

2001

Lucille Bearden, Dorothy Lucille Christensen
Bearden as Trustee of the Lucille Bearden Family
Trust, and Harold Dee Bearden v. Guy Gritton,
Wardley Corporation dba Wardley Better Homes
& Gardens : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LUCILLE BEARDEN, DOROTHY
LUCILLE CHRISTENSEN BEARDEN
AS TRUSTEE OF THE LUCILLE
BEARDEN FAMILY TRUST, and
HAROLD DEE BEARDEN,

Plaintiffs-Appellees,

v.

GUY GRITTON, WARDLEY
CORPORATION dba WARDLEY
BETTER HOMES & GARDENS,

Defendants-Appellants.

Appellate Case No. 20011036-CA

Priority No. 15

Oral Argument Requested

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court, Utah County,
Honorable Dennis Frederick, District Judge

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FILED
Utah Court of Appeals

AUG 27 2002

Priscilla M. Hargrett
Clerk of the Court

LIST OF PARTIES

In addition to the parties identified in the caption herein, the following were parties to the proceedings in the court below:

Charlene Burns-Nielson

Backman Stewart Title Services, Ltd.

Old Republic Surety Group

Pursuant to Rule 24(d) of the Utah Rules of Appellate Procedure, the following party designations will be used to promote clarity and avoid confusion:

Lucille Bearden, seller: Bearden

Harold Bearden, Lucille Bearden's husband: Mr. Bearden

Lucille Bearden Family Trust: Family Trust

Guy Gritton, the real estate agent: Gritton

Wardley Corporation, the real estate broker: Wardley

Charlene Burns-Nielson, notary: Burns-Nielson

Backman Stewart Title Services, Ltd., title company: Backman Stewart

Old Republic Surety Group, surety for Backman Stewart's Bond: Old Republic

FILED
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

AUG 27 2002

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Patricia Stegg
Clerk of the Court

Lucille Bearden, Dorothy)
Lucille Christensen Bearden as)
Trustee of the Lucille Bearden)
Family Trust and Harold Dee)
Bearden,)
)
Plaintiffs and Appellees,)
)
v.)
)
Guy Gritton; Wardley)
Corporation dba Wardley Better)
Homes & Gardens; Charlene)
Burns-Nielson; Backman Stewart)
Title Services, Ltd. and)
Old Republic Surety Group,)
)
Defendants and Appellants.)

ORDER


Case No. 20011036-CA

This matter is before the court upon a motion filed by appellant on August 16, 2002, to allow filing of an over-length brief. Appellee stipulated to the motion.

IT IS HEREBY ORDERED that appellant's motion to allow filing of an over-length brief is granted. Appellant's brief, previously lodged, is hereby accepted for filing and is deemed filed as of the date hereof.

Dated this 27 day of August, 2002.

FOR THE COURT:



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on August 27, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this August 27, 2002.

By 
Deputy Clerk

Case No. 20011036

LUCILLE BEARDEN, DOROTHY
LUCILLE CHRISTENSEN BEARDEN
AS TRUSTEE OF THE LUCILLE
BEARDEN FAMILY TRUST, and
HAROLD DEE BEARDEN,

V.

Defendants-Appellants.

Oral Argument Requested

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Charlene Burns-Nielson

Backman Stewart Title Services, Ltd.

Old Republic Surety Group

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Wardley Corporation, the real estate broker: Wardley

Charlene Burns-Nielson, notary: Burns-Nielson

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated sections 78-2a-3(2)(j) and 78-2-2(4) (1996).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review.

Issue #1: Whether the trial court should have granted Wardley's Motion for Summary Judgment based on the undisputed facts which demonstrated, as a matter of law, that Gritton's conduct was outside the course and scope of his independent contractor relationship with Wardley and Wardley could not, therefore, be vicariously liable for Bearden's losses resulting from that conduct.

Standard of Review: In reviewing a denial of summary judgment, the reviewing court is to "consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Surety Underwriters v. E & C Trucking*, 2000 UT 71, ¶ 14, 10 P.3d 338 (quoting *Aurora Credit Servs. v. Liberty W. Dev. Inc.*, 970 P.2d 1273, 1277 (Utah 1998)). No deference is accorded the trial court's conclusions of law. *Malibu Inv. Co. v. Sparks*, 2000 UT 30, ¶ 12, 996 P.2d 1043. When reviewing an order denying a motion for summary judgment, appellate courts are to review "the facts and reasonable inferences drawn therefrom in the light most favorable to the . . . the nonmoving party." *Surety Underwriters*, 2000 UT 71, ¶ 15, 10 P.3d 338.

This issue was preserved for appeal at R. 213.

Issue #2: Whether the trial court should have granted Wardley's Motion for Directed Verdict based on the testimony which demonstrated, as a matter of law, that

Gritton's conduct was outside the course and scope of his independent contractor relationship with Wardley and Wardley could not, therefore, be vicariously liable for Bearden's losses resulting from that conduct.

Standard of Review: In reviewing a denial of a motion for directed verdict, there is one standard of review: An appellate court will “reverse only if, viewing the evidence in the light most favorable to the prevailing party, we conclude that the evidence is insufficient to support the verdict.” *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557 (quoting *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992)); see also *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933 (“When reviewing any challenge to a trial court’s denial of a motion for directed verdict, we review “the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict.” (quoting *White v. Fox*, 665 P.2d 1297, 1300 (Utah 1983))); *Scudder v. Kennecott Copper Corp.*, 886 P.2d 48, 52 (Utah 1994); *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1359 (Utah 1994) (“A directed verdict and a judgment n.o.v. are justified only if, after looking at the evidence and all reasonable inferences in a light most favorable to the nonmoving party, ‘the trial court concludes that there is no competent evidence which would support a verdict in his favor.’” (quoting *Gustaveson v. Gregg*, 655 P.2d 693, 695 (Utah 1982))).

This issue was preserved for appeal at R. 708 at 171-75.

Issue #3: Whether the jury was properly instructed regarding the relationship between Gritton and Wardley; the standard governing Wardley’s vicarious liability for

Gritton's acts; and the appropriate evidentiary standard governing Bearden's claims for fraud.

Standard of Review: An appeal challenging the jury instructions presents a question of law with respect to which the trial court is given no deference. *Ong v. 11th Avenue Corp.*, 850 P.2d 447, 452 (Utah 1993) (citing *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992); *Ramon v. Farr*, 770 P.2d 131, 133 (Utah 1989)). Similarly, "Whether [a] trial court's refusal to give a proposed jury instruction constitutes error is a question of law" which is reviewed for correctness. *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 38, 31 P.3d 557. Nonetheless, appellate courts will affirm the use of the jury instructions when they "taken as a whole, fairly tender the case to the jury even where one or more of the instructions, standing alone, are not as full or accurate as they might have been." *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997).

This issue was preserved for appeal at R. 708 at 229. The trial court did not permit counsel an opportunity to completely state his objections to the jury instructions on the record, contrary to Rule 51(d) of the Utah Rules of Civil Procedure ("Objections to written instructions shall be made before the instructions are given to the jury The court shall provide an opportunity to make objections outside the hearing of the jury."). The trial court's refusal to permit Wardley's counsel to fully set forth the bases for his objections should not preclude consideration of this issue. *See Nielsen v. Pioneer Valley Hospital*, 830 P.2d 270, 272 (Utah 1992) ("The judge did not afford counsel any opportunity to enter objections on the record before the jury retired. This court should not enjoin [the] appeal because of this irregularity by the trial court.").

Issue # 4: Whether the Special Verdict was confusing and improperly tied the jury's findings of Gritton's fault to Wardley and whether the Special Verdict allowed the jury to find there was fraud by a preponderance of the evidence.

Standard of Review: Whether a trial court has correctly refused to give a special verdict form is a question of law. *Collins v. Wilson*, 1999 UT 56, ¶ 22, 984 P.2d 960 (citing *State v. Carter*, 888 P.2d 629, 655 (Utah 1995)). Nonetheless, "a court has considerable discretion in accepting proposed special verdict forms." *Id.* (citing *Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1989)).

This issue was preserved for appeal at R. 708 at 229.

Issue #5: Whether the trial court erred in failing to follow Rule 47(n) of the Utah Rules of Civil Procedure when the jury had a question regarding the meaning of the Special Verdict.

Standard of Review: The determination of the propriety of a trial court's communication with a jury during deliberations is reviewed under a correction-of-error standard. The trial court will be reversed only if the error is "substantial or prejudicial . . . such that the result would have been different had it not taken place." *Board of Commissioners of the State Bar v. Peterson*, 937 P.2d 1263, 1270 (Utah 1997)(quoting *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979)).

This issue was not preserved for appeal but should be considered preserved because trial counsel was unaware that the jury had submitted a question to the judge until being informed of that fact by Wardley's current counsel, who did not discover the issue until the record on appeal was received from the trial court. It was impossible for

trial counsel to preserve the issue for appeal when he had no knowledge of the issue's existence.

