

2000

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

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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LINDA BROWN,

Plaintiff/Appellee,

vs.

ROBERT L. MILLER, OWNA MILLER,  
GERALD E. RICHARDS, **WARDLEY  
BETTER HOMES & GARDENS**, and  
STEVEN B. GOFF,

Defendants/Appellant

APPEAL NO.: 2000<sup>2</sup>~~0~~79-CA

PRIORITY 15

Civil Case No.: 960900289 CN

**ORAL ARGUMENT REQUESTED**

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**BRIEF OF APPELLANT, WARDLEY BETTER HOMES & GARDENS**

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

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## **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 ISSUES PRESENTED**

This appeal involves three (3) main issues. They are:

### **Issue # 1:**

Whether Plaintiff/Appellee Linda Brown's (hereinafter "Brown") claims against Defendant/Appellant Wardley Better Homes and Gardens (hereinafter "Wardley") (other than those for vicarious liability) should have been dismissed at the close of Plaintiff's case when Brown failed to produce any evidence that Wardley (other than through its agent Defendant Gerald Richards (hereinafter "Richards")) did anything wrong.

### **Standard of Review:**

This Court's "standard of review of a directed verdict (or in this case the failure to direct a verdict) is the same as that imposed upon a trial court." *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 898 (Utah 1982). A directed verdict should be granted only if, examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor. *Cornia v. Wilcox*, 898 P.2d 1379, 1383 (Utah 1995). A motion for directed verdict "can be granted only when the moving party is entitled to judgment as a matter of law." *Id.*

### **Preservation of Appeal:**

Wardley moved the trial court for a directed verdict and the parties orally argued those motions at the close of Brown's case in chief. [pp. 145-60 of Transcript beginning at R. 426 (hereinafter "426 Transcript")].<sup>1</sup> At that time Brown agreed to dismiss all her

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<sup>1</sup> While the Transcript of the testimony elicited at the trial of this matter is part of the record on appeal, the pages of the transcript of the trial testimony and arguments of counsel are not separately numbered. The testimony and arguments in question are comprised of three (3) volumes ( VIDEOTAPED TRANSCRIPT, Trial Volume I starting at R. 424; VIDEO APPEAL TRANSCRIPT, Trial Volume II starting at R. 425; and TRANSCRIPT, Volume III starting at R. 426. Each will be referred to throughout this Brief by the word "Transcript" preceded by the initial page number given to each transcript volume by the trial court clerk.



claims against Defendant Steve Goff (hereinafter “Goff”) as well as her claims for negligence and breach of fiduciary duty against both Richards and Wardley. [426 Transcript, pp. 145-47]. The trial court then dismissed Brown's claims for negligent misrepresentation. [426 Transcript, pp. 156-60]. Only Brown's fraud claim against Wardley and Richards went to the jury. During argument on Wardley's Motion for a Directed Verdict, the parties stipulated that the fraud damages supported by the evidence were no more than \$9,000. [426 Transcript, pp. 148-54 and 159-60].

### **Issue # 2:**

Whether the trial court should have corrected the jury verdict of \$9,000 compensatory damages against Wardley and \$9,000 compensatory damages against Richards to accurately reflect the Parties' stipulation that \$9,000 was the appropriate measure of compensatory damages awardable for Brown's fraud claim against Wardley and Richards.

### **Standard of Review:**

A trial court may correct clerical mistakes in judgments at any time. Utah R. Civ. P. 60(a). See also *Bagnall v. Suburbia & Co., Utah*, 579 P.2d 917 (1978). “[I]t matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended.” *Stanger v. Sentinel Security Life Ins. Co.*, 669 P.2d 1201 (Utah 1983). Such a mistake is one that is mechanical in nature and readily apparent on the record. *Id.* (Quoting *In Re Merry Queen Transfer Corp.*, 266 F.Supp. 605, 607 (1967)).

### **Issue # 3:**

Whether the trial court should have set aside the verdict and or should have refused to enter a separate judgment against Wardley (except vicariously for Gerald Richards' conduct) when there was no evidence whatsoever that Wardley (other than through its agent Richards) caused or contributed to Brown's damages.

### **Standard of Review:**

In ruling on a motion to correct a verdict or for a j.n.o.v. the trial court has no latitude and must be correct. *Braithwaite v. West Valley City Corp*, 921 P.2d 997, 999 (Utah 1996) (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991)). Nevertheless, a verdict should be corrected, or a j.n.o.v. granted, if “after looking at the evidence and all of its reasonable inferences in a light most favorable to the [nonmoving party], the trial court conclude[s] that there [is] no competent evidence to support a verdict in [the nonmoving party's] favor.” *Id.* (quoting *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1066 (Utah 1996)).

**Preservation of Appeal:**

Wardley filed a Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial with supporting memoranda following the trial and verdict in this matter. [R. 266-287 and 374-382].

**DETERMINATIVE STATUTES**

Rule 50, Utah R. Civ. P. governs motions for directed verdicts and judgments notwithstanding the verdict while Rule 60 governs the correction of errors in judgments or verdicts. The complete texts of Rule 50 and 60 are contained in Addendum A to this Brief.

Utah Code Anno § 78-18-1 governs the award of punitive damages. Its relevant portions state:

- (1)(a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.
- (2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.
- (3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of \$20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

**STATEMENT OF THE CASE**

**NATURE AND FACTS OF THE CASE**

Brown contracted to purchase a home with an enclosed swimming pool (“the Property”) from Defendants Richard and Owna Miller (“the Millers”). During the negotiation process Wardley, by and through Richards, represented the Millers. [R. 15-17].

Brown contracted to purchase the Property for \$109,000.00, subject to the following contingencies: (1) her ability to sell her home; (2) her inspection of the Property; (3) her acceptance of the Millers' Sellers' Disclosures regarding the condition of the Property; (4) the Property appraising for at least \$109,000; and (5) her ability to qualify for acceptable financing. [R. 15-17].

While the sale of the Property was pending, Brown spoke with Richards several times about the Property. They discussed the condition of the home, including the roof, the swimming pool enclosure, the electrical system and the plumbing. [424 Transcript (Volume I), pp. 14, 17-18, 23, 44, 62-64, 67-68 and 89-90; 425 Transcript (Volume II), pp. 24-25].

Brown and Richards also spoke about having the Property inspected by a local home inspection company. At trial Brown testified that she totally relied upon Richards to have the inspection done. [424 Transcript, pp. 40-43, 57, 67-68 and 89-90]. Brown also testified that Richards misrepresented the extent and findings of the home inspection and caused her to believe a complete home inspection had been performed and that everything with the Property was all right. [424 Transcript, pp. 62-64 and 89-90].

The Property was appraised by Brown's lender and she spoke with Richards about that appraisal. Brown received a copy of the appraisal from Richards prior to purchasing the Property and could have obtained a copy from her lender at anytime. In spite of having received the appraisal, Brown claimed that Richards mislead her about the appraisal by telling her the appraised value of the Property, \$103,138.00, did not include the swimming pool and that he believed the swimming pool added an additional \$15,000 in value to the home. [424 Transcript, pp. 93-95 and 98-100].

There is no evidence that Wardley knew or should have known that Richards made any misrepresentations to Brown regarding the inspection or the appraisal of the Property. In fact, Brown

never spoke with anyone from Wardley (except Richards) until after she had already purchased and moved into the Property. [425 Transcript, pp. 42-43; and 426 Transcript, pp. 167-171].

The other contingencies in the contract to purchase the Property were fulfilled and Brown elected to proceed with the contract to purchase the Property for \$109,000.

After Brown moved into the home she claims to have discovered problems with water leaking into the swimming pool enclosure and with the electrical system. Brown also came to learn that the \$103,138.00 appraisal actually included \$3,138 for the swimming pool, making the appraised value of the home without the swimming pool \$100,000. Brown then commenced an action in the Second Judicial District Court for Weber County against the Millers, Wardley and Richards. [R. 4-10].

The parties agreed that Wardley would be vicariously liable for the damages incurred by Brown which were caused by Richards' breaches of his duties as a real estate agent. [426 Transcript, pp. 145 and 147].

The parties also stipulated that the appropriate measure of damages on Brown's fraud claims against Wardley and Richards would be \$9,000 (the difference between the appraised value of the Property without the swimming pool (\$100,000) and the price Brown paid (\$109,000)). [426 Transcript, pp. 148-54 and 159-60]. Brown's attorney acknowledged in open court that "ON THE FRAUD CLAIM, WE WOULD AGREE THAT THE MAXIMUM AMOUNT CHARGEABLE TO WARDLEY AND TO MR. RICHARDS IS \$9,000 BECAUSE THE EVIDENCE DEMONSTRATES THE VALUE OF THE HOME IS A HUNDRED THOUSAND DOLLARS...SO WITH RESPECT TO WARDLEY AND TO MR. RICHARDS ON THAT ISSUE, YES, THE AMOUNT OF DAMAGES SHOULD BE LIMITED TO \$9,000." (Capital letters in the original) [426 Transcript, p. 151].

