conduct, would permit Ms. Brown to recover twice for the same damages." (Brief of Appellant, p. 9-10)  
"...Without allegations or evidence to support a claim that Wardley was somehow independently at fault, the verdict against Wardley should have been vacated by the trial court" (Brief of Appellant, p. 13).

<sup>2</sup> "It appears the jury accepted the position of [Ms. Brown] and allocated specific awards to both Richards and Wardley totaling eighteen thousand dollars (\$18,000.00)" [R. 371]

[R. 371]

The General Verdict Sheet was submitted to the jury with out objection<sup>3</sup>. The form was prepared by counsel and submitted to the jury. The fact that the form contains language to the effect that the jury found liability and awarded damages separately and distinctly against Richards and Wardley is the fault of counsel and should not be used as a basis for claiming that the jury went off on its own and made specific findings against either defendant. Clearly the jury was trying to follow the Court's instruction by filling out the entire form. Instruction No. 48 told the jury it was "your duty to answer the questions in the general (sic) verdict sheet I will submit to you". [R. 245] A review of the General Verdict Sheet shows the jury did indeed answer every question.

Furthermore, it is unreasonable to believe the jury made findings of compensatory damages amounting to \$9,000.00 dollars, rather than allocating \$18,000.00, because Wardley never argued damages to the jury. Only Ms. Brown argued damages to the jury and the amount requested was \$18,000.00. [Transcript of Closing Argument p. 14] The \$9,000.00 damages stipulation asserted by Wardley for the first time on this appeal was never presented to the jury via an instruction or argument. How then could the jury have limited its award to only \$9,000.00? Clearly the jury allocated an \$18,000.00 award in an effort to comply with Instruction No. 48.

The jury was instructed that as a corporation, Wardley could only act through its

---

<sup>3</sup> The General Verdict Sheet is attached as Addenda B.

agents and that the act of an agent was the act of the corporation.<sup>4</sup> Liability of a corporation for the acts of its agents is well settled. *Sullivan v. Evans-Morris-Whitney, Co.* 180 P. 435 (1919), *Weyeth Hardware & Manufacturing, Co. v. James-Spencer-Bateman, Co.*, 47 P. 604 (1897).

The issue submitted to the jury concerning Wardley was fraud. [426 Transcript, p. 159] Wardley is subject to liability for Richard's fraud if it was committed in the furtherance of Wardley's interest<sup>5</sup>. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988). On direct examination, Richards testified he was a "sales executive" for Wardley during the entire time he represented the Millers and facilitated the sale of the Home to Ms. Brown. [425 Transcript, p. 131] He further testified that Wardley would receive half the commission from the sale of the Home. [425 Transcript, p. 201] Since Richard's was Wardley's agent in this transaction, and since his sales commission was also Wardley's commission, Wardley is reasonably subject to liability for Richard's fraud.

A. The jury entered a single verdict against Richards and allocated that verdict between Richards and Wardley.

Wardley next argues that a single judgment against Richards will make

---

<sup>4</sup> Instruction No. 28, "Wardley Better Homes & Gardens is a corporation and, as such, can act only through its officers and employees, and others designated by it as its agents. Any act or omission of an officer, employee or agent of a corporation, in the performance of the duties or within the scope of the authority of the officer, employee or agent, is the act or omission of the corporation. [R. 225]

<sup>5</sup> Instruction No. 33 "If an agent wrongfully committed and act...the principal is liable for the intentional act or omission only if (1) the act or omission was committed or omitted in the furtherance of the principal's interests...." MUJI 25.13

Ms. Brown whole for the fraud committed. [Principal Memorandum, p. 9] What Wardley continually fails to understand is the jury's verdict was a single verdict allocated between jointly liable defendants.