Issue #6: Whether the evidence supports the judgment for compensatory and punitive damages awarded against Wardley, in the amount of approximately \$135,000.00.

Standard of Review: Juries are generally allowed wide discretion in their assessment of damages. *See Cornia v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) (citing *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1084 (Utah 1985)). A reviewing court views the evidence in the light most favorable to the jury's findings and will uphold its calculation of damages so long as there is competent evidence to sustain it. *Id.*

This issue was preserved for appeal at R. 653.

Issue #7: Whether the trial court appropriately awarded attorney fees of \$46,970.19.

Standard of Review: Whether attorney fees are recoverable in an action is a question of law that is reviewed for correctness. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) (citing *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 499 (Utah Ct. App. 1992)). Similarly, "whether the trial court's findings of fact in support of an award of fees are sufficient is a question of law, reviewed for correctness." *Id.* (citing *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1991)). Once it has been determined that a party is legally entitled to a fee award, the trial court has broad discretion in determining what constitutes

a reasonable attorney fee. *Id.* (citing *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988)).

This issue was preserved for appeal at R. 558.

STATUTES AND RULES WHICH ARE DETERMINATIVE OR OF CENTRAL IMPORTANCE TO THIS APPEAL

Utah Code Ann. §§ 61-2-1, *et seq.*

See Addendum.

Rule 47(n) of the Utah Rules of Civil Procedure – Jurors.

Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

Rule 51(d) of the Utah Rules of Civil Procedure – Instructions to Jury; Objections

(d) *Objections to instructions.* Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

STATEMENT OF THE CASE

Nature of the Case

This case arose out of the sale of rental property owned by Lucille Bearden (“Bearden”¹) to Gritton, whom Bearden had hired as a real estate agent initially to help her sell the rental property. Bearden and Gritton agreed he would buy the property on a contract. Gritton, however, surreptitiously had Bearden sign a Warranty Deed; had the Warranty Deed improperly notarized and recorded, thereby transferring the title to himself. In addition to defaulting on the purchase contract, Gritton took out several loans secured by the property, failing to pay two of them. Bearden, Mr. Bearden and the Family Trust sued Gritton, his employer, Wardley Corporation, the notary, the title company for whom the notary worked and the surety on the notary’s bond.

Course of Proceedings

The initial Complaint in this case was filed on November 30, 1998 against Defendants Wardley Corporation and Guy Gritton. (R. 1.) On May 20, 1999, an Order was entered granting Plaintiffs permission to file their Amended Complaint to add as Defendants Charlene Burns-Nielson, Backman Stewart Title Services Ltd., and Old Republic Surety Group. (R. 102.) On January 11, 2000, Wardley filed a Motion for Summary Judgment. (R. 213.) No hearing was held, and by minute entry dated April 6, 2000, the trial court denied Wardley’s motion, “for the reasons specified in the opposing memorandum.” (R. 305.) An Order to this effect was entered on July 12, 2000.

¹ Unless a distinction is necessary, all of the plaintiffs are referred to collectively as “Bearden.”

(R. 307.) On August 2, 2000, Wardley filed a petition for interlocutory review of the denial of its Motion for Summary Judgment, (R. 311), which was denied by the Utah Supreme Court by its Order dated September 20, 2000. (R. 331.)

By Order dated May 18, 2001, Burns-Neilson, Backman Stewart, and Old Republic were dismissed from the suit after settling with Plaintiffs. (R. 353.)

A two-day trial was held on September 4-5, 2001. At the close of plaintiffs' case in chief, Wardley brought a Motion for Directed Verdict. (R. 708 at 171-74.) That motion was denied. (*Id.* at 174.) After deliberations, the jury brought back a verdict against Wardley and Gritton, (R. 471, 475), and on November 13, 2001, the trial court entered a judgment against Wardley and Gritton in the amount of \$75,000, punitive damages against Gritton in the amount of \$25,000, and against Wardley in the amount of \$15,000. (R. 644.) Plaintiffs' filed a Motion for Attorney's Fees and Costs and Prejudgment Interest after the verdict was returned (R. 479-81). Pursuant to this Motion, the trial court further awarded \$1,107.00 in costs, \$46,970.19 in attorneys' fees, and \$7,203.00 in prejudgment interest. (R. 644)

Statement of Facts

At all times relevant to this case, Gritton was a real estate agent affiliated with Wardley through a written independent contractor agreement. (Tr. Ex. 2, 3) In approximately June of 1997, Bearden engaged Gritton and Wardley to help her sell a home located at 550 Adams Avenue, Midvale, Utah, which she had been renting out (the "Property"). (R. 707 at 12.) The parties entered into a Listing Contract and Agency Disclosure so Gritton could help Lucille sell the Property. (*Id.* at 15-16; Tr. Ex. 4.)

Shortly after the Property was placed on the market, Gritton told Lucille that his wife had asked him to move out and advised Lucille he personally might be interested in purchasing the Property for \$89,000.00. (R. 707 at 19-21, 114-15. Gritton told Bearden he planned to make improvements to the Property and resell it at a higher price. (*Id.* at 19, 114-15.) Bearden agreed to sell Gritton the Property. (*Id.*)

On July 11, 1997, Gritton came to Bearden's home to have her sign papers relating to the sale of the Property to him. (*Id.* at 24, 26-27.) Bearden and Gritton executed a Real Estate Purchase Contract (the "REPC"), which stated Gritton would purchase the Property for \$89,000. (*Id.*; Tr. Ex. 7.) Under the REPC, Bearden agreed to accept \$400.00 per month from Gritton as "interest only" payments while Gritton was living in the Property and fixing it up. (R. 707 at 20, 114-15.) Gritton was to make a balloon payment of \$89,000 at the end of five years. (*Id.* at 20; 115.) The REPC required Gritton to provide a \$500 earnest money deposit on or before October 15, 1997. Addendum No. 1 to the REPC indicates Gritton was purchasing the Property to fix it up and sell it at a profit. (Tr. Ex. 7.)

At the meeting on July 11, 1997, Gritton handed Bearden papers to be signed or initialed as Gritton instructed. (R. 707 at 26.) Bearden relied on Gritton's representations as to the contents of the documents relating to Gritton's purchase of the Property, and then signed them without reading them. (*Id.*) In addition to the REPC and among the documents Bearden apparently signed during that meeting (or at a meeting five days later) was a Warranty Deed purporting to transfer title to the Property from Bearden to Gritton. (Tr. Ex. 9.) Gritton did not disclose that he was having Bearden sign

a Warranty Deed and Bearden did not realize that she was signing a Warranty Deed to the Property. (R. 707 at 27.)

The Warranty Deed was later notarized by Charlene Burns-Nielson, who did not witness Bearden's signature. (R. 708 at 179.) The Warranty Deed with its improper notarization was recorded by Gritton several months later. (R. 707 at 137, 143.) Gritton did not tell Bearden he had recorded the Warranty Deed (*id.* at 149) and, in fact, their agreement did not call for title to transfer until after Gritton had fully paid for the Property. (*Id.* at 27-28.)

Gritton moved into the Property and sporadically made the monthly payments required by the REPC. (R. 707 at 32-33.) In total, Gritton paid Bearden \$3,200, and did not make any payments after May of 1998, although he remained in the house until November 3, 1998. (*Id.*) Eventually, Bearden contacted an attorney to look into getting copies of the papers she had signed with Gritton and getting Gritton to make the promised payments. (*Id.* at 34.) Bearden's attorney discovered that title to the Property had been transferred to Gritton and that large liens had been placed against the Property. (*Id.* at 35.) The loans Gritton had taken went into foreclosure. (*Id.* at 37.) Bearden was able to pay Gritton's loans off and save the home from being sold at public sale by borrowing nearly \$60,000 and arranging for the Deed of Trust held by Gritton's lender to be transferred and assigned to her. (*Id.*)

SUMMARY OF ARGUMENT

Because *Phillips v. JCM Development Corp.*, 666 P.2d 876 (Utah 1983), is no longer good law, the trial court erred by not assessing Wardley's right to control the real estate agent, Gritton, to determine whether he was an "employee" or an independent contractor of Wardley.

With respect to Bearden's claims that Wardley should be vicariously liable, reasonable minds could not disagree that the actions of Gritton were not within 1) the scope of his employment, 2) his apparent authority, or 3) the scope of his subagency with his broker, Wardley. Although Gritton had been given limited authority to undertake certain actions with respect to helping buyers and sellers of real property, such as Bearden, with marketing their properties, Gritton did not, under any agency theory, have authority to fraudulently obtain Bearden's signature on a Warranty Deed, and have it notarized and recorded, so that he could then obtain several loans by securing them with Bearden's property – all for his personal benefit. Gritton's lack of authority to do the very acts of which Bearden complains, should have prevented this case from going to the jury on the issue of Wardley's vicarious liability.