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

Brown's Complaint asserted causes of action against all the Defendants for: (1) misrepresentation; (2) fraudulent concealment; and (3) negligence. Brown's Complaint also included a breach of contract claim against only the Millers and a claim against Wardley, Steve Goff (Richards' Branch Broker) and Richards for the alleged breach of their fiduciary duties. [R. 1-13].

The case was tried to a jury in February of 1998. At the close of Brown's case in chief, the parties stipulated to dismiss all the claims against Steve Goff as well as the negligence claims against all the Defendants and the breach of fiduciary duty claim against Richards and Wardley. [426 Transcript, pp. 145-47]. Additionally, the trial court dismissed all Brown's claims for negligent misrepresentation. [426 Transcript, pp. 156-60]. Therefore, the only claims left for the jury to decide were the breach of contract and fraud claims against the Millers and the fraud claims against Richards and Wardley. Brown's claims against the Millers dealt with the condition of the Property while her claims against Wardley and Richards involved Richards' representations regarding the inspection and the appraisal. During oral argument on Wardley's Motion for a Directed Verdict, the Parties stipulated that the appropriate measure of damages on the fraud claims against Wardley and Richards would be \$9,000 (the difference between the appraised value of the Property (\$100,000) and the price Brown paid (\$109,000)). [426 Transcript, pp. 148-54 and 159-60].

The jury returned verdicts against the Millers for \$1.00; against Richards for \$9,000 in compensatory damages and \$7,000 in punitive damages; and against Wardley for \$9,000 in compensatory damages and \$20,000 in punitive damages. [R. 184-85]. Wardley objected to the verdict because it conflicted with the parties' stipulations regarding Wardley's vicarious liability for Richards' conduct and the appropriate measure of damages, and because it did not comport with Utah law

regarding respondeat superior liability or the award of punitive damages. [R. 266-287 and 374-382]. Wardley's Motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial were both denied. [R. 369-72]. In anticipation of entry of a final judgment Wardley filed a notice of appeal. [R. 386-87] Nevertheless, a final judgment had not been submitted by Brown in time for that appeal to be heard and it was remanded. Finally, on February 29, 2000, a Final Judgment on the Jury Verdict was signed and entered by the trial court. This Appeal followed.

### **SUMMARY OF THE ARGUMENT**

Wardley's liability in this case was secondary and derivative, arising from Richards' communications with Brown. Brown did not assert any claims, make any allegations or present any evidence at trial that Wardley independently did anything wrong. In spite of that fact, 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. The judgment rendered against Richards will constitute full compensation for Brown's damages and pursuant to well settled principles of law, the satisfaction of that judgment will relieve Wardley from any further liability and prevent Brown from recovering twice for the same measure of damages.

Wardley also should not be vicariously liable for the punitive damage award issued against Richards. Wardley did not commit any wrongs independent of Richards, did not have any knowledge of Richards' allegedly wrongful conduct and did not ratify the misrepresentations upon which Brown's claims were based.

Even though the parties stipulated and agreed and the trial court recognized that \$9,000 was the maximum amount Brown could recover on her fraud claim, the jury returned two separate verdicts for compensatory damages for \$9,000 against both Wardley and Richards. The combined

judgment should have been \$9,000. The trial court, however, refused to correct that clear mistake and alter the verdict and subsequent judgment to reflect the agreement of the parties and the applicable law.

The complete lack of evidence regarding any separate wrongful conduct by Wardley required the trial court to set aside the verdict which the jury rendered against Wardley. The verdict could only stand upon separate allegations and evidence of wrongdoing by Wardley. No such allegations or evidence existed and, while Wardley is vicariously liable for damages caused by Richards' wrongful conduct, a separate and distinct verdict against Wardley cannot be permitted to stand.

## **ARGUMENT**

### **I. Wardley's Vicarious Liability for the Damages Caused by Richards' Breaches, Is Secondary And Derivative And Without Evidence Of A Breach (other than through Richards) By Wardley, Any Independent Claims Against Wardley Should Have Been Dismissed**

Joint liability of wrongdoers under common law arose where there was joint or contingent liability. An employer's vicarious liability pursuant to the doctrine of respondeat superior, however, is secondary or derivative, and arises solely because of the employer's relationship to his employee and not due to any actual negligence by the employer. *Krukiewicz v. Draper*, 725 P.2d 1349, 1351 (Utah 1986). Utah's tort reform act (Utah Code Anno. 78-27-37 through 43) instituted a comparative fault analysis where fault is apportioned among all those that are alleged to have caused or contributed to a plaintiff's damages. Utah's comparative fault statutes are intended to prevent any single defendant from having to pay for more than his or her own proportionate share of fault of a Plaintiff's damages.

In this case Brown did not allege any independent cause of action against Wardley or claim that any of her damages were caused by Wardley's own negligence. Instead Brown alleged that

Wardley was liable as a result of its relationship with Richards. If Brown had alleged that Wardley was liable because of its own conduct and produced evidence to support those allegations the jury would have been asked to apportion fault among Brown, the Millers, Wardley, Richards, the home inspection company and the appraiser and to determine whether Wardley should be held vicariously liable for Richards' actions.

In order to simplify the issues and streamline the trial, however, Wardley agreed to be vicariously liable for the damages resulting from Richards' breaches of his duties as the Millers' agent. In spite of that concession and a record devoid of evidence , or even allegations, of actual negligence by Wardley (other than through its agent) the trial court failed to dismiss the claims against Wardley and allowed the jury to return a verdict against it. Any independent claims against Wardley should have been dismissed prior to any jury deliberations.

**A Single Judgment Against Richards' For Which Wardley Is Vicariously Liable Will Fully Compensate Brown**

Pursuant to the doctrine of respondeat superior, employers and employees may not be joint tort-feasors but they are, nonetheless, each obligated for the same thing--total reparation of the plaintiff's damages. Once a plaintiff has recovered all his damages, either from the employer or the employee, there is nothing else to collect. A plaintiff such as Brown "may not recover a windfall by receiving more than his actual damages." *Nelson v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*, 935 P.2d 512, 514-15 (Utah 1997). Once the full amount of damages has been satisfied there is no cause of action against the master. *Id.* (Citing *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex.1980). Allowing the jury to return separate verdicts against Wardley and Brown when Wardley should have only been vicariously liable to Brown for Richards' wrongful



conduct, would permit Brown to recover twice for the same damage. The entry of a directed verdict on any independent claims against Wardley, on the other hand, would still give Brown her full recovery.

**The Punitive Damage Award Against Wardley Is Impermissible Pursuant To Utah Law**

The trial court's failure to direct a verdict in favor of Wardley, except with respect to Wardley's vicarious liability, also allowed the jury to return verdicts for punitive damages against both Wardley and Richards for \$20,000 and \$7,000 respectively. The arguments set forth above regarding independent versus derivative liability for Brown's compensatory damages apply equally to the jury's award of punitive damages against Wardley. Without any wrongful conduct by Wardley (except through Richards) an award of punitive damages against Wardley cannot stand.

Utah Code Anno § 78-18-1 also precludes the award of punitive damages unless “compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.” In the instant case, Brown has not produced any evidence to support an award of compensatory or general damages due to Wardley's conduct (except through Richards) and a separate award of punitive damages against Wardley, therefore, is improper.

**Wardley Should Not Be Held Vicariously Liable For The Punitive Damage Verdict Rendered Against Richards**

Wardley agreed to be vicariously liable for the damages incurred by Brown as a result of Richards' conduct. The punitive damage award, however, does not reflect damages incurred by Brown. It should be an amount intended to punish the wrongdoer, send a message and curtail future wrongful

conduct. Since there is no evidence that Wardley independently did anything improper, it should not be responsible to satisfy any portion of the award for punitive damages awarded against Richards.

An employer may be responsible for punitive damages resulting from an employee's conduct in any one of the following four circumstances:

- (a) if the principal or a managerial agent authorized the doing and the manner of the act;
- (b) if the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him;
- (c) if the agent was employed in a managerial capacity and was acting in the scope of employment; or
- (d) if the principal or a managerial agent of the principal ratified or approved the act.

*Hodges v. Gibson Products Co.*, 811 P.2d 151, 63 (Utah 1991); (citing Restatement (Second) of Agency § 217C (1958)).

While documents regarding the Miller/Brown transaction were reviewed by Richard's Broker, Steve Goff, and appeared to be in order, there is no evidence that Wardley's principal or a managerial agent authorized Brown to misrepresent the nature or results of the Property inspection or the content or meaning of the appraisal. Likewise there is no evidence (other than this single isolated incident) that Richards was unfit or that Wardley recklessly employed or retained him. To the contrary, Goff testified that he did not know of any complaints about Richards and wished that he had a "truckload of agents" like Richards. [426 Transcript, pp. 167-69]. It is also undisputed that Richards was a sales executive and not, therefore employed in any managerial capacity. Finally, there is no evidence that a principal or managerial agent of Wardley ever ratified or approved the misrepresentations complained of by Brown. Without clear and convincing evidence that Wardley

somehow participated in or ratified the wrongful conduct upon which the punitive damage award against Brown was based, Wardley should not be held vicariously liable for those damages.