This allocation is not a reversible error, and does not call for a new trial. Rather, it represents a clerical error made in good faith by the jury in an effort to follow the Court's instructions, which may be corrected by this court to reflect the true nature of the verdict. Rule 60(a), Utah Rules of Civil Procedure, *Stanger v. Sentinal Security Life Ins. Co.*, 669 P.2d 1201 (Utah 1983), *Bennion v. LeGrand Johnson Construction Co.*, 701 P.2d 1078, 1083 (Utah 1985).

B. The punitive damages award is supported by substantial evidence of ratification by Wardley.

With respect to the punitive damages award, it is not a separate and distinct award, but is based upon vicarious liability and ratification of Richards' conduct by Wardley. Wardley should not be allowed to confuse the issue by claiming the jury capriciously held Wardley liable for some action separate and distinct from Richards' fraud.

The trial Court did not fail to direct a verdict in favor of Wardley on the punitive damages issue because Wardley did not move for a directed verdict as to punitive damages<sup>6</sup> and Wardley has not contested this finding on appeal. Failure to challenge the

---

<sup>6</sup> In its memorandum Decision on Wardley's motion for judgment notwithstanding the verdict, the trial court found "At the conclusion of [Ms. Brown's] case, [Wardley] did not make a motion for a directed verdict." [R. 369]

sufficiency of the evidence at trial prevents Wardley from attacking the evidence on appeal. *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975).

C. Wardley ratified and approved Richard's fraudulent representations.

As Wardley correctly points out in its principal memorandum, under the facts of this case it could only be liable for the punitive damages assessed against Richards if it ratified or approved of Richards' fraudulent act. (Appellant's Brief, p.11).

1. Wardley failed to marshal the evidence.

"On appeal, the court reviews the evidence presented at trial in the light most favorable to the prevailing party and will reverse a trial court's decision only if the evidence is insufficient to support the verdict. Moreover, the appealing party has the burden of marshaling the evidence in support of the verdict and then showing that it is insufficient." *Fitz v. Synthes*, 990 P.2d 391, 393 (Utah 1999). Where a party fails to marshal the evidence, the appellate court will not disturb the verdict. *Wright v. Westside Nursery*, 787 P.2d 508, 514 (Ut. Ct. App.1990). "The burden on an appellant to establish that the evidence does not support the jury's verdict . . . is quite heavy." *Dejavue, Inc v. U.S. Energy Corp*, 993 P.2d 222, 226 (Ut. Ct. App. 1999) citing *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987). "Review of the jury's verdict, however, places a difficult burden on the challenging party. 'To support a claim that the jury verdict is against the clear weight of the evidence, an appellant must marshal all of the evidence that supports the findings and demonstrate that when viewed in the light most favorable to the verdict, there is insufficient evidence to support it.'"

Furthermore, all reasonable inferences are drawn in favor of the verdict, and if the evidence supports the verdict, we will affirm” *Selvage v. J.J. Johnson & Assoc.*, 910 P.2d 1252, 1257 (Ct. App. 1996) (citations omitted).

It is the duty of the Appellant to painstakingly and fastidiously identify why that evidence fails to support the verdict. *Interiors Contracting, Inc., v. Smith, Halander & Smith*, 881 P.2d 929, 933 (Ct. App. 1994). It is inappropriate for the Appellant simply to cite facts which support its claim that the evidence is insufficient; rather, the Appellant is to identify all evidence having any tendency to support the verdict. *Bell v. Elder*, 782 P.2d 545, 547 (Ct. App. 1989).

On page 11 of its principal Memorandum, Wardley speaks to the ratification issue and states:

Finally, there is no evidence that a principal or managerial agent of Wardley ever ratified or approved of the misrepresentations complained of by Ms. Brown.

Despite the burden imposed upon Wardley to marshal the evidence on appeal and challenge the evidence in detail, this simple sentence is all Wardley says about ratification, which fails to satisfy the marshaling requirement.