Under the traditional three-part test established in *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056-57 (Utah 1989), Gritton's actions were not within the scope of his employment, or the scope of his subagency, with Wardley. Although Gritton's used his legitimate real estate activities "as a springboard," *Jackson v. Righter*, 891 P.2d 1387, 1391 (Utah 1995), for his fraudulent actions, the actions he took to defraud Bearden were not the general kind of activities a real estate agent performs. In addition, they were not

intended to further Wardley's interest but, rather, as Gritton testified, to serve solely his own private and personal interests.

There was no basis for finding Gritton had apparent authority to defraud Bearden because Wardley took no steps which might reasonably be found to cause third parties to believe that Gritton was clothed with apparent authority to purchase property for his own account. Gritton was only authorized to act as Wardley's agent in a limited capacity. Bearden's sole and exclusive reliance on Gritton for a claim that Gritton had apparent authority is wrong.

Wardley's inquiries about this listing elicited lies and deceit from Gritton. Being thus kept in the dark, there was no reason for Wardley to have taken any of the aggressive actions suggested by Bearden in an effort to protect Bearden. The fraud and the harm were unanticipated. In fact, Bearden had an obligation to ascertain the scope of the authority she supposed Gritton had. There is no basis to impute Gritton's knowledge to Wardley.

One of the problems with this case is that the instructions to the jury unnecessarily confused Gritton's actions with the actions and statements of Wardley in a way that was prejudicial to Wardley. The trial court essentially told the jury that Gritton's acts could bind Wardley because Wardley, as a corporation, could only act through its agents.

For the same reasons articulated in connection with Wardley's scope of employment argument, above, Gritton's conduct was not within the scope of his subagency relationship with Wardley. Wardley can only be held responsible for those

things its agent does which are within the scope of the agent's employment or in the course of carrying out the duties assigned to the agent.

Wardley cannot be held directly liable for the results of Gritton's fraud based on a claimed breach of fiduciary its duty. Wardley could not have anticipated Gritton's fraudulent scheme largely due to Gritton's lies and deceit practiced on Wardley. No evidence was submitted as to an applicable standard of care, leaving the jury to apparently make one up.

Likewise, Wardley cannot be held directly liable for punitive damages. There is no doubt that Wardley did not act in a sufficiently culpable manner to warrant being held responsible for punitive damages based on its own conduct. Rather, it appears that the jury attributed Gritton's conduct to Wardley. This appears to have been the result of the lower court's confusing jury instructions. There was no evidence of any act by any person must sufficiently high-up in the Wardley organization to justify holding the corporation responsible. The only evidence regarding willful, malicious, or reckless conduct was that of Gritton.

The Special Verdict form used by the court prejudiced Wardley because it instructed the jury to apply an incorrect evidentiary standard for determining fraud. In addition, when the jury had a follow up question, the trial judge failed to call the attorneys back to the court as required by Rule 47(n) of the Utah Rules of Civil Procedure.

Finally, the jury's calculation of damages is not supported by competent evidence. The basis of the jury's damage award is a mystery, even to Bearden's counsel, with the

final figure appearing to have been pulled out of thin air. In addition, according to Bearden's supposition as to how they arrived at a number, the jury held Wardley vicariously liable for Gritton's rent, failed to credit \$3,200 Gritton paid the Bearden and clearly did not account for damages caused by the settling defendants, Backman Stuart Title Company, Charlene Burns-Nielson, and the Old Republic Surety Group.

ARGUMENT

Wardley believes this case presents a factual setting where none of the various theories promoted by Bearden were sufficient to hold Wardley vicariously liable for Gritton fraudulently obtaining Bearden's signature on a Warranty Deed, having it illegally notarized, recording it and fraudulently obtaining several loans secured by the Property effectively stolen from Bearden – all for his personal benefit.

This court's recent decision in *Wardley Better Homes and Garden v. Cannon*, 2001 UT App 48, 21 P.3d 235, is instructive in disposing of Bearden's suppositions. In *Cannon*, Wardley's agent, Arles Hansen ("Hansen"), signed four listing agreements with the Mascaros. *Id.* at ¶ 2. The first listing agreement was set to expire the next day, November 15, 1993. *Id.* The expiration dates on the other three listing agreements were left blank. *Id.* Hansen, after obtaining the Mascaros' signatures, and without their knowledge or approval, fraudulently altered the expiration date on the first of the four listing agreements (changing the expiration date from November 15, 1993 to November 15, 1994), and unilaterally filled in the blank expiration dates on the three other listing

agreements with the same fraudulent date. *Id.* Unaware, the Mascaros listed the property in September 1994 with Cannon's real estate brokerage company and, when it was sold shortly thereafter, Cannon was paid the commission. *Id.* Wardley, ignorant of Hansen's fraud, sued for the commission under what it thought were extant listing agreements. *Id.* at ¶ 3.

At trial, the court concluded that Wardley's listing agreements were voidable and unenforceable due to Hansen's fraud. *Id.* Cannon and the Mascaros then requested attorneys' fees pursuant to Utah Code Ann. § 78-27-56. This request was denied. *Id.* at ¶ 4. Cannon appealed, arguing that pursuant to principles of vicarious liability, Hansen's fraudulent actions should be imputed to Wardley, thus making Wardley's suit "without merit" and "not brought or asserted in good faith," and entitling Cannon to attorney fees under Utah Code Ann. § 78-27-56. *Id.*

In *Cannon*, the Court of Appeals rejected Cannon's vicarious liability theory. *Id.* at ¶ 11. The court refused to extend the holding of *Hodges v. Gibson Prod. Co.*, 811 P.2d 151 (Utah 1991), and thereby expand the scope of vicarious liability.

In distinguishing *Hodges*, the *Cannon* court noted that the knowledge of the agent/employee "could be imputed to his employer only if [the agent/employee] acted within the scope of his authority and was motivated at least in part to carry out the employer's purposes." 2001 UT App 48, ¶ 9, 21 P.3d 235 (footnote omitted). In a footnote addressing the scope of the real estate agent's authority, the court noted:

Hansen may have had authority to enter into the listing agreements with the Mascaros; however, he did not, **under any**

agency theory, have authority to fraudulently change the dates on those agreements.

Id. at ¶ 9 n. 5 (emphasis added).

Similarly, here, although Gritton had authority to enter into the Listing Contract and Agency Disclosure with Bearden (Tr. Ex. 4), he did not, “under any agency theory, have authority to fraudulently” obtain Bearden’s signature on the Warranty Deed, and have it notarized and recorded, so that he could then obtain several loans by securing them with Bearden’s property – all for his personal benefit. Gritton’s clear lack of authority to do that of which Bearden complains, should have prevented this case from going to the jury on the issue of Wardley being vicariously liable for Gritton’s fraudulent activities – whether in the context of Bearden’s subagency, apparent authority or *respondeat superior* theories, or being directly liable for breaching its fiduciary duty.

MARSHALLING OF THE EVIDENCE.

Because Wardley challenges a trial court’s ruling concerning a motion for a directed verdict and questions the sufficiency of the evidence supporting the jury’s conclusions as to Wardley’s vicarious liability, it is required to “‘marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.’” *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 448 Utah Adv. Rep. 14 (quoting *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 33, 31 P.3d 557 (quotations and citation omitted); *see also* Utah R. App. 24(a)(9).

Gritton's Relationship With Wardley.

1. Gritton, as a real estate agent with Wardley pursuant to a July 14, 1997 Broker-Sales Executive Contract/Independent Contractor Agreement (Tr. Ex. 3), was authorized to perform certain types of work on behalf of Wardley. (*Id.*) Such work included the solicitation of real estate related service contracts to be taken in the name of Wardley. (*Id.*)

2. Real estate agents and brokers represent or act on behalf of individuals **buying** or selling real property. And the job of an agent or broker is to help them buy or sell property. (R. 708 at 198.)

3. Wardley provided Gritton with:
- a. an office;
 - b. business cards with Wardley's logo;
 - c. a name tag with Wardley's logo;
 - d. access to secretaries, a receptionist, and other administrative and support staff;
 - e. telephone service;
 - f. accounting services;
 - g. signs, which Wardley required to have the Wardley name;
 - h. a magazine in which agents could advertise properties;
 - i. a television program on which agents could advertise properties;
 - j. ads in newspapers in which agents could advertise open houses;
 - k. other agents with whom to network;
 - l. access to the local Multiple Listing Service ("MLS");

m. forms, such as the Listing Agreement (Tr. Ex. 4), the Real Estate Purchase Contract (Tr. Ex. 7/Ex. 23) and the Under Contract Information Sheet (Tr. Ex. 10), which bore the Wardley logo; and

n. opportunities for training.

(R. 707 at 103-06; R. 708 at 199-200, 201-03, 211.)

The Listing Agreement With Bearden.