**II. The Parties' Stipulation That \$9,000 Was The Appropriate Measure Of Damages Awardable Against Richards And Wardley On Brown's Fraud Claim Obligated the Trial Court To Correct The Jury Verdict To Accurately Reflect The Stipulated Amount**

The parties agreed in open court that, based upon the evidence submitted, the maximum amount Brown could recover on her fraud claim against Wardley and Brown was \$9,000. [426 Transcript, pp. 148-54 and 159-60]. When the jury returned separate verdicts for compensatory damages against Wardley for \$9,000 and against Richards for \$9,000, the trial court should have altered the verdict to accurately reflect the parties' agreement.

Pursuant to Rule 60(a) Utah R. Civ. P., the trial court can and should correct clerical mistakes in judgments at any time. *Stanger v. Sentinal Security Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983) (citing *Bagnall v. Suburbia & Co.*, Utah, 579 P.2d 917 (1978)). The *Stanger* court went on to refer to the comment to Rule 60(a) Fed. R. Civ. P., which is identical to Utah's rule, which states "in this broad approach to correctability under Rule 60(a), it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended." A correctable mistake will be one that is "mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." *Id.* (citing *In Re Merry Queen Transfer Corp.*, 266 F.Supp. 605, 607 (1967)).

In the instant case it is clear from the record that the parties and the trial court all recognized that \$9,000 was the maximum amount Brown could recover from Wardley and Richards on the fraud claim (the only claim that went to the jury). The parties and the trial court described the basis

for that amount as the difference between the actual value of the home (\$100,000) and the amount Brown Paid (\$109,000). This is purely a mathematical calculation that should be corrected to accurately reflect the agreement of the parties and the order of the Court. There is no need for a legal decision or the judgment of an attorney or the court to correct this mistake. The trial court, therefore, should be instructed to reduce the amount of the compensatory damages awarded against Wardley and Brown to \$9,000, consistent with the parties' understanding and intention.

**III. Because Brown Did Not Assert Any Separate Claims Against Wardley Or Produce Any Evidence That Wardley (other than through Richards) Breached Any Duties It Owed To Brown, The Trial Court Should Have Set Aside The Verdict Which The Jury Rendered Against Wardley Or Granted A New Trial In Order To Clarify The Inconsistent Verdict**

A verdict must be preceded by allegations and supported by evidence. In the instant case Brown did not allege or present any evidence that, other than through Richards, Wardley did or did not do anything that caused her to be damaged. Brown's fraud claim arose from Richards' alleged misrepresentations regarding the inspection of the Property and the appraisal. Brown's other claims against Richards and Wardley, however, were dismissed. Without allegations or evidence to support a claim that Wardley was somehow independently at fault, the separate verdict against Wardley should have been vacated by the trial court.

Wardley's liability in this case can only be based upon the doctrine of respondeat superior, whereby Wardley would be liable to Brown for damages inflicted by Richards in the course of his employment and within scope of his authority. As discussed above, however, that liability is derivative and secondary. *Holmstead v. Abbott G. M. Diesel, Inc.*, 493 P.2d 625, 627 27 Utah 2d 109 (1972); See also *Nelson on Behalf of Hirschfeld v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter- Day Saints* 935 P.2d 512, 514 (Utah 1997). Without some separate and distinct

basis for liability of the master the resolution of claims against the servant will exonerate the master.

*Id.* In this case the verdict against Richards together with Wardley's admission of vicarious liability should have relieved Wardley from having to answer for any other claims, verdicts or judgments.

The jury's verdict is, at best, confusing and contrary to the parties' agreement and the evidence presented. Inconsistencies in verdicts should be reconciled with the facts, the jury instructions and the parties agreement. *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083 (Utah 1985). If the trial court could not reconcile the verdict with the parties' stipulation, the law and the evidence presented it should have granted a new trial. Instead of vacating the offending portions of the verdict, or granting a new trial, the court ignored the law regarding vicarious liability, ignored the lack of independent allegations against Wardley, ignored the lack of evidence regarding wrongful conduct by Wardley and let the verdict stand. This Court should correct that error and direct the trial court to set aside those portions of the verdict that relate directly to Wardley.

### **CONCLUSION AND REQUESTED RELIEF**

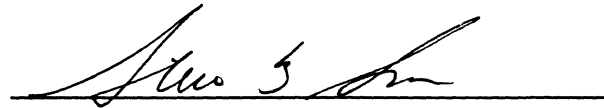
For the reasons set forth above Wardley requests this Court to remand this case to the trial court with instructions that the verdict against Wardley be vacated, the claims against Wardley, except for those regarding its vicarious liability for the damages directly caused by Richard's wrongful conduct, be dismissed and that Wardley be held vicariously liable for only the verdict for compensatory damages rendered against Richards.

## **REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 29, Utah R. App. P. Wardley hereby requests oral argument on this Appeal.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2000.

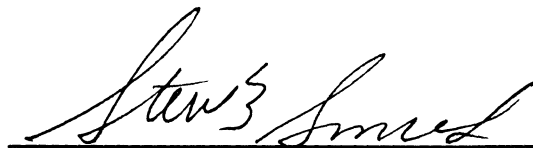
SCALLEY & READING, P.C.  
Attorneys for Appellant/Wardley

  
Steven B. Smith

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 16 day of August, 2000, two true and correct copies of the foregoing BRIEF OF APPELLANT was deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

DANA T. FARMER , No. 8317  
DAVID L. KNOWLES, No. 5615  
SMITH, KNOWLES & HAMILTON, P.C.  
4723 Harrison Blvd, Ste 200  
Ogden, Utah 84403



Tab A

Cited in *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

**Am. Jur. 2d.** — 75B Am. Jur. 2d Trial 1835 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 526 to 573.

**A.L.R.** — Submission of special interrogatories in connection with general verdict under Federal Rule 49(b), and state counterparts, 6 A.L.R.3d 438.

Quotient verdicts, 8 A.L.R.3d 335.

Competency of juror's statement or affidavit

to show that verdict in civil case was not correctly reported, 18 A.L.R.3d 1132.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 A.L.R.3d 472.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.

### **Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) *Motion for directed verdict; when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: conditional rulings on grant of motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to



Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Same: denial of motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**Compiler's Notes.** — This rule corresponds to Rule 50, F.R.C.P.

#### NOTES TO DECISIONS

##### Directed verdict.

- In general.
- Appeal.
- After failure to seek.
- Evidence.
- Findings and conclusions not required.
- Instruction.
- Jury trial.
- Nunc pro tunc.
- Judgment notwithstanding verdict.
- Appeal.
- Construction.
- Evidence.
- Motion foreclosed.
- Ruling on reserved motion.
- Splitting of negligence and damages issues.
- Time of notice.
- Cited.

##### Directed verdict.

###### — In general.

In reality, ordering a directed verdict is an act of the court, the signing and entry thereof being formalities paying tribute to the history of the practice. *Finlayson v. Brady*, 121 Utah 204, 240 P.2d 491 (1952).

A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. *Management Comm. of Graystone Pine Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1982).

###### — Appeal.

Supreme Court's standard of review of a directed verdict is the same as that imposed upon the trial court; the evidence must be examined in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained. *Management Comm. of Graystone Pine Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1982).

The Supreme Court will sustain the granting of a motion for a directed verdict only if the evidence was such that reasonable men could

not arrive at a different conclusion. *Anderson v. Gribble*, 30 Utah 2d 68, 513 P.2d 432 (1973).

###### — After failure to seek.

Although party who does not move for directed verdict generally has no standing to appeal on the basis that the evidence does not support the judgment, an exception exists where plain error appears in the record and would result in a miscarriage of justice. *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975).

###### — Evidence.

In directing a verdict, the court must examine the evidence in a light most favorable to the party against whom the verdict is intended; and it is not its province to weigh or determine the preponderance of the evidence. *Finlayson v. Brady*, 121 Utah 204, 240 P.2d 491 (1952).

In deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor. *Boskovich v. Utah Constr. Co.*, 123 Utah 387, 259 P.2d 885 (1953).

A directed verdict pursuant to Subdivision (a), upon the ground that the evidence fails to show that defendant is negligent, is tantamount to granting a motion for a nonsuit, and on appeal must be reversed if the evidence is such that reasonable men could arrive at a different conclusion. *Rhiness v. Dansie*, 24 Utah 2d 375, 472 P.2d 428 (1970).

Mere fact defendant's horses escaped from inclosure was not sufficient, under § 41-6-38, to justify submitting defendant's negligence to jury in action by motorist whose vehicle struck a horse, and thus directed verdict for defendant was proper. *Rhiness v. Dansie*, 24 Utah 2d 375, 472 P.2d 428 (1970).

In suit by wife for her personal injuries and husband's wrongful death in collision, wife's claim for injuries should have been submitted to jury since there was no evidence to establish any basis to impute alleged negligence of husband-driver to wife; wrongful death claim also presented question for jury since there were fact issues as to whether defendant's truck could be seen, whether husband was keeping a proper lookout and as to proximate cause. *Anderson v. Gribble*, 30 Utah 2d 68, 513 P.2d 432 (1973).