2. Substantial evidence of ratification exists.

If this Court were to find this simple statement sufficient to satisfy the marshaling burden placed upon Wardley on this appeal, it is clear that sufficient evidence exists from which the jury could conclude Wardley ratified Richards’ behavior.



Steven Goff, the managing broker at the office where Mr. Richards worked for Wardley, indicated he was contacted by Linda Ms. Brown and advised of problems with the Home and the misrepresentations made to her by Richards. [426 Transcript. pp. 169-175] :

- 1) Goff indicated that his initial response to these claims of fraud against Richards was disbelief. [426 Transcript, p. 171];
- 2) He communicated the concerns to Richards, upon which Richards indicated that yes, the appraisal had come back low, but Ms. Brown had decided to go ahead with the purchase anyway. [426 Transcript, pp. 172-174] .

In his second conversation with Ms. Brown, Goff indicated to Ms. Brown that she had ample opportunity on her own to review the appraisal and determine the value of the Home, he stated:

- 1) “. . . and there is nothing I can do to go and to reverse it”. [426 Transcript, p. 174] ;
- 2) He further told her: “The best I can do is get in touch with the Millers and tell them of your complaint”. *Id.*
- 3) Finally, he stated: “I was very clear to her that we, as a real estate company, had no obligation to fix problems”. [426 Transcript, p. 175]

Upon further complaints by Ms. Brown, Mr. Goff said that he would agree to list the house and allow it to be resold. Ms. Brown indicated that this was ridiculous

because the condition the house was in would not make it reasonable for any person to purchase it. [426 Transcript, pp. 177-178] Goff further indicated that they would be happy to disclose all of the defects in the Home. However, this was an unreasonable position for Ms. Brown to take because she would have then had to sell the Home for less than it was worth to her. Accordingly, she decided to file suit against Wardley and Richards.

In determining whether or not a principal has ratified the conduct of its agent for purposes of punitive damages under *Hodges v Gibson Products Co* , 811 P.2d 141 (Utah 1991); relying on *Restatement (Second) of Agency* §217C (1958) and *Restatement (Second) of Torts* § 909 (1979), several factors come into context. Among these are whether:

- 1) the principal “continued the employment of the agent”, *Meleski v Pinero Int’l Restaurant, Inc* , 424 A.2d 784, 792 (Maryland 1981), citing *Wardman-Justice Motors v. Petrie*, 39 F.2d 512 (DC Cir.);
- 2) whether the agent was reprimanded, whether the principal continued to support the conduct of the agent at trial, *Smith’s Food & Drug Centers, Inc. v Argentine Bellgarde*, 958 P.2d 1208, 1214 (Nev. 1998) ;
- 3) whether the principal allowed the conduct to occur without intervention, *Kortmeier v Ferbend & Ferbend, Ltd* , 1990 U.S. Dist. LEXIS 19164;
- 4) failure to promptly repudiate the act, *Grandi v. LeSage*, 399 P.2d 285, 293 (N.M. 1965); and

- 5) whether the principal defends the action of the agent at trial. *Smith's Food and Drug Centers, Inc. v. Bellegarde*, 958 P.2d 1208, 1214 (Nev. 1998)

In view of the foregoing precedents, the following facts support ratification:

- 1) Mr. Goff met Ms. Brown's claims with disbelief and accepted Richards excuses at face value; [426 Transcript, p. 171]
- 2) Wardley accepted the benefits of the sale by enjoying the proceeds of the sales commission; [425 Transcript, p. 201]
- 3) Wardley continued Richards employment; and [425 Transcript, p. 129]
- 4) At trial, as the final witness, Goff sat through all of the direct and cross-examination of every witness, including Ms. Brown and Richards, the same evidence which the jury heard and concluded gave rise to a finding of fraud by clear and convincing evidence. Despite this clear and convincing evidence of fraud, Goff stated at trial that Richards was a "person of absolute integrity" and he wished he had a "truck load of agents" like Richards working for him. [426 Transcript, pp. 168-169]

Considering that this Court is required to view the evidence of ratification in the light most favorable to Ms. Brown, there is clearly ample evidence to support the jury's finding that Wardley ratified the behavior of Richards and is therefore liable for punitive damages assigned to him in the amount of \$27,000.00.