4. In June of 1997, Gritton solicited business from Bearden, whom he had known growing up (R. 707 at 8) and from church. (*Id.* at 8-9.) Bearden agreed to use Gritton as her agent at least in part because he worked for Wardley, which Bearden recognized as a reputable real estate broker. (*Id.* at 13, 17.)

5. The two parties discussed Gritton acting as Bearden's real estate agent and Gritton convinced Bearden she should sell a home she owned at 550 Adams Avenue, Midvale, Utah ("the Property"). (R. 707 at 13.)

6. Bearden knew other properties in her area were selling for \$125,000 (R. 707 at 17), but Gritton convinced her to sell the Property for \$89,000. (*Id.* at 16, 17.) The Property was listed for \$89,000.00. (Tr. Ex. 4; R. 707 at 19-20, 111.)

7. Gritton signed a Listing Agreement on behalf of Wardley, (Tr. Ex. 4; R. 707 at 16, 109; R. 708 at 218), on a form provided by Wardley. (R. 707 at 117.) As Wardley's client, Bearden was owed a fiduciary duty by Wardley. (R. 707 at 110-11; R. 708 at 219.)

8. Bearden did not read the Listing Agreement before she signed it. (R. 707 at 46) Bearden did not really understand the limited agency provisions in Section 6. (R. 707 at 46, 47, 50-51, 69.)

9. She could not recall if Gritton ever explained the limited agency provisions to her (R. 707 at 69) and neither could Gritton. (R. 707 at 159-160; 166-67.)

Marketing Bearden's Property.

10. Shortly after the Property was placed on the market, Gritton received an offer for \$89,000.00 from a young couple to buy Bearden's Property, but they reneged a couple of days later. (R. 707 at 18, 55-56; Tr. Ex. 24.)

11. Shortly after that deal fell through, Gritton asked Bearden if he could purchase the Property on the same conditions as the young couple – for \$89,000.00. (R. 707 at 19-20, 56.)

Gritton's Attempted Purchase of Bearden's Property.

12. Bearden agreed to accept \$400.00 per month from Gritton with a balloon payment in five years. (R. 707 at 20.) This was less than she had been getting from renters (*id.*), and less than she had indicated she would be willing to take on an MLS disclosure form Gritton helped her fill out. (*Id.* at 23; Tr. Ex. 5.) (On that form, Gritton and Bearden had agreed that if Seller financing was selected by a buyer, the purchase price would be \$95,000, with 20% down, 10% interest, and the balance to balloon in five years. (Tr. Ex. 5.))

13. The \$400.00 monthly payment did not equal the 10% interest payment indicated on the MLS disclosure form. (R. 707 at 115-16.)

14. Gritton and Bearden agreed that she would retain title in her name until the balloon payment was made. (R. 707 at 21.)

15. Gritton came to Bearden's home on July 11, 1997 to have her sign papers related to the sale of her Property to him. (R. 707 at 24.) As they talked about family and old friends, Gritton handed Bearden papers to be signed or initialed, as Gritton instructed. (*Id.* at 26.)

16. Bearden did not read any of the documents. (*Id.*) Gritton was explaining them to her, and told her he would take care of her. (*Id.*) Bearden relied on Gritton's representations as to the contents of these documents and then signed them without reading them. (*Id.*)

17. She signed the documents because she trusted him. (*Id.* at 9, 26, 63, 64, 66.) She trusted Gritton because she knew him and his family (*id.* at 9, 64), they belonged to the same church, (*id.* at 9), and because he worked for a reputable broker, Wardley. (*Id.* at 63, 70-71.)

The Real Estate Purchase Contract Between Gritton and Bearden.

18. During this meeting, Bearden signed a Real Estate Purchase Contract ("the REPC") (Tr. Ex. 7/Ex. 23; R. 707 at 26-27), on a form provided by Wardley. (R. 707 at 117.)

19. The REPC stated Gritton would purchase the Property for \$89,000. (Tr. Ex. 7/Ex. 23; R. 707 at 117-18.) The REPC required Gritton to provide a \$500 earnest money deposit on or before October 15, 1997. (Tr. Ex. 7/Ex. 23; R. 707 at 118.)

20. The REPC clearly identified Gritton as the buyer. (Tr. Ex. 7/Ex. 23.)

21. Although the REPC discloses that both Gritton and Wardley were representing both sides of the transaction (Tr. Ex. 7/Ex. 23 at ¶ 5), Bearden did not really

understand the limited agency provisions. (R. 707 at 46, 47, 50-51, 69.) She did not understand that Gritton's or Wardley's duties were to her were going to change. (R. 707 at 70.)

Wardley's Involvement.

22. Gritton provided a copy of the REPC to Wardley in Gritton's capacity as Wardley's agent. (R. 707 at 104, 120-21, 125.)

23. A file was created, according to Wardley's policy. (R. 708 at 220-21.) It was Wardley's policy to review the documents in these transaction file as part of its fiduciary duty to its clients, such as Bearden. (R. 708 at 212, 221.)

24. Thus, Wardley was aware that Gritton had executed the REPC with **Bearden and that he** was acting as both Wardley's real estate agent representing the seller, and as the buyer of the Property. (R. 707 at 121, 123; R. 708 at 195.)

25. Wardley had a policy against agents buying properties they had listed. (R. 708 at 215-16.) Gritton was not aware of this policy. (R. 707 at 132-33.)

26. This policy was considered to be in the best interests of Wardley's clients (R. 708 at 217) and should have caused Wardley some concern. (*Id.* at 223.)

27. No one at Wardley ever called Gritton about his violating this policy or asked him to stop representing Bearden. (R. 707 at 134; 152; 168; R. 708 at 224.) In fact, he was congratulated. (Tr. Ex. 11; R. 707 at 152-53.)

28. No one at Wardley ever offered to provide Bearden with an alternate agent or asked another agent to step in and represent Bearden. (R. 708 at 224.) In fact, after he

agreed to buy the Property, Gritton felt like he was in a buyer-seller situation, not an agency situation. (R. 707 at 167.)

29. Wardley established a trust account for this transaction. (R. 708 at 215, 222; Tr. Ex. 12.)

30. Gritton did not make the \$500 earnest money deposit required by the REPC. (R. 707 at 118.)

31. It was Wardley's policy that earnest money should be turned in and deposited in the trust account within 24 hours. (R. 708 at 223.)

32. Wardley was aware that Gritton failed to make the earnest money payment to Bearden, as required by the REPC. (Tr. Ex. 12; R. 708 at 222.)

33. After the REPC was signed, Gritton prepared a Wardley approved form: "Under Contract Information Sheet." (Tr. Ex. 10; R. 707 at 121-23, 125.) Gritton provided a copy of the Under Contract form to Wardley in Gritton's capacity as Wardley's agent. (R. 707 at 125.)

34. It was Wardley's policy to place the under contract information sheet in the tracking file. (R. 707 at 122-23, 125; R. 708 at 213-15, 221-22.)

35. And again, Wardley's policy to review the documents once placed in the tracking file. (R. 708 at 213-15, 221-22.)

36. Wardley sent Gritton an undated Reminder Notice requesting the earnest money and other documentation, and congratulating him on his sale. (Tr. Ex. 11.)

Someone on behalf of Wardley wrote: "Way to go!" at the bottom of that sheet. (R. 707 at 152-53; Tr. Ex. 11.)

37. Gritton was notified by Wardley that the REPC had expired, that no earnest money deposit had been received, and was asked to provide an appropriately modified and signed REPC. (Tr. Ex. 13.)

Gritton's Fraudulent Obtaining a Warranty Deed.

38. Among the documents Bearden signed during the July 11, 1997 meeting was a Warranty Deed purporting to transfer title to the Property from Bearden to Gritton. (Tr. Ex. 9.)

39. Bearden does not recall signing **any** Warranty Deed. (R. 707 at 27.) She is certain she would have recalled signing it because she has dealt with such documents before. (*Id.*)

40. There is no dispute that Gritton fraudulently had Bearden sign the Warranty Deed. (R. 235, 264.)

41. Gritton's actions and representations with respect to his purchase of the Property from Bearden were intentional and fraudulent. (R. 235, 264.)

42. Gritton did not disclose to Bearden that he had filed a Chapter 13 bankruptcy which was still pending at the time he agreed to purchase her Property (R. 707 at 139), that a federal tax lien had been placed against a home he owned in West Valley at the time (*id.* at 140-41), or that his former brokerage company was suing him (and obtained a \$3,000 judgment against on July 23, 1997). (*Id.* at 141.)

43. Gritton tried to obtain financing for his purchase of the Property from another lender, but was unable to because of his financial situation. (*Id.* at 142.)

44. During the meeting on July 11, 1997, at which Bearden signed the documents, Bearden asked to have her attorney review the papers. Gritton told her that would not be necessary as Wardley had an attorney who would look everything over and make sure everything was all right. (*Id.* at 27-28.)