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

Excessiveness or adequacy of compensatory damages for personal injury to or death of

seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

## Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(Amended effective April 1, 1998.)

**Advisory Committee Note.** — The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in con-

flict with rules permitting service by means other than personal service.

**Amendment Notes.** — The 1998 amendment deleted the former fourth ground for a motion in Subdivision (b), as described in the Advisory Committee Note above, and renumbered the grounds accordingly.

**Compiler's Notes.** — This rule is similar to Rule 60, F.R.C.P.

### NOTES TO DECISIONS

"Any other reason justifying relief."

- Default judgment.
- Impossibility of compliance with order.
- Incompetent counsel.
- Lack of due process.
- Merits of case.
- Mistake or inadvertence.
- Mutual mistake.
- Real party in interest.
- Refund of fine after dismissal.
- Appeals.

Clerical mistakes.

- Computation of damages.
- Correction after appeal.
- Date of judgment.
- Void judgment.
- Estate record.
- Inherent power of courts.
- Intent of court and parties.
- Judicial error distinguished.
- Order prepared by counsel.
- Predating of new trial motion.

Tab B

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IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

\*\*\*\*\*

LINDA L. BROWN,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	TRANSCRIPT
	)	
ROBERT L. MILLER, ET AL,	)	CASE NO. 960900289
	)	
DEFENDANT.	)	

\*\*\*\*\*

FEBRUARY 25, 1998

HONORABLE PARLEY R. BALDWIN

\*\*\*\*\*

APPEARANCES:

FOR THE PLAINTIFF:	STANFORD A. GRAHAM
FOR THE DEFENDANTS:	JOHN T. CAINE
	NEIL R. SABIN

\*\*\*\*\*

REPORTED/TRANSCRIBED BY DEAN OLSEN, CSR  
2525 GRANT AVENUE  
OGDEN, UTAH 84401  
(801) 395-1056

COPY

1 COURT IS GOING TO EXCUSE THE JURY. I'LL ASK THE BAILIFF TO  
2 TAKE YOU BACK INTO THE JURY ROOM. WE HAVE A FEW MATTERS THAT  
3 WE'LL TAKE CARE OF. FOLLOWING THOSE, YOU'LL BE BROUGHT BACK  
4 IN. THANK YOU.

5 (JURY WITHDRAWS.)

6 THE COURT: MR. SABIN.

7 MR. SABIN: YES. THANK YOU, YOUR HONOR. MAY IT  
8 PLEASE THE COURT, WE RESPECTFULLY MOVE FOR A DISMISSAL OF THIS  
9 ACTION ON THE BASIS THAT THE PLAINTIFF HAS FAILED TO ESTABLISH  
10 A PRIMA FACIE CLAIM UNDER ANY OF THE CLAIMS WHICH ARE ASSERTED  
11 HERE. NOW, I'LL -- MUCH OF THE STATEMENTS IN THE COMPLAINT,  
12 ALTHOUGH THERE'S SOME STIRRING UP OF THE CAUSES OF ACTION  
13 WHICH SEEM TO RELATE ONE TO ANOTHER, MAKE REFERENCE TO  
14 NEGLIGENCE. AND I UNDERSTAND MR. GRAHAM, HE ACQUIESCES IN THE  
15 ACKNOWLEDGEMENT THAT THERE IS NO BASIS FOR NEGLIGENCE IN A  
16 MATTER -- IN A CASE OF THIS KIND BASED UPON THE MOCK CASE.  
17 AND SO THE ISSUES OF NEGLIGENCE ARE OUT BECAUSE IT'S SOLELY A  
18 CLAIM FOR ECONOMIC DAMAGES. AND THE MOCK CASE IS VERY CLEAR  
19 ON HERE, AND I UNDERSTOOD MR. GRAHAM TO ACKNOWLEDGE THAT WHEN  
20 YOU AND I AND HE WERE SITTING TOGETHER.

21 SECONDLY, WE HAVE ACKNOWLEDGED THAT WARDLEY BETTER HOMES  
22 AND GARDENS AS THE PRINCIPAL BROKER WOULD HAVE LIABILITY IF  
23 GERRY RICHARDS HAD LIABILITY. WE HAVE NEVER ACKNOWLEDGED WITH  
24 RESPECT TO MR. GOFF. THERE'S NOT A SHRED OF EVIDENCE BEFORE  
25 THE COURT AS TO THE LIABILITY, IF ANY, OF A BRANCH BROKER IN

1 CIRCUMSTANCES IN THIS CASE. THERE'S NOT EVEN ANY CLAIM THAT  
2 MR. GOFF HAD ANY INDEPENDENT ACTIONS THAT HE HAD TAKEN. IT'S  
3 JUST SIMPLY A SECONDARY ACTION JUST BY VIRTUE OF HIS POSITION  
4 AS A BRANCH BROKER THAT HE IS SOMEHOW LIABLE. THERE'S NOTHING  
5 BEEN PRESENTED TO THIS COURT EITHER BY MEMO, BY EVIDENCE, BY  
6 WITNESS, AND SO THERE BEING NO EVIDENCE TO ESTABLISH ANY  
7 LIABILITY TO STEVE GOFF, HE SHOULD BE DISMISSED. BECAUSE  
8 THERE'S BEEN NO EVEN -- NOT EVEN A STATEMENT ABOUT HIM OTHER  
9 THAN JUST SIMPLY HIS ROLE.

10 NEXT, THE ALLEGATIONS OF BREACH OF FIDUCIARY DUTY AGAINST  
11 MR. RICHARDS. IT DOESN'T -- IT'S ABSOLUTELY FUNDAMENTAL THAT  
12 TO ESTABLISH A BREACH OF FIDUCIARY DUTY, THE PLAINTIFF HAS THE  
13 BURDEN OF ESTABLISHING WHAT THAT DUTY IS. AND THE WAY YOU  
14 ESTABLISH A DUTY, AND UNDER THE ISSUE OF A BREACH OF FIDUCIARY  
15 DUTY, JUST LIKE YOU WOULD ESTABLISH THE DUTY WHEN IT RELATES  
16 IT ISSUES OF NEGLIGENCE, IS THERE MUST BE SOME EVIDENCE TO  
17 ESTABLISH WHAT THAT DUTY IS. AND THE ONLY -- THE PERSON WHO  
18 CAN ESTABLISH THAT DUTY IS SOMEBODY WHO IS CAPABLE AND  
19 QUALIFIED TO BE ABLE TO TESTIFY AS TO WHAT THAT DUTY WAS --

20 MR. GRAHAM: YOUR HONOR, I CAN MAYBE SAVE SOME TIME  
21 FOR MR. SABIN.

22 MR. SABIN: WELL, I'D JUST SOON NOT HAVE MY TIME  
23 SAVED. THANK YOU.

24 THE COURT: OH, GO AHEAD.

25 MR. GRAHAM: IF IT'S GOING TO AFFECT THE RESULT OF

1 THIS, WITH RESPECT TO THE CLAIMS OF NEGLIGENCE, AS WE  
2 INDICATED WHEN WE STARTED, THAT'S FINE. WE STIPULATE WE HAVE  
3 THOSE DISMISSED --

4 THE COURT: THANK YOU.

5 MR. GRAHAM: -- BASED ON THE MOCK CASE AND THE  
6 ECONOMIC DAMAGES RULE.

7 THE COURT: I THINK WE DISCUSSED THAT EARLIER.

8 MR. GRAHAM: WE DISCUSSED THAT. THAT'S FINE.

9 THE COURT: THANK YOU.

10 MR. GRAHAM: WITH RESPECT TO MR. GOFF AS WELL, YOU  
11 KNOW, THIS WAS PRESENTED SIMPLY FOR THAT VERY REASON. WE  
12 DON'T BELIEVE THAT HE HAS ANY LIABILITY.

13 THE COURT: THANK YOU. MR. GOFF IS DISMISSED.

14 MR. GRAHAM: WITH RESPECT TO WARDLEY, OBVIOUSLY  
15 THERE'S A STIPULATION BASED ON MR. RICHARDS'S LIABILITY, THEN  
16 WARDLEY ALSO SHARES IN THAT LIABILITY.

17 WITH RESPECT TO THE ISSUE OF FIDUCIARY DUTY AS WELL, WE'D  
18 STIPULATE THAT NO EVIDENCE HAS BEEN PRESENTED AS TO  
19 ESTABLISHING A FIDUCIARY RELATIONSHIP BETWEEN MR. RICHARDS AND  
20 MISS BROWN. AND HAVEN'T ADMITTED ANY -- HAVEN'T CALLED FOR  
21 ANY EVIDENCE TO ESTABLISH THE WRONG RELATIONSHIP OR ANY  
22 EVIDENCE TO ARGUE THAT HE HAD SUCH A COMPELLING FORCE ON HER  
23 AS TO CAUSE HER TO DO CERTAIN THINGS. SO WITH RESPECT TO THE  
24 CLAIM OF FIDUCIARY DUTY AS WELL (UNINTELLIGIBLE) --

25 THE COURT: THAT'S DISMISSED.

1           **MR. SABIN:**           THANK YOU. I OWE YOU AN APOLOGY. I  
2 APOLOGIZE FOR -- FOR WHAT I NOW NEED TO SAY NICE THINGS ABOUT  
3 YOU, OKAY? TWO REMAINING ISSUES, YOUR HONOR --

4           **MR. GRAHAM:**       I'LL PUT THAT IN MY POCKET. I MIGHT  
5 NEED IT. RIGHT NOW.