- II. At the close of Ms. Brown's case in chief, counsel agreed to instruct the jury on a damages formula but did not stipulate to a cap on damages.

In its principal memorandum Wardley next argues a stipulation capped compensatory damages against Richards and Wardley on the fraud claim. At the close of Ms. Brown's case in chief, the parties stipulated to dismiss several causes of action. Additionally, counsel for Wardley requested an instruction for the jury stating the maximum measure of damages "[is] the difference between [the amount] paid and what the [home is worth]". [426 Transcript, p. 150] In this case, it was the difference between \$109,000.00 and \$100,000.00. Counsel for Ms. Brown agreed and the Court ordered this stipulation be submitted to the jury in the form of the instruction prepared by counsel. [426 Transcript, pp. 151-160]

At the conclusion of the trial, instructions were submitted to the jury without objection. [Closing Argument Transcript, p. 56]. Instruction No. 44, the compensatory damages instruction stated the appropriate measure of damages was the difference between the value of the house (\$100,000.00) and the value of the house *as represented* (\$118,000.00). The jury instruction which Mr. Sabin requested and which the Court ordered was never submitted to the jury. Likewise, Mr. Sabin did not argue damages to the jury. Furthermore, in its Motion for Judgment Notwithstanding the Verdict, Wardley did not object to Instruction No. 44, but instead argued this instruction could only have led the jury to conclude \$9,000.00 was the proper measure of damages.

Within the context of the record, the upshot of this claim by Wardley is that the wrong instruction went to the jury. Rule 51 Utah R. Civ. P., requires "[i]f instructions are to be given to the jury in writing, all objections thereto must be made before the

instructions are given to the jury; otherwise, objections may be made to the instructions after they are give to the jury, but before the jury retires to consider the verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto.” Utah case law is replete with cases requiring parties to object at trial or lose the right to contest instructions on appeal. In *Kesler v. Rogers*, 542 P.2d 354 (Utah 1975), we are instructed that a claim of error for failing to give a desired instruction is meritless on appeal if the party requesting the instruction failed to object at the trial court’s failure to give the instruction. Since Wardley never objected to Instruction No. 44, or sought to enforce the stipulation at the trial level, it may not do so now.

III. The verdict was not set aside because Wardley did not move for a directed verdict and because there is substantial evidence to support the verdict.

Ms. Brown next argues the alleged verdict against Wardley should be set aside because there was no separate and distinct claim made against Wardley. Again, Wardley misunderstands the verdict of the jury and the liability stipulations at trial. It was recognized, understood and stipulated at trial that Wardley was vicariously liable for the conduct of Richards as to compensatory damages. [R. 149-161] Therefore, the jury’s verdict of \$18,000.00 in compensatory damages is chargeable to Richards and to Wardley. Furthermore, as the foregoing analysis shows, there was sufficient evidence presented at trial for the jury to find Wardley ratified and approved of Richards’ behavior. Therefore, as the jury found, Wardley is liable for the punitive damages assigned to Richards in the amount of \$27,000.00.

It should be remembered Wardley stipulated to dismissal of all claims but fraud and never contested the evidence supporting punitive damages. Thus, Wardley is liable for all of the damages found in this case which are \$18,000.00 compensatory and \$27,000.00 punitive.

### **CONCLUSION**

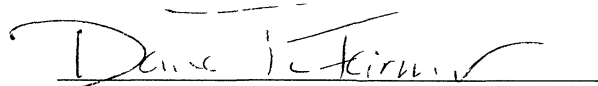
For the foregoing reasons, Ms. Brown requests that the jury's verdict be affirmed and that she be entitled to collect \$18,000.00 compensatory damages and \$27,000.00 punitive damages jointly and severally from Richards and Wardley, and that she further be entitled to pre-judgment and post-judgment interest, along with her costs at trial and on appeal.