45. Bearden also noticed that one of the documents required her signature to be notarized. (*Id.* at 28-29.) Because the top of the document was covered up, she did not see what it was. (*Id.* at 29.) When Bearden offered to go to a notary just down the street, Gritton assured Bearden that a notary at Wardley's offices would handle the notarization. (*Id.* at 29-30.)

46. The Warranty Deed was later notarized by a notary who did not witness Bearden's signature. (R. 708 at 179.)

47. Gritton did not leave copies of the papers, but told Bearden that he would send them to her when everything was in order. (R. 707 at 31.) Although Bearden made several calls to Gritton to get copies, Gritton made up excuses and she was never provided copies of the papers she had signed. (*Id.* at 31.)

48. During the meeting on July 11, 1997, Gritton mentioned that both he and Wardley were to receive a commission as a result of the Bearden transaction. (R. 707 at 30.) Bearden understood that the commissions were to be paid out of the purchase price. (*Id.* at 30.)

49. An Addendum No. 1 to the REPC was presented by Gritton to Bearden. (Tr. Ex. 8.) Although her signature to the Addendum was dated July 16, 1998, she remembers signing all of the papers on the same day. (R. 707 at 58-59.)

50. Addendum No. 1 reflects a reduction in the price to \$83,660 (Tr. Ex. 8), which was to reflect the 6% commission. (\$89,000 – 6% commission = \$83,660) (Tr. Ex. 8; R. 707 at 60-61, 136.)

51. Gritton provided a copy of the Addendum No. 1 to Wardley. (R. 707 at 123.) Again, this was done in his capacity as Wardley's agent. (*Id.* at 125.)

Gritton Fraudulently Obtained Loans Secured by Bearden's Property.

52. The Warranty Deed with its improper notarization was recorded by Gritton several months later. (*Id.* at 137; 143.) Gritton still worked for Wardley when he recorded it. (*Id.* at 145.) Gritton did not tell Bearden he had recorded the Warranty Deed. (*Id.* at 149.)

53. Bearden's agreement with Gritton did not call for title to transfer until after Gritton had fully paid for the Property. (*Id.* at 27-28.)

54. On or about February 12, 1998, Gritton borrowed the sum of \$32,020 from Rocky Mountain Financial, LLC, using the Property as collateral. (Tr. Ex. 17; R. 707 at 143-44, 146-47.)

55. On or about May 21, 1998, Gritton borrowed an additional \$17,000 from Rocky Mountain, again using the Property as collateral. (Tr. Ex. 18; R. 707 at 148.)

56. When Gritton failed to make payments on the loans, Rocky Mountain commenced foreclosure proceedings. (R. 707 at 143-44, 146-47, 148.)

57. The loans Gritton had taken went into foreclosure. (Tr. Ex. 19; Tr. Ex. 20; R. 707 at 79-81, 89-90, 146.)

Bearden Discovers Gritton's Fraud.

58. Gritton was staying at the Property within a short time after the July 11, 1997 meeting. (*Id.* at 31.) He made the first monthly payments in October, as required by the REPC. (*Id.* at 32.) The next four payments (November, December, January 1998 and February 1998) were made after Bearden called and reminded Gritton. (*Id.* at 32.)

59. In May 1998, Gritton brought a check from his church and paid for March, April and May, 1998. (*Id.* at 33.)

60. In all, Gritton only paid Bearden \$3,200, and he has not made any payments since May of 1998. (*Id.* at 32-33.)

61. When Gritton stopped making payments, Bearden tried to call him several times at Wardley's offices in June, July and August, 1998. (*Id.* at 33.) Bearden was told Gritton was not in. (*Id.* at 34.) She was not told that Gritton was no longer affiliated with Wardley. (*Id.* at 34.)

62. At no time during the course of the transaction was Bearden ever notified by Gritton, Wardley or any of Wardley's representatives that Gritton was no longer authorized to act as a Wardley agent. (*Id.* at 34, 39.)

63. Bearden's telephone number appears on the documents Gritton submitted to Wardley. (Tr. Ex. 10; R. 707 at 124.)

64. At no time during the course of the transaction – including the time at which Gritton was notified by Wardley that the REPC had expired for lack of earnest money – did anyone from Wardley other than Gritton contact Bearden to investigate the status of the transaction between Gritton and Bearden. (R. 707 at 34, 39.)

65. Bearden finally contacted an attorney to look into getting copies of the **papers** she had signed and getting **Gritton** to make the promised payments. (R. 707 at 34.) He discovered that the title to the Property had been transferred to Gritton (R. 707 at 35) and that large liens had been placed against the Property. (*Id.* at 35.)

66. In order to avoid foreclosure, Bearden was required to take out two loans. (*Id.* at 94-97.) These loans were used to pay off the loans Gritton had taken out using the **property** as collateral. The first loan was in the amount of \$50,000. (Tr. Ex. 21.) The **second** loan was in the amount of \$9,621.15. (Tr. Ex. 22.)

67. A day or so before the sale, Bearden was able to pay Gritton's loans off and save her home from being sold at a public sale. (R. 707 at 37.)

68. Gritton moved out on November 3, 1998 (*Id.* at 38), only after being order to do so by the lower court. (R. 210; R. 707 at 150.)

Benefit to Wardley

69. Although Wardley received no commission as a result of the Bearden transaction (R. 707 at 129), Gritton **repeatedly** demanded that such a commission be paid by Bearden, and Bearden intended to do so had Gritton ever paid the agreed upon purchase price of the home. (*Id.* at 30.)

I. PHILLIPS IS NO LONGER GOOD LAW.

In denying Wardley's Motion for Summary Judgment, the trial court relied upon and adopted the reasoning set forth in the Memorandum In Opposition to Defendant's Motion for Summary Judgment ("Memorandum in Opposition") filed by Bearden.

Central both to Bearden's argument and, therefore, the trial court's ruling, was the Utah Supreme Court's decision in *Phillips v. JCM Development Corp.*, 666 P.2d 876 (Utah 1983). Because *Phillips* is no longer good law, the lower court's denial of Wardley's Motion for Summary Judgment should be reversed.

In *Phillips*, the court found that Utah's statutory system pertaining to real estate brokers and salespersons contained "numerous implications of an employer-employee relationship." 666 P.2d at 881. As noted by Bearden, the *Phillips* decision determined that "based on Utah's statutory scheme governing the profession, [the real estate] Agent was an 'employee' of Broker. Thus, Broker was responsible for the tortious actions of Agent which were done within the course and scope of employment."² (R. 270.)

However, the statutory scheme relied upon by the court in *Phillips* was amended shortly after that decision was announced to specifically allow for an independent contractor relationship. The references to "employment" and "employed" in Utah Code Ann. § 61-2-8, upon which the *Phillips* court relied were eliminated. See L. 1985, ch. 162 § 2.

Prior to 1985, and at the time of the Utah Supreme Court's decision in *Phillips*, Utah Code Ann. § 61-2-3 defined a "real estate salesman" as "any person **employed** or engaged by or on behalf of a licensed real estate broker." *Phillips*, 666 P.2d at 881

² As further noted by Bearden, "[i]n reaching its decision, the Court did not rely on the subagency theory. Instead, it concluded that the evidence at trial was sufficient to find that Agent had acted within the scope of his employment. Thus, the question of subagency was moot." (Memorandum in Opposition, R. 270-71.) Bearden's argument that Gritton was a subagent of Wardley is addressed below.

(emphasis added). The definition of “real estate sales agent,” now set forth in Utah Code Ann. § 61-2-2(15) (2000), reads: “any person employed or engaged **as an independent contractor** by or on behalf of a licensed principal real estate broker.” (Emphasis added.)³ The Utah Legislature clearly expanded the scope of the statutory scheme governing real estate brokers and agents to allow for independent contractor relationships and other forms of affiliation.

The trial court should not merely have assumed that Gritton was an “employee” of Wardley. Rather, it should have made a legal and factual determination as to whether an employer-employee relationship existed. “Whether an employer-employee relationship exists . . . is determined by whether the alleged employer had the right to control the employee.” *Glover ex rel. Dyson v. Boy Scouts of Am.*, 923 P.2d 1383, 1385 (Utah 1996) (sustaining summary judgment finding the Boy Scouts of America and Great Salt Lake Council, Inc. had no right to control a scoutmaster’s activities and, therefore, could not be vicariously liable for the scoutmaster’s negligence which injured Glover). Based on *Glover*, if Wardley did not have the “right to control”⁴ Gritton, he was not Wardley’s

³ In addition, the current version of Utah Code Ann. § 61-2-10, no longer precludes a real estate salesman from accepting commissions “from any person, except his employer, who must be a licensed real estate broker.” It now provides that no valuable consideration can be accepted “from any person except the principal broker with whom he is affiliated and licensed.” Utah Code Ann. § 61-2-10 (2000).