6           **THE COURT:**       OKAY.

7           **MR. SABIN:**       TWO REMAINING ISSUES. ONE HAS TO DO  
8 WITH THE REMAINING CLAIM OF FRAUD. AND THE OTHER HAS TO DO  
9 WITH THE FACT THAT WE DON'T HAVE THE APPROPRIATE MEASURE OF  
10 DAMAGES EVIDENCE. THE ONLY EVIDENCE THAT WE HAVE AS TO  
11 ANYBODY WHO HAS TESTIFIED FROM SOME THIRD PARTY AS TO WHAT THE  
12 DAMAGES ARE, WAS THE ELECTRICIAN WHO JUST TESTIFIED, WHO JUST  
13 SIMPLY TESTIFIED AS TO WHAT EXPENSES WENT INTO WHAT THE  
14 ELECTRICAL COMPANY PUT INTO THE HOME. BUT EVEN THAT,  
15 THERE'S -- OF COURSE IT'S MR. CAINE'S ARGUMENT -- TO ARGUE AS  
16 TO WHETHER OR NOT THERE WAS ANY CAUSE OF ACTION THERE. BUT  
17 THE POINT IS, I -- ON A CONTRACT CASE, WE AREN'T EVEN ALLEGED  
18 TO BE A CONTRACT PARTY. BUT THE ONLY EVIDENCE -- AND I WOULD  
19 SUBMIT THAT EVEN THAT IS FAULTY -- IS THE EVIDENCE THAT CAME  
20 IN THROUGH THE ELECTRICIAN.

21           FINALLY, YOU'VE GOT THE ISSUE OF FRAUD. AND WE WOULD  
22 SUBMIT THAT THERE'S NO -- THAT THERE HAS BEEN NO PRIMA FACIE  
23 CASE ESTABLISHED ON FRAUD FOR A COUPLE OF THINGS. ONE, THERE  
24 IS NO EVIDENCE THAT EITHER MR. RICHARDS, MR. MILLER, OR  
25 MRS. MILLER HAD ANY KNOWLEDGE OF ANYTHING WRONG AS IT RELATED



1 TO ANY LEAKS WITH THE ROOF OR THAT FIBERGLASS ROOF OR ANYTHING  
2 THAT RELATED TO THE ELECTRICAL OR INDEED ANYTHING ELSE WRONG  
3 WITH THAT HOME. THE ONLY EVIDENCE WHICH IS BEFORE THE COURT  
4 IS THE -- IS THE IMPRESSION EVIDENCE THAT SAYS, WELL, IF YOU  
5 OCCUPIED THE HOME THAT LONG, YOU MUST HAVE KNOWN. BUT THE  
6 EVIDENCE IS BEFORE THIS COURT THAT CERTAINLY -- THAT CERTAINLY  
7 IS WITH RESPECT TO MR. RICHARDS, THERE WAS NO EVIDENCE THAT HE  
8 HAD ANY KNOWLEDGE AT ALL. SO CLEARLY AS IT RELATES TO ISSUES  
9 RELATING TO THE ROOF AND ISSUES AS IT RELATES TO THE -- TO THE  
10 CONDITION OF THE PROPERTY, THERE IS NO BASIS FOR THE KNOWLEDGE  
11 WHICH IS REQUIRED, AND SO ACCORDINGLY, THERE'S NO EVIDENCE OF  
12 THE INTENTIONAL INTENT TO HAVE THEM -- TO HAVE MISS BROWN RELY  
13 UPON THIS.

14 THE ONLY REMAINING THING TO TALK ABOUT IS THE ISSUE OF  
15 MR. BROWN'S SUPPOSEDLY STATING --

16 MR. GRAHAM: MR. BROWN?

17 MR. SABIN: I'M SORRY, MR. RICHARDS. OF MR.  
18 RICHARDS SUPPOSEDLY FRAUDULENTLY DEALING WITH MRS. BROWN WITH  
19 RESPECT TO THE INSPECTION AND THE APPRAISAL REPORT. I WOULD  
20 SUBMIT TO THE COURT THAT THE ISSUE AS TO WHAT HIS OBLIGATION  
21 WAS TO DELIVER AN INSPECTION AND TO DELIVER A APPRAISAL REPORT  
22 TIES IN WITH THE ISSUE OF HIS FIDUCIARY DUTY. AND IF INDEED  
23 HE HAS NO DUTY TO HER, THEN THE FACT THAT HE DID NOT TAKE SOME  
24 ACTION TO DELIVER SOMETHING CANNOT BY ITS DEFINITION BE  
25 LABELED FRAUD. AND ON THAT BASIS, WE'D -- THERE'S -- AND

1 FINALLY, THE ONLY EVIDENCE OF DAMAGES THAT HAS BEEN PUT OUT  
2 HAS BEEN THE ALLEGATION THAT, LET'S SUPPOSE THAT THESE  
3 OTHER -- THAT ALL OF THESE CAUSES OF ACTION DID EXIST AND  
4 INDEED, THAT THERE WAS A DAMAGE TO MISS BROWN. WHAT'S HER  
5 MEASURE OF DAMAGES? HER MEASURE OF DAMAGES IS TO SAY, YOU  
6 SOLD ME SOMETHING THAT WASN'T WORTH WHAT I PAID FOR IT, THEN  
7 HE OWE ME THE DIFFERENCE.

8 NOW, I POINTEDLY ASKED THE APPRAISER IF HE HAS APPRAISED  
9 THE PROPERTY SINCE THE TIME SHE BOUGHT IT. HE DOESN'T --  
10 THERE WAS NO EVIDENCE BEFORE THIS COURT AS TO WHAT THE VALUE  
11 OF THAT PROPERTY WAS OTHER THAN THE HUNDRED THOUSAND DOLLAR  
12 APPRAISAL ON THAT AMOUNT. AND WHAT SHE'S ASKING IS TO TRY TO  
13 GET IN THE EVIDENCE THAT SOMEHOW SHE PAID \$27,000 IN ORDER TO  
14 REPLACE THE ROOF. AND SO THE ONLY EVIDENCE THAT WE HAVE ON  
15 WHAT SHE DID WAS SHE PAID \$27,000 TO REPLACE THE ROOF AND SHE  
16 PAID THE ELECTRICAL SOMETHING. BUT THAT IS NOT THE MEASURE OF  
17 DAMAGES EVEN IF THERE WERE PROOF OF FRAUD IN THIS SORT OF A  
18 CASE. THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN WHAT  
19 SHE PAID AND WHAT IT WAS WORTH AND SHE -- AND -- AND SO IF THE  
20 COURT WERE TO DETERMINE THAT THE APPRAISAL ITSELF MIGHT BE  
21 SUFFICIENT TO GET THAT -- AT LEAST THAT ISSUE PASSED TO THE  
22 JURY, THERE SHOULD BE AN INSTRUCTION TO THE JURY THAT THE  
23 MAXIMUM MEASURE OF DAMAGES HAS GOT TO BE THE DIFFERENCE  
24 BETWEEN WHAT SHE PAID AND WHAT THE JURY DETERMINES THAT HOME  
25 WAS WORTH. AND WE WOULD SO SUBMIT.

1           THE COURT:           LET'S SEE, MR. GRAHAM DO YOU TO GO  
2 (UNINTELLIGIBLE) RESPOND. DO YOU WANNA GO, THEN YOU CAN GO?

3           MR. GRAHAM:         ANY WAY YOU WANT.

4           THE COURT:         GO AHEAD, MR. GRAHAM.

5           MR. GRAHAM:         OKAY. THE ISSUE OF DAMAGES AS IT  
6 APPLIES TO WARDLEY AND RICHARDS, ON THE FRAUD CLAIM, WE WOULD  
7 AGREE THAT THE MAXIMUM AMOUNT CHARGEABLE TO WARDLEY AND TO  
8 MR. RICHARDS IS \$9,000 BECAUSE THE EVIDENCE DEMONSTRATES THE  
9 VALUE OF THE HOME IS A HUNDRED THOUSAND DOLLARS. I DON'T  
10 THINK THERE'S -- THAT AS OF THE DAY OF THE APPRAISAL, AS OF  
11 THE DAY OF CLOSING, IN FACT, IN THIS COURT, THERE ISN'T ANY  
12 OTHER EVIDENCE AS TO WHAT IT'S ACTUALLY WORTH, IF THAT IS THE  
13 EVIDENCE. I DON'T THINK THERE'S ANY QUESTION ON THAT.  
14 THAT'S -- THAT WAS THE VALUE OF THE HOME. WHAT WAS PAID WAS  
15 \$109,000. WHICH IS \$9,000 IN EXCESS OF WHAT ITS VALUE WAS.  
16 SO WITH RESPECT TO WARDLEY AND TO MR. RICHARDS ON THAT ISSUE,  
17 YES, THE AMOUNT OF DAMAGES SHOULD BE LIMITED TO \$9,000.