### **REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 29, Utah Rules of Appellate Procedure, Appellee hereby requests oral argument on this appeal.

RESPECTFULLY SUBMITTED this 12 day of September, 2000.

SMITH, KNOWLES & HAMILTON, P.C.

A handwritten signature in dark ink, appearing to read "Dana T. Farmer", is written over a horizontal line.

DANA T. FARMER  
DAVID L. KNOWLES  
Attorneys for Appellee

**MAILING CERTIFICATE**

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellee, postage prepaid, to Steven B. Smith and Darwin H. Bingham. SCALLEY & READING, P.C., 261 East 300 South, Suite 200, Salt Lake City, UT 84111, on this \_\_\_\_\_ day of September, 2000.

\_\_\_\_\_  
Dana T. Farmer

Tab A



*URCP Rule 51*

UTAH COURT RULES ANNOTATED  
Copyright (c) 1953-1999 by the Michie Company  
A Division of Reed Elsevier Inc.  
and Reed Elsevier Properties Inc.  
All Rights Reserved

\* THIS DOCUMENT IS CURRENT THROUGH CHANGES RECEIVED AS OF FEBRUARY 10, 2000 \*

State Rules  
UTAH RULES OF CIVIL PROCEDURE  
PART VI. TRIALS

URCP Rule **51** (2000)

Rule **51**. Instructions to jury; objections.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

**HISTORY:** (Amended effective Jan. 1, 1987.)

**NOTES:**

Compiler's Notes. -- This rule varies substantially from Rule **51**, F.R.C.P., after which it is patterned.

Cross References. -- Exceptions unnecessary, U.R.C.P. 46.

NOTES TO DECISIONS

Comments on evidence.  
-- Allowed and disallowed.  
-- Proper.  
-- -- Accurate statement of facts.  
Copy of instructions.  
-- Delay.

Tab B

---

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH  
WEBER COUNTY, OGDEN DEPARTMENT

---

LINDA BROWN,

)

Plaintiff (s),

)

GENERAL VERDICT  
SHEET

vs.

)

ROBERT L. MILLER; OWNA MILLER,  
GERALD E. RICHARDS; WARDLEY  
BETTER HOMES & GARDENS;  
STEVEN B. GOFF; and DOES 1-10,

)

)

Case No. 980900289 CN

Defendant (s).

)

---

Members of the Jury:

We, the jury in the above-entitled action, find for the plaintiff and against the defendant,  
Robert Miller and Owna Miller, and fix the amount of compensatory damages at \$ \$1.00  
and the amount of punitive damages at \$ 1.00.

or,

We, the jury in the above-entitled action, find in favor of the defendant, Robert Miller and  
Owna Miller, and award no damages to the plaintiff. NO (YES OR NO)

and/or,

We, the jury in the above-entitled action, find for the plaintiff and against the defendant,  
Gerald E. Richards, and fix the amount of compensatory damages at \$ 9,000, and the  
amount of punitive damages at \$ 7,000.

or,

We, the jury in the above-entitled action, find in favor of the defendant, Gerald E.  
Richards, and award no damages to the plaintiff. NO (YES OR NO)

and/or,

General Verdict Sheet  
960900289 CN  
Page Two

We, the jury in the above-entitled action find for the plaintiff and against the defendant,  
Wardley Better Homes & Gardens, and fix the amount of compensatory damages at  
\$ 9,000 and the amount of punitive damages at \$ 20,000.

or,

We, the jury in the above-entitled action find in favor of the defendant, Wardley Better  
Homes & Gardens, and award no damages to the plaintiff. NO YES OR NO  
DATED this 27<sup>th</sup> day of February, 1998.

Ray L. Rummel  
FOREPERSON