⁴ As noted in *Glover*, the Utah Supreme Court has:

identified several “main facts” which are helpful in determining whether an employer had the right to control an alleged employee. [Citation omitted.] These factors include (i) whatever covenants or agreements exist concerning the right of direction and control over the employee; (ii) the right to hire and fire; (iii) the method

employee and Wardley “could not be found vicariously liable for his tortious conduct.” *Id.* at 1385. *See also Thompson v. Jess* 1999 UT 22, ¶ 13, 979 P.2d 322 (employer of independent contractor not liable for harm caused by contractor or his servants where employer does not control means of accomplishing work).

Thus, the trial court erred in not analyzing or even addressing whether the relationship between Wardley and Gritton was employer-employee, or whether Wardley exercised a sufficient degree of control over Gritton as an independent contractor so as to hold Wardley responsible for Gritton’s conduct. For these reasons, the denial of summary judgment should be reversed.

II. WARDLEY CANNOT BE HELD VICARIOUSLY LIABLE FOR GRITTON’S FRAUD.

Bearden sought and the jury found Wardley was vicariously liable for Gritton’s fraud based on three theories: 1) *respondeat superior*; 2) apparent authority; and 3) subagency. Whether viewed from the vantage of Wardley’s principal-agent (employer-employee) relationship with Gritton, or its principal-agent relationship with Bearden – with Gritton acting as its subagent – reasonable minds could not disagree with

of payment (*i.e.*, wages versus payment for a completed job or project); and (iv) the furnishing of equipment.

923 P.2d at 1385-86 (citing *Averett v. Grange*, 909 P.2d 246, 249 (Utah 1996)).

Considerable testimony was presented which established that Gritton was an independent contractor: there was a written agreement to that effect (Tr. Ex. 3 at ¶ 1); Gritton had no mandatory hours (R. 707 at 155); no obligation to attend meetings (*id.* at 155-56); Wardley did not control how he did his job – finding buyers and sellers or marketed properties (*id.*); Wardley did not withhold taxes for Gritton (*id.* at 157); did not pay for Gritton’s license fees or costs of marketing. (*Id.*)

the conclusion that Gritton's actions were not within the scope of his employment, or the scope of his subagency.

A. Respondeat Superior – Scope of Employment.

If Gritton is viewed as Wardley's employee under the doctrine of *respondeat superior*, Wardley may be subject to liability for Gritton's tortious acts done within the course and scope of Gritton's employment. The Utah Supreme Court has adopted a three-part analysis to address the issue of what types of acts fall within the scope of employment. *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989):

First, an employee's conduct must be of the general kind the employee is employed to perform

Second, the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment

Third, the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest

Birkner, 771 P.2d at 1056-57 (citations omitted). Wardley only needs to show Bearden cannot meet one of the three factors. *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 4 (Utah Ct. App. 1994) ("An employee who fails to meet any one of the three factors is outside the scope of employment and the employer cannot be held liable under the doctrine of respondeat superior.") (citing *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1040 (Utah 1991)).

The undisputed facts established at the time of the denial of the summary judgment motion, and the evidence presented at the trial in this case, show that Bearden failed to satisfy both the first and third *Birkner* criteria. "[W]hen the employee's activity

is so clearly within or outside the scope of employment that reasonable minds cannot differ, the court may decide the issue as a matter of law.” *Christensen v. Swenson*, 874 P.2d 125 (Utah 1994) (citing *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1040 (Utah 1991), and *Birkner*, 771 P.2d at 1057). The lower court should have granted Wardley’s motion for summary judgment and motion for directed verdict. This Court should overturn the jury’s verdict.

1. Gritton’s Conduct Was Not of the General Kind He Was Employed to Perform.

In denying Wardley’s motion for summary judgment, the trial court effectively expanded the scope of the second *Birkner* factor⁵ to swallow the first *Birkner* factor. Just because the wrongful act was performed within the physical and spatial boundaries of employment, or in connection with the legitimate activities of an employee, does not result in liability, if that conduct was not within the general kind the employee is employed to perform.

In an effort to satisfy the first prong of *Birkner*, Bearden argued that, as a real estate agent, the services Gritton provided on behalf of Wardley include helping individuals buy or sell real property and, therefore, Gritton’s effort to buy real property on his own behalf did not remove him from his role as Wardley’s agent. This approach has been rejected by the Utah Supreme Court.

⁵ The second *Birkner* factor requires a finding that “the employee’s conduct must occur within the hours of the employee’s work and the ordinary spatial boundaries of the employment.” 771 P.2d at 1056-57. This factor was conceded by Wardley in the court below and in this court.

In *Jackson v. Righter*, 891 P.2d 1387 (Utah 1995), the court held that Mr. Righter's employer was not vicariously liable for Righter's alienation of the affections of another employee whom Righter supervised. In that case, Righter's job included supervising and managing employees – specifically, “hiring, evaluating, promoting, and firing employees.” 891 P.2d at 1389. Righter was the immediate supervisor of Jackson, the woman who was the object of his affections and he had authority “to promote, evaluate, train, and give raises to Mrs. Jackson.” *Id.* at 1391.

The evidence in *Righter* was that Righter's affections had been shown by promoting Jackson, authorizing her to record unworked overtime hours as an unofficial raise, and giving her substantial bonuses. *Id.* at 1392. In addition, the tortious conduct took place “during a formal employee evaluation in [Righter's] office. *Id.* at 1391. Rejecting the plaintiff's argument that Righter's alleged acts were part of “of the general kind [he was] employed to perform,” the court focused on the specific wrongful acts which allegedly caused plaintiff's harm:

Mr. Righter was not authorized to use his supervisory position to engage in a romantic relationship with his subordinates. His romantic advances were not a part of his duties but amounted to an abandonment of the supervisory and managerial responsibilities he was hired to perform.

Id. at 1391. Thus, the fact that Righter “used his company duties as a springboard for pursuing his relationship with Mrs. Jackson,” *id.* at 1391, did not result in vicarious liability for his employer.⁶

The same focus on the specific conduct which caused the harm at issue was evident in *J.H. by D.H. v. West Valley City*, 840 P.2d 115 (Utah 1992). In *J.H. by D.H.*, the court held that a police officer’s sexual molestations of a youth under his supervision was clearly outside the scope of employment because the officer’s acts were not of the kind and nature he was employed to perform. *Id.* at 123. The second prong of the *Birkner* test was satisfied – the molestations occurred while the police officer was on duty, performing his assigned duties supervising the Law Enforcement Explorer Scout program organized by the City and in a City-owned patrol car knowingly used to transport participants the explorer program activities. *Id.* at 123. However, the first prong was not.

As in *Righter*, the plaintiff asserted that because the officer was employed to instruct and supervise youth and his wrongful actions were carried out pursuant to this type of instruction and supervision, the City should be liable. The court again rejected this approach “because it is not the instruction and supervision by [the officer] of which [plaintiff] now complains.” *Id.* The court noted:

⁶ Because *Righter* affirmed the grant of summary judgment in favor of the employer, the court viewed the facts and the inferences therefrom, in a light most favorable to the plaintiff. 891 P.2d at 1391. In addition, since the scope of employment analysis is ordinarily a question of fact, the court had to determine that the employee’s conduct was “so clearly outside the scope of employment that reasonable minds cannot differ.” *Id.* (citations omitted).

[The officer] was not hired or authorized to instruct the explorers in sexual matters, nor was he authorized to touch the explorers in any manner. His acts of molestation were not in any way part of the instruction and supervision of the explorers but were in fact a complete abandonment of that instruction and of his employment.

Id. (footnote omitted); *see also Wardley Better Homes and Garden v. Cannon*, 2001 UT App 48, ¶ 9, fn. 5 (although the real estate agent “may have had authority to enter into the listing agreements with the [Seller]; however, he did not, under any agency theory, have authority to fraudulently change the dates on those agreements.”).

Here, Gritton was not hired or authorized to purchase property for his own use and benefit; prepare and record warranty deeds (a function handled by title companies); take out loans secured by real property; or fail to repay loans. Real estate agents in general are not hired to do such things. Gritton’s conduct in this case amounted to a complete abandonment of the responsibilities he was contracted to perform. The fact that he used his position with Wardley “as a springboard,” is no reason to hold Wardley liable. On these issues, reasonable minds cannot differ.

2. **Gritton’s Fraudulent Conduct Was Not Motivated Even in Part by the Purpose of Serving Wardley’s Interest.**

Although Wardley does not need to defeat another of the three *Birkner* factors, *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d at 4, Bearden has also failed to establish that Gritton was acting, even in part, for Wardley’s benefit. The court in *Birkner* explained what was needed to satisfy this requirement:

If the employee acts “from purely personal motives . . . in no way connected with the employer’s interests” or if the conduct is “unprovoked, highly unusual, and quite outrageous,” then the master is not liable.