18           AND BELIEVE MR. SABIN CITES THE LAW CORRECTLY, THAT IN  
19 DETERMINING THE AMOUNT OF DAMAGES IN A FRAUD CLAIM, IT IS THE  
20 AMOUNT -- THE DIFFERENCE BETWEEN THE AMOUNTS OF THE VALUE OF  
21 THE PROPERTY AND WHAT WAS ACTUALLY PAID FOR IT. AND THERE'S  
22 SOME LOGIC TO THAT MEASURE OF DAMAGES AND TO MAKE A PERSON  
23 WHOLE FOR THEIR FRAUD THAT WAS -- THAT WAS COMMITTED, THE  
24 AMOUNT OF MONEY THAT WAS OVERPAID. IT'S PAY THE PERSON THE  
25 DIFFERENCE BETWEEN THAT AMOUNT AND THE AMOUNT THAT THE REAL

1 VALUE WAS BECAUSE THAT'S WHAT THEY WERE EXPECTING. WE WOULD  
2 AGREE.

3 NOW, WITH RESPECT TO THE -- MR. SABIN SAYS THERE'S ONE  
4 CLAIM LEFT OF FRAUD. THERE'S ALSO CLAIMS OF NEGLIGENT  
5 MISREPRESENTATION IF YOU READ CAREFULLY THE LANGUAGE OF THE  
6 COMPLAINT. NEGLIGENT MISREPRESENTATION IS -- WELL, THERE'S  
7 A -- WE'VE GOT SOME NON STIPULATED JURY INSTRUCTIONS THAT  
8 OUTLINE THE ELEMENTS TO THAT CLAIM.

9 ALSO WITH RESPECT TO DAMAGES, IN RELATIONSHIP TO THE  
10 NEGLIGENT MISREPRESENTATION CLAIMS AS WELL, WE HAVE MEASURES  
11 FOR DAMAGES IN THAT INSTANCE AS WELL.

12 NOW, THE -- THOSE CLAIMS RUN TO RICHARDS AND WARDLEY,  
13 BECAUSE AS THE EVIDENCE SHOW -- AND I -- WE'VE TRIED TO BE  
14 CONSISTENT, WHEN WE STARTED MONDAY MORNING, THE CASE THAT WE  
15 OUTLINED TO THE JURY WAS IN OPENING STATEMENTS, WAS THAT THERE  
16 WAS MISREPRESENTATION WHICH WAS INTENTIONAL OR NEGLIGENT IN  
17 THE COMMUNICATIONS BETWEEN MR. RICHARDS AND MISS BROWN ABOUT  
18 THE INSPECTION, DID IT ACTUALLY OCCUR, OF THE ROOF. AND ABOUT  
19 THE APPRAISAL. THE -- WITH RESPECT TO THE INSPECTION THE  
20 EVIDENCE IS, THAT WAS ADMITTED, THE EVIDENCE THAT CAME IN  
21 WAS -- FROM MISS BROWN WAS, HAD -- HAD SHE KNOWN THAT THE  
22 PROPERTY HAD NOT BEEN INSPECTED, THAT THE ROOF HAD NOT BEEN  
23 INSPECTED, SHE WOULDN'T HAVE CLOSED ON THE PROPERTY. --

24 THE EVIDENCE ALSO SHOWS -- THESE ARE FACTUAL QUESTIONS  
25 THAT OUGHT TO REACH THE JURY. THE EVIDENCE IS CONTRADICTORY

1 AND THAT DOESN'T SURPRISE US, WE'RE HERE, BUT THE EVIDENCE  
2 ALSO SHOWS THAT THERE WERE MISREPRESENTATIONS ABOUT THE  
3 APPRAISAL, THE ACTUAL VALUE OF THE HOME.

4 NOW, WHAT -- WHAT DIFFERENCE DOES THAT MAKE ON THE  
5 NEGLIGENT MISREPRESENTATION CLAIMS? WELL --

6 THE COURT: YOU'RE CLAIMING THE MOCK CASE DOES NOT  
7 COVER NEGLIGENT MISREPRESENTATION.

8 MR. GRAHAM: THAT'S CORRECT, IT DOES NOT ADDRESS THAT  
9 ISSUE.

10 MR. SABIN: THE MOCK CASE DOES HAVE A CLAIM OF  
11 NEGLIGENT MISREPRESENTATION.

12 MR. GRAHAM: WELL, THEN -- THEN LET'S TALK ABOUT THAT  
13 BECAUSE TO MY RECOLLECTION, IT DID NOT. BUT --

14 THE COURT: YOU'RE CLAIMING THAT IS SEPARATE AND  
15 APART FROM REGULAR NEGLIGENCE, THE NEGLIGENT  
16 MISREPRESENTATION --

17 MR. GRAHAM: CORRECT, CORRECT. BECAUSE THE -- THE  
18 ELEMENTS TO SATISFY A NEGLIGENT MISREPRESENTATION CLAIM  
19 INCLUDE PECUNIARY INJURIES. AND THOSE ARE THE TYPES OF  
20 INJURIES WE'RE TALKING ABOUT HERE, SO -- BUT IN -- IN ALL  
21 HONESTY, I DON'T KNOW IF I CAN CREDIBLY ARGUE THAT WE OUGHT TO  
22 RECOVER TWICE, \$9,000, FOR INSTANCE, ON A NEGLIGENT  
23 MISREPRESENTATION CLAIM AND \$9,000 ON THE FRAUD CLAIM. I  
24 DON'T -- I DON'T FEEL THAT THAT'S -- I DON'T THINK THE LAW  
25 SUPPORTS THAT ARGUMENT. BECAUSE IN FACT, WITH RESPECT TO THE

1 ELEMENTS OF NEGLIGENT MISREPRESENTATION OF FRAUD, MEASURE OF  
2 DAMAGES IS THE SAME. IT'S THE DIFFERENCE BETWEEN THE VALUE OF  
3 THE PROPERTY AND -- THE ACTUAL VALUE AND THE VALUE THAT WAS  
4 PAID, THAT WAS INDUCED BY EITHER THE NEGLIGENT  
5 MISREPRESENTATION OR THE FRAUD. IN EITHER CASE, IN THIS CASE,  
6 IT'S \$9,000. AND SO I WOULD SIMPLY ARGUE THAT ON EITHER  
7 CLAIM, THE PROPER MEASURE OF DAMAGES IS \$9,000.

8 I DON'T THINK THERE'S A -- I DON'T THINK THERE IS A  
9 CREDIBLE ARGUMENT TO MAKE THAT, WELL, YOU CAN RECOVER \$9,000  
10 TWICE. I DON'T THINK THAT'S WARRANTED.

11 THE COURT: OKAY.

12 MR. GRAHAM: ALSO, AS WE IDENTIFIED IN OUR OPENING  
13 STATEMENT, THE -- IN THE CLAIMS WITH RESPECT TO WARDLEY HAD TO  
14 DO WITH THE APPRAISAL AND THE INSPECTION. THE DAMAGES OF THE  
15 FLOW FROM THOSE ARE THE DIFFERENCES BETWEEN VALUE OF THE  
16 PROPERTY AND THE AMOUNT THAT WAS PAID. THAT'S THAT WITH  
17 RESPECT TO WARDLEY AND MR. RICHARDS.

18 WITH RESPECT TO THE MILLERS, OBVIOUSLY, OUR CLAIMS ARE  
19 BASED ON BREACH OF CONTRACT WHERE THE LANGUAGE IN THE REAL  
20 ESTATE PURCHASE CONTRACT IS CLEAR, ABOUT WHAT THE OBLIGATIONS  
21 WERE, THE EVIDENCE HAS COME INTO COURT AS --

22 THE COURT: THAT HASN'T BEEN RAISED AND I DON'T KNOW  
23 IF YOU'RE GONNA RAISE THAT.

24 MR. GRAHAM: PERHAPS --

25 MR. CAINE: ABSOLUTELY.

1           THE COURT:            OKAY.

2           MR. GRAHAM:          (UNINTELLIGIBLE)

3           THE COURT:          LET'S GET MR. CAINE TO RESPOND OR TO GO  
4 TO THAT ONE. WHY DON'T YOU FINISH AS IT RELATES TO -- AS IT  
5 RELATES TO RICHARDS AND WARDLEY.

6           MR. GRAHAM:          OKAY. I THINK, YOU KNOW, IT'S -- I WAS  
7 JUST GONNA SAY, I WANNA MAKE SURE I ADDRESS ALL THE ITEMS THAT  
8 MR. SABIN HAD RAISED. AND I'VE JUST RUN OUT OF INK.

9           THE COURT:          DO YOU NEED ANOTHER PEN?

10          MR. GRAHAM:          NO. WITH --

11          THE COURT:          I'VE GOT A PEN IF YOU --

12          MR. GRAHAM:          OH, THAT WOULD BE APPRECIATED. TRADE  
13 YOU. WITH RESPECT TO THE -- MR. SABIN'S STATEMENTS THAT THERE  
14 ISN'T ENOUGH EVIDENCE FOR A PRIMA FACIE CASE, I UNDERSTAND HIM  
15 MAKING STATEMENT, BUT SURE THERE IS. SURE THERE IS. I MEAN,  
16 WE'RE NOT SURPRISED IN -- TO ANY DEGREE THAT THE EVIDENCE  
17 WHICH HAS COME IN BY MR. RICHARDS OR THE MILLERS IS AS IT IS.  
18 THAT WAS EXPECTED. BUT TO -- BUT TO MAKE THE ARGUMENT THAT  
19 BECAUSE THE FACTS ARE IN DISPUTE, THAT THERE'S NO PRIMA FACIE  
20 CASE, THAT LOGIC DOESN'T FOLLOW. DOESN'T FOLLOW. EACH  
21 ELEMENT OF THE CLAIMS THAT WE HAVE AGAINST WARDLEY AND  
22 RICHARDS HAVE BEEN ADDRESSED IN THE EVIDENCE. IF THERE'S NO  
23 COALESCING OF THE EVIDENCE BETWEEN THE OPPOSING PARTIES, THAT  
24 MEANS THE FACT FINDER HAS TO DETERMINE, HAS TO WEIGH THE  
25 EVIDENCE, HAS TO DETERMINE THE CREDIBILITY OF THE WITNESSES,

1 AND NEED TO MAKE AN INDEPENDENT DECISION ABOUT WHETHER --  
2 WELL, DIDN'T EXPECT, QUITE FRANKLY, THE MILLERS TO COME IN AND  
3 SAY, GEE, YOU KNOW, WE -- WE KNEW. THAT WASN'T ANTICIPATED.  
4 BUT THE EVIDENCE THAT'S BEEN SUBMITTED IN BOTH BY WAY OF MISS  
5 BROWN, BY THE -- BY THE ITEMS, BY INDEPENDENT WITNESSES WHO  
6 HAVE NO INTEREST IN THE CASE, NO INTEREST WHATSOEVER, CLEARLY  
7 SHOW THAT IT WOULD BE REASONABLE TO CONCLUDE THAT THEY HAD  
8 KNOWLEDGE OF IT. THE FACT THAT THEY SAY THEY DON'T, THAT'S  
9 THEIR TESTIMONY. BUT TO SAY THAT BECAUSE THEY SAY THAT THEY  
10 DIDN'T KNOW, THEREFORE, THERE IS NO CASE, IS I THINK NOT QUITE  
11 CREDIBLE. SO ON THAT ISSUE, I'D HAVE TO DISAGREE WITH  
12 MR. SABIN. THERE ARE FACTS IN DISPUTE. THE CASE NEEDS TO GO  
13 TO THE FACT FINDER.

14 NOW, ON THE ISSUE OF -- WELL, I THINK (UNINTELLIGIBLE) --

15 **THE COURT:** YEAH, THANK YOU. LET'S --

16 **MR. SABIN:** (UNINTELLIGIBLE) MR. CAINE'S, YOUR  
17 HONOR.

18 **THE COURT:** -- RESPOND.

19 **MR. SABIN:** MAY I APPROACH?

20 **THE COURT:** YOU MAY.

21 **MR. GRAHAM:** HAVE YOU GOT A COPY FOR ME?

22 (UNINTELLIGIBLE).

23 **MR. SABIN:** WELL, I'M JUST STARTING. THE-MACK CASE  
24 IS VERY SIMILAR TO THIS CASE IN THE SENSE THAT THE BUYERS OF  
25 PROPERTY SUED THE SELLERS AND SUED THE SELLERS' AGENTS FOR A



1 WHOLE SERIES OF THINGS WHICH INCLUDED FRAUD, NEGLIGENT  
2 MISREPRESENTATION, NEGLIGENCE, AND JUST THE USUAL SHOPPING  
3 LIST. AS YOU READ THE MOCK CASE, ONE THING OUGHTA BE  
4 PERFECTLY CLEAR IS THAT NEGLIGENT MISREPRESENTATION IS  
5 NEGLIGENCE. THE ONLY DIFFERENCE BETWEEN THE REGULAR  
6 NEGLIGENCE CASE AND NEGLIGENT MISREPRESENTATION IS YOU HAVE TO  
7 STILL PROOF ESSENTIALLY THE ELEMENTS OF FRAUD ONLY WITH A  
8 NEGLIGENCE STANDARD ON THERE. AS YOU LOOK AT THE MOCK CASE,  
9 THE COURT TOOK THINGS STEP AT A TIME AND STARTED TO THROW 'EM  
10 OUT. AND THE COURT THEN TOOK A LOOK BEFORE THEY EVER STARTED  
11 THE ECONOMIC DAMAGES ARGUMENT, THEY APPROACHED THE ISSUE OF  
12 NEGLIGENT MISREPRESENTATION. AND ON THAT CASE, THEY DIDN'T  
13 EVEN HAVE TO GET TO THE ISSUE OF THE DAMAGES BECAUSE THE COURT  
14 HELD ON THE NEGLIGENT MISREPRESENTATION CASE -- AND I'M  
15 REFERRING AT PAGE 577, THEY'RE SAYING THAT THE DEFENDANTS  
16 FAILED TO CONDUCT A REASONABLE INVESTIGATION OF THE MARKET  
17 VALUE PRIOR TO EXECUTING THE AGREEMENT.

18 WELL, LET ME READ THE EXTRA WORDING. DEFENDANTS COULD  
19 HAVE ASCERTAINED WITH REASONABLE DILIGENCE THE TRUTH OR  
20 FALSITY OF CAROL CLASS'S ALLEGED MISREPREEN --

21 THE COURT: HELP ME OUT, WHERE YOU'RE AT.

22 MR. SABIN: BOTTOM COLUMN OF 577, LEFT-HAND COLUMN.  
23 IT'S THE ITALICIZED INFORMATION.

24 THE COURT: OKAY. GO AHEAD, I'M WITH YOU.

25 MR. SABIN: AND THEY'RE QUOTING THE CLASS CASE. AND

1 THEY'RE SAYING THE DEFENDANTS COULD HAVE ASCERTAINED WITH  
2 REASONABLE DILIGENCE THE TRUTH OR FALSITY OF CAROL CLASS'S  
3 ALLEGED MISREPRESENTATIONS BY REQUESTING COPIES OF THE  
4 APPRAISALS OR DEMANDING TO KNOW THE BASIS FOR HER INFORMATION  
5 OR BY OBTAINING AN INDEPENDENT APPRAISAL OF THE SUBJECT  
6 PROPERTY. SAYS, SINCE THE MEANS OF KNOWLEDGE WERE AVAILABLE  
7 TO DEFENDANT, AND SINCE THEY FAILED TO AVAIL THEMSELVES OF  
8 THESE MEANS, THEY CANNOT CLAIM -- THEY CANNOT NOW CLAIM TO  
9 HAVE BEEN DECEIVED BY THE REPRESENTATIONS OF THE VENDOR. NOW,  
10 IN THIS CASE, WE HAD MANY OF THE SAME SORT OF CLAIMS. I  
11 RELIED UPON YOU BECAUSE YOU TOLD ME CERTAIN THINGS. AND THEY  
12 WENT ON AHEAD TO SAY THAT -- I'M READING NOTE NUMBER 3,  
13 ALTHOUGH THE UTAH SUPREME COURT HAS NOT INCLUDED DUE DILIGENCE  
14 AS AN ELEMENT OF NEGLIGENT MISREPRESENTATION, IT HAS REQUIRED  
15 A SOMEWHAT ANALOGOUS ELEMENT OF REASONABLE RELIANCE.

16 AND THEN THEY WENT AHEAD AND IN THE REST OF FOOTNOTE 3,  
17 FOOTNOTE 4, THEY FIND THAT THERE WAS -- THAT THERE WAS NO  
18 BASIS FOR -- OR THAT THERE WAS NO REASONABLE RELIANCE ON THE  
19 BASIS OF THE PLAINTIFFS IN THIS CASE, AND SO THEY THREW IT OUT  
20 ON ITS OWN MERITS. THEN THEY GET FURTHER IN AFTER THEY TALK  
21 ABOUT FRAUDULENT CONCEALMENT, AND THEN THEY TALK ABOUT  
22 FRAUDULENT DISCLOSURE, AND THEN THEY GET CLEAR OVER ON 579 AND  
23 THEY START TALKING ABOUT THE ECONOMIC LOSS OF NEGLIGENCE.