771 P.2d at 1057 (quoting W. Keeton, Prosser and Keeton on the Law of Torts § 70, at 506 (5th ed. 1984)). In *Jackson*, the Utah Supreme Court noted:

An employee's conduct is usually not in the scope of employment where the employee's motivation for the activity is personal, even though some transaction of business or performance of duty may also occur.

891 P.2d at 1391 (citations omitted).

Significantly, like the tortfeasor in *Jackson*, Gritton admitted that he acted solely and exclusively for his own benefit. While this fact was disputed in consideration of Wardley's summary judgment motion (R. 235, 264), it was established at trial by testimony from Gritton:

Q Did you have any intent to benefit Wardley in taking out those loans?

A No.

Q Did you have any intent to benefit Wardley when you had the warranty deed prepared?

A No.

Q What about when the warranty deed was recorded?

A No.

(R. 707 at 164.)

No evidence was presented that Gritton was motivated in any way whatsoever to benefit Wardley with any of these acts. The only evidence Bearden introduced was that:

- Gritton mentioned that both he and Wardley were to receive a commission as a result of the Bearden transaction. (R. 707 at 30.)
- Bearden understood that the commissions were to be paid out of the purchase price. (*Id.*)

- Gritton repeatedly demanded that a commission be paid to Wardley by Bearden, and that Bearden intended to do so had Gritton ever paid the agreed upon purchase price of the home. (*Id.*)

While it presented no testimony at trial, in connection with Wardley's Motion for

Summary Judgment Bearden took the position that:

- Wardley received the benefit of having an agent who appeared to be effectively selling property for its clients. (R. 282.)
- Bearden recommended and expressed her general satisfaction with both Wardley and Gritton to her friends, associates, and family following the supposed sale on July 11, 1999. (R. 282, 285-86.)

All of these facts, however, go to the underlying real estate transaction, not the fraud for which Bearden wants to hold Wardley responsible.

Although Gritton's misconduct took place in connection with his legitimate activities as a real estate agent for Wardley, his fraudulent actions were not the general kind of activities a real estate agent performs. In addition, they were not intended to further Wardley's interest but, rather, as Gritton testified, to serve solely the private and personal interests of Gritton.

B. Wardley Never Clothed Gritton With Apparent Authority.

The main fallacy of Bearden's apparent authority argument is that "[a]n agent's apparent . . . authority flows **only** from the acts and conduct of the principal." *Bodell Construction Co. v. Stewart Title Guaranty Co.*, 945 P.2d 119, 124 (Utah Ct. App. 1997) (quoting *Zions First Nat'l Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1095 (Utah 1988)) (emphasis added). The *Bodell* court continued to quote from *Zions*:

"The authority of the agent [is not] 'apparent' merely because it looks so to the person with whom he deals. It is the principal who

must cause third parties to believe that the agent is clothed with apparent authority. . . . **It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations."**

Bodell, 945 P.2d at 124, (quoting *Zions* (quoting *City Electric v. Dean Evans Chrysler-Plymouth*, 672 P.2d 89, 90) (Utah 1983)) (emphasis added). As the court in *Zions* noted, "liability is premised upon the corporation's **knowledge of and acquiescence in** the conduct of its agent which has led third parties to rely upon the agent's actions." 762 P.2d at 1095 (emphasis added).

Here, Wardley only authorized Gritton to act as its Agent in a limited capacity. (Tr. Ex. 3 and Ex. 4.) *See Bodell*, 945 P.2d at 124 (noting that First Title was Stewart Title's agent for a "limited purpose.") Bearden relied on Gritton's statements about the scope of Wardley's involvement, not Wardley's. No one from Wardley told her that its attorney's would review all of the papers Gritton asked her to sign; Gritton did. (R. 707 at 28; 65-66.) No one from Wardley told her that its notary would certify her signature on any of the papers Gritton asked her to sign; Gritton did. (*Id.* at 30.) Bearden did not ask Wardley to ensure that Gritton would pay his debt to her – she trusted Gritton. (*Id.* at 66.) She did not ask Wardley to confirm the financial information Gritton had given her. (*Id.* at 67.) Rather, she "trusted **him**;" "accepted **his** word." (*Id.* (emphasis added).)

Furthermore, Wardley was unaware of several crucial facts. Although Wardley knew Gritton was acting as a purchaser of a property he listed, in violation of company policy, it knew that no earnest money had been paid and, when Wardley inquired about this problem, it was told that the deal had failed. (R. 226.) In this context, there would

have been no reason for Wardley to take the actions Bearden identifies in an effort to make it appear like Wardley – as opposed to Gritton – did something or failed to do something of consequence.

Wardley providing Gritton an office, and business cards and forms with Wardley's logo, are not enough to "cloak" Gritton with apparent authority. *Bodell*, 945 P.2d at 124. In *Bodell*, a title insurance company, First Title of Utah, Inc. ("First Title"), handled a closing, issuing a title insurance policy underwritten by Stewart Title Guaranty Company. First Title's agreement with Stewart Title expressly stated that while First Title could handle closing escrows, it could not "represent to the public that it is an agent of [Stewart Title] in the conduct of the escrow business." 945 P.2d at 122. First Title handled a transaction which involved, among other things, a "double" escrow allowing the sale price to be inflated, concealing a commission to a related party. *Id.* Although Stewart Title allowed First Title to use Stewart Title's name on First Title's letterhead, title policies, and settlement statements, the court determined that "[a]ny appearance of authority to act as Stewart Title's agent in escrow, closing, or settlement transactions came from First Title, not Stewart Title." *Id.* at 124. The court went on to note that "if plaintiffs really believed that First Title was acting as Stewart Title's agent for settlement, escrow, or closing transactions, then they were under an obligation to ascertain the scope of that agency." *Id.* Like Wardley in this case, Stewart Title never had any contact with the plaintiffs. *Id.* at 122.

In addition, there is no evidence that Wardley had "knowledge of and acquiescence in" Gritton's actions. Wardley was unaware of Gritton's prior relationship

with Bearden. Wardley cannot be held responsible for knowing or understanding that Bearden would place so much trust in Gritton that she would not read documents⁷ – in essence throwing caution to the wind.

When an agent is authorized to act as an agent for limited purposes, the agent's actions which go well beyond those actions cannot bind the authorizing entity, absent some action on its part. The focus of the inquiry is on what Wardley did; not what Gritton did; on what Wardley knew; not what Gritton knew.

The only things Wardley did here (based on the marshaled facts) was:

- be recognized as a reputable real estate broker;
- hire Gritton;
- provide him with forms for listing properties (**but not for transferring title**);
- maintain a transaction file on the REPC between Gritton and Bearden, making Wardley aware that Gritton was acting as both Wardley's real estate agent representing the seller and as buyer;
- never calling Gritton about his violating its policy against buying properties he was listing;
- never contacting Bearden and offering to provide Bearden with an alternate agent or asking another agent to step in and represent Bearden;
- maintain a trust account for this transaction

⁷ The Listing Agreement (Tr. Ex. 4) states in bold at the top:

**THIS IS A LEGALLY BINDING AGREEMENT – READ
CAREFULLY BEFORE SIGNING.**

In addition, Bearden was no novice at real estate transactions and well knew the significance of a document needing a notarized signature. (R. 707 at 64.) When she noticed that something needed to be notarized (R. 707 at 28-29), she testified that she trusted Gritton (R. 707 at 64); trusted him because she knew him and his family. (*Id.*)

- be aware that Gritton failed to make the earnest money payment to Bearden, as required by the REPC; and
- never calling Bearden about this problem.

Wardley was unaware of the fraud and, because Gritton was misrepresenting the transaction to Wardley. (*See e.g.* R. 708 at 226 (Wardley was advised that the transaction with Bearden had failed).) There is no basis to impute Gritton’s knowledge to Wardley. Because the REPC in Wardley’s file indicated that Gritton was paying the full asking price, “[t]here were no terms in there that would cause alarm.” (R. 708 at 195.) (Wardley was unaware that the price had been reduced by 6% so Bearden could avoid paying a commission. (Tr. Ex. 8; R. 707 at 60-61, 136.))

C. Problem With “Agent” Jury Instructions.

The difficulty here is that the lower court’s instructions to the jury were unnecessarily confusing with respect to the issue of Gritton’s actions and statements being equated with the actions and statements of Wardley – in a way that was prejudicial to Wardley. The court correctly instructed the jury that Wardley’s liability for Gritton’s actions as its “agent” was limited:

A principal is liable to others for the acts or omissions of the agent, **if the agent was acting within the scope of the agent’s employment** or in the course of carrying out the agent’s express duties at the time the claim arose.

Instruction No. 36, Liability of Principal for Acts of Agents (R. 460) (emphasis added). (For the same reasons articulated above, Wardley cannot be held liable for Gritton’s actions as they were outside of the scope of his agency.)