24 NOW, IF THERE'S A BASIS FOR A DISPUTE OF FACTS FOR THE  
25 JURY, TO GO TO THE JURY ON ALLEGATIONS OF FRAUD, THEN SO BE

1 IT. BUT IF THE ALLEGATION IS NEGLIGENT MISREPRESENTATION,  
2 THAT'S PRECISELY WHAT I'M SAYING. THE COURT HAS SAID IN THE  
3 MOCK CASE THAT YOU DO NOT HAVE A CLAIM UNDER NEGLIGENCE FOR  
4 PURELY ECONOMIC DAMAGES. AND IF THERE'S A CONTRACT, IF  
5 THERE'S A BREACH OF FIDUCIARY CLAIM, IF THERE'S A FRAUD CLAIM,  
6 THEN THOSE -- THEN THOSE ARE OTHER ELEMENTS AND WAYS IN WHICH  
7 PEOPLE CAN REACH IT. BUT NEGLIGENCE IS NEGLIGENT, AND WHETHER  
8 YOU CALL IT NEGLIGENT MISREPRESENTATION OR JUST NEGLIGENCE,  
9 IT'S NEGLIGENCE. AND SO WHAT I'M SAYING IS THE MOCK CASE  
10 THREW THAT OUT. AND IT THREW IT OUT FOR TWO REASONS. ONE,  
11 IT THREW IT OUT ON ITS OWN MERITS BECAUSE THEY FOUND AT MOCKS  
12 HADN'T UNDERTAKEN REASONABLE EFFORTS, AND THEY THREW IT OUT ON  
13 THE ECONOMIC BASIS.

14 AND SO IT SEEMS TO ME, THE ONLY REAL ISSUE FOR THIS COURT  
15 TO CONSIDER IS WHETHER OR NOT YOU FEEL THAT THERE'S BEEN A  
16 PRIMA FACIE CASE AGAINST GERRY RICHARDS AND WARDLEY THAT  
17 RELATES TO THIS ISSUE OF THE INSPECTION AND THE APPRAISAL.

18 **THE COURT:** THANK YOU, MR. SABIN. THE COURT FINDS  
19 THAT THERE IS -- I'M GOING TO LET IT GO TO THE JURY AS IT  
20 RELATES TO THE ISSUE OF FRAUD. NOT THAT THERE WAS SOME ACTION  
21 TAKEN, BUT THAT MAYBE THERE'S SOME FACTS THAT CAN GO TO THE  
22 JURY. BUT NOT AS TO NEGLIGENT MISREPRESENTATION. NEGLIGENT  
23 MISREPRESENTATION IS NEGLIGENCE, AND THAT'S OUT.

24 ALSO, THERE IS A STIPULATION AS TO THE MEASURE OF  
25 DAMAGES. WE WON'T NEED GO ANY FURTHER THAN THAT, AND THAT

1 NEEDS TO BE HANDLED IN THE JURY INSTRUCTIONS. AND I SUSPECT  
2 THAT YOU CAN WORK THOSE OUT. MR. CAINE.

3 MR. CAINE: WELL, AGAIN, WITH THAT RULING, BECAUSE  
4 OF THE NATURE OF SOME OF THOSE ARGUMENTS, I WAS GONNA MAKE THE  
5 SAME ARGUMENT WITH RESPECT TO THE BREACH OF CONTRACT. I'M  
6 ASSUMING THAT NEGLIGENT MISREPRESENTATION IS OUT AGAINST ONE,  
7 IT'S OUT AGAINST ALL.

8 THE COURT: CERTAINLY.

9 MR. CAINE: AND SO I CAN GET UP AND TALK TO YOU FOR  
10 A HALF AN HOUR ABOUT WHAT I THINK ABOUT THE BREACH CONTRACT  
11 CLAIM (UNINTELLIGIBLE) --

12 THE COURT: AND I'LL DENY IT.

13 MR. CAINE: OKAY.

14 THE COURT: OKAY. THANK YOU. LET'S BRING THE JURY  
15 IN.

16 MR. CAINE: WELL, I AM GONNA ARGUE THAT TO THE JURY.

17 THE COURT: WELL, CERTAINLY. I WOULD EXPECT THAT  
18 YOU MAY SAY SOMETHING TO THE JURY ABOUT THAT.

19 MR. CAINE: ALL RIGHT.

20 THE COURT: OKAY. LET'S JUST LOGISTICALLY, HOW ARE  
21 WE GONNA HANDLE THIS? WHO'S GONNA GO FIRST?

22 MR. SABIN: I'LL GO FIRST.

23 THE COURT: OKAY. SHALL WE --

24 MR. SABIN: YEAH, WE PROBABLY OUGHT TO. MAY WE HAVE  
25 JUST A MOMENT?

Tab C

LINDA BROWN,  
  
Plaintiff (s),  
  
ROBERT L. MILLER, OWNA  
MILLER, GERALD E. RICHARDS,  
WARDLEY BETTER HOMES &  
GARDENS, and STEVEN B. GOFF,  
  
Defendant (s).

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MEMORANDUM DECISION  
JUL 17 1998  
Civil No. 960900289 CN  
  
Honorable Parley R. Baldwin

At the conclusion of the plaintiff's case, the defendants did not make a Motion for Directed Verdict. Pursuant to Rule 50 of the Utah Rules of Civil procedure, plaintiff argues that failure to raise such a motion generally precludes a Motion of Judgment Not Withstanding the Verdict. Despite the language of Rule 50 and some strong language in cases cited, there is an exception for the filing of a

Motion for Judgment Notwithstanding the Verdict in cases where there is the existence of plain error that would result in the miscarriage of justice.

The standard this court must use is whether there is no substantial evidence to justify the verdict rendered by the jury. In meeting the standard, the court is required to accept as true all the testimony and reasonable inferences drawn therefrom which tend to prove plaintiff's case and disregard all conflicts in the evidence which tend to disprove. There was evidence presented by the plaintiff, as a witness, by Joseph Anderson and other witnesses where the jury could draw by reasonable inference that Richards committed fraud. Recognizing that much of the testimony given by the witnesses for the defense, contradicted that of the plaintiff, the standard set forth above precludes the court from granting the motion regarding Richards. Because of the evidence presented that Richards' actions were fraudulent, and that he was acting as Wardley's agent at the time and acting to further Wardley's interests, Wardley is vicariously liable. Nelson v. Corporation of the President, 935 P.2d 512 (Utah 1997).

Defendant's motion, pursuant to Rule 50, is denied.

Next, the court reviews Plaintiff's Motion for a New Trial pursuant to Rule 59 of the Utah Rules of Civil Procedure. The standard for the court in determining whether a new trial may be granted on all or part of the issues, and for all or part of the parties, is whether the jury's award indicates that the jury disregarded competent evidence, or that the award is so excessive that is beyond rational justification as to indicate the effect of improper factors in the determination, or that it clearly appears that the award was rendered under a misunderstanding.

The jury awarded an amount of nine thousand dollars (\$9,000) as compensatory damages against each of the defendants, Richards and Wardley. Plaintiff presented evidence and argued that the measure of damages should be the difference between the actual value of the property of one hundred thousand dollars (\$100,000) and the amount of one hundred eighteen thousand dollars (\$118,000) because of questions related to the value of the pool. It appears that the jury accepted the position of the plaintiff and allocated specific awards to both Richards and Wardley totaling eighteen thousand dollars (\$18,000).

Punitive damages are allowed only where it is established by clear and convincing evidence that the acts or omissions of the defendants are the result of willful and malicious or intentionally fraudulent conduct or conduct that manifests a knowing and reckless indifference toward, and a disregard of the rights of others. Richards mental state may be imputed to Wardley to support a punitive award against Wardley if there was evidence Wardley ratified or approved the act. The evidence at the time of trial, including that of Steve Goff, was sufficient for the jury to find approval or ratification by Wardley.

The standard this court must reach is not whether it agrees with the verdict rendered by the jury, but whether the evidence at trial was so completely lacking and unconvincing as to make the verdict plainly unreasonable and unjust. The punitive damages given by the jury fall within the ratio of three (3) to one (1) given by the appellate courts to assist in determining the appropriateness of the amount of punitive damages when comparing the compensatory damages.

The attorneys for all the parties were extremely well prepared. They presented their case thoroughly and very professionally. The members of the jury were chosen by the parties from a pool of members of the community. The jury listened intently to the evidence as it was presented. All eight



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members of the jury agreed with the verdict they rendered. There is no evidence of the jury being under the influence of passion or prejudice in awarding the damages.

Rule 59 requires that this court find grounds in order to grant a new trial or reduce the award. After participating with the jury in this multiple day trial, this court can not find that the compensatory or punitive damages were a result of passion or prejudice or that the jury could not support there verdict based on the testimony of the witnesses, other evidence, and the inferences drawn therefrom.

Defendant's Motion For a New Trial is denied.

DATED this 16 day of July, 1998.

  
\_\_\_\_\_  
PARLEY R. BALDWIN  
DISTRICT COURT JUDGE

Brown vs. Miller  
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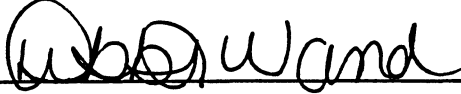
CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of July, 1998, a correct copy of the foregoing Decision was mailed postage prepaid, to the following:

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\_\_\_\_\_  
In-Court Clerk