In an earlier instruction, however, the trial court had told the jury that Gritton's acts could bind Wardley because "Wardley Corporation is a corporation and, as such, can act only through its officers and employees, **and others designated by it as its agents.**" Instruction No. 23, Corporation Acts Through Its **Agents** (R. 446) (emphasis added). The use of the word "agents" in the factual context of this case – dealing with independent contractor real estate agents – was prejudicial. Clearly, Gritton is not the type of corporate agent who can bind Wardley in the general context of Instruction No. 23.⁸ However, no one told the jury that "agent" meant something different in the context of this instruction.

Thus, all of the instructions which focus on Wardley's actions or knowledge are tainted by the jury's having been instructed that Wardley, as a corporation, "can act only through its . . . agents," of whom Gritton was one. *See* Instruction No. 26(A), Fraudulent Omission – Confidential or Fiduciary Relationship (R. 450); Instruction No. 28, Intentional or Reckless Misrepresentation (R. 452 ("whether **Guy Gritton** made a deliberate misrepresentation") (emphasis added)); Instruction No. 29, Statement of Opinion of Belief (R. 453 ("whether the **defendants'** statement was a representation of fact") (emphasis added)); Instruction No. 32, Material Fact (R. 456 ("whether **Guy Gritton's** statement related to a material fact") (emphasis added)); and Instruction

⁸ Instruction No. 23 is identical to and obviously was taken from the Model Utah Jury Instructions ("MUJI") No. 25.1. The model instruction cites only *Radio Corp. of Am. v. Radio Station KYFM, Inc.*, 424 F.2d 14 (10th Cir. 1970). That case involved a defense of want of authority based on a corporation's assertion that its president lacked authority to enter into the contract at issue.

No. 33, Intent to Induce Reliance (R. 457 (“whether **Guy Gritton** intended to induce” “whether **Guy Gritton** made the representation” “It is sufficient if the **defendant** made a misrepresentation”) (emphasis added).)

The instructions so inexorably bound Wardley to Gritton and used “Gritton” and “defendant” so interchangeably that the jury was confused. So confused that they sought clarification on this point – resulting in another procedural misstep by the trial court.

D. Gritton’s Conduct Was Outside The Scope of His Subagency.

For the same reasons articulated in connection with Wardley’s scope of employment argument, above, Gritton’s conduct was not within the scope of his subagency relationship with Wardley. Wardley is not liable for every conceivable act its subagent might commit. Rather, as the rule of law states, Wardley can only be found liable “if the agent was acting within the scope of the agent’s employment or in the course of carrying out the agent’s express duties.” Instruction No. 36, Liability of Principal for Acts of Agents (R. 460). *See also Phillips*, 666 P.2d at 882 (the action complained must be in “reference to the principal’s affairs entrusted to the subagent”). As noted above, an agent’s function – and therefore the scope of his authority and the limit of his principal’s liability – can be limited. *Bodell Construction Co. v. Stewart Title Co.*, 945 P.2d 119, 124 (Utah Ct. App. 1997) (“First Title is Stewart Title’s agent for the **limited purpose** of issuing title insurance policies and commitments.” (Emphasis added)); *Zions First Nat’l Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1095 (Utah 1988).

III. WARDLEY CANNOT BE HELD DIRECTLY LIABLE FOR THE RESULTS OF GRITTON'S FRAUD.

Bearden sought and the jury found Wardley was directly liable for Gritton's fraud based on a breach of fiduciary duty theory. In addition, the jury held Wardley directly liable for punitive damages.

A. Breach of Fiduciary Duty.

Because of the confusion created by the jury instructions, it is not certain whether the jury decided this issue based on Gritton's actions or Wardley's. The only witness with a significant background in real estate matters, Jeff Sommers, testified that even with hindsight, Wardley could not have seen Gritton's fraudulent scheme coming. (R. 708 at 196.) No other witness testified as to the standard of care that governs real estate professionals or what Wardley should have done. The jury was left to fend for themselves, apparently grabbing onto Bearden's suggestions that she should have been called or another agent should have intervened when Wardley became aware Gritton was buying the property. (*Id.* at 224.)

However, any concerns raised about Gritton buying a property he had listed were alleviated by the fact that it appeared from the information Wadley had that the full purchase price was being paid. (*Id.* at 194-96, 226.) In addition, Wardley did not react to this transaction because, a victim itself of Gritton's fraud, it had been told the deal had fallen through. (*Id.*)

Without any evidence of duty, there can be no determination of a breach. Without a breach, the claims against Wardley must fail with regard to the breach of fiduciary duty claim.

B. There Was No Basis for the Jury's Award of Punitive Damages Against Wardley.

There is no basis for the jury's award of punitive damages against Wardley.

1. Because Plaintiff Is Not Entitled to Recover On Any of Its Theories, Wardley Cannot Be Liable for Punitive Damages.

As discussed in detail above, Wardley should have been granted summary judgment or a directed verdict on Bearden's claims against it. The evidence presented was not sufficient to hold Wardley liable for Gritton's fraud, and there is no evidence that anyone else at Wardley acted willfully or recklessly toward Bearden. Once Bearden's theories of liability are discounted, there is no basis for imposing punitive damages on Wardley.

2. There Was No Basis for Finding Wardley Liable for Punitive Damages.

Even if Wardley could be held vicariously liable for Gritton's conduct, punitive damages still should not have been awarded against Wardley, either on the basis of its own conduct, or based on Gritton's conduct.

Questions 8 and 9 of the Special Verdict put the issue of punitive damages to the jury – Question 8 for Gritton; Question 9 for Wardley. (R. 473-74.) Accordingly, there is no doubt that Wardley was being held responsible for punitive damages based on its own conduct, not that of Gritton; and for conduct in addition to and separate from

Gritton's. Question 9 asks: "do you find by clear and convincing evidence that the acts or omissions of Wardley were a result of willful and malicious conduct, or conduct that manifested a knowing reckless indifference toward, and a disregard for, the rights of Mr. and Mrs. Bearden?" (R. 474.)

Similarly, the Addendum to Special Verdict put the issue of the amount of punitive damages to the jury – Question 1 for Gritton; Question 2 for Wardley. (R. 475-76.) Question 2 of the Addendum to Special Verdict states: "If you answered Question 9 of the Special Verdict "Yes" you may award a sum which, in your judgement [sic], would be reasonable and proper punishment to Wardley for its treatment of Mr. and Mrs. Bearden, and as a wholesome warning to others not to offend in a like manner." (R. 475-76.) The jury answered Question 9 "yes", and awarded \$15,000 in punitive damages against Wardley.⁹ This was error.

As a corporation, Wardley can act only through its agents – its officers and other employees.¹⁰ *Stratton v. West States Constr.*, 440 P.2d 117, 118 (Utah 1968). However, a corporation is not automatically liable for punitive damages simply because someone in the corporation committed a bad act, and acted willfully or recklessly in doing so. Rather, the person committing the act must have been sufficiently high-up in the corporation to justify holding the corporation responsible. In *Johnson v. Rogers*, 763

⁹ The jury separately awarded \$25,000 in punitive damages against Gritton.

¹⁰ Jury Instruction No. 23 prejudiced Wardley because Gritton was not an agent for this purpose. That is, it is highly likely that the jury was confused by the instruction that a corporation can act only through its agents when Gritton was always referred to as Wardley's agent. However, Gritton was not an agent for this purpose.

P.2d 771 (Utah 1988), the Utah Supreme Court adopted Section 909 of the Restatement (Second) of Torts for the test of whether punitive damages can properly be awarded against a master or other principal (*i.e.*, a corporation) because of an act by an agent. *Id.* at 779. Under the Restatement such liability can be imposed only if:

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

Id. at 776-77; *see also Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 163 (Utah 1991).

Satisfaction of one of these factors is a prerequisite to an award of punitive damages against a corporation. Someone at a managerial level must have authorized the act, committed the act, ratified the act, or been reckless in employing the lower-level agent that in fact committed the act. Under Utah law, there is no other basis on which to impose punitive damages on a corporation. *See also Flint Hills Rural Elec. Coop. v. Federated Rural Elec. Ins. Co.*, 941 P.2d 374 (Kans. 1997) (characterizing Restatement's Section 909 "complicity rule" as one of direct, not vicarious liability.)

Applying the Utah Supreme Court's rule in *Johnson* to this case, there was no basis on which to impose punitive damages against Wardley. The only evidence regarding willful, malicious, or reckless conduct went to Gritton. There is no evidence that anyone associated with Wardley, other than Gritton, acted in a culpable manner.

(See R. 708 at 196 (even in retrospect, nothing would have alerted Wardley to a problem on this transaction).) Furthermore, there is absolutely no evidence in the record that would tend to show Gritton was a managerial level agent of Wardley, or that someone at a managerial level in any way ratified what Gritton had done. Similarly, there is no claim made that Gritton's conduct was authorized by any of Wardley's managerial agents, that Gritton was unfit, or that any of Wardley's managerial agents were reckless in hiring or retaining Gritton.¹¹ In fact, Gritton came to Wardley with an excellent reputation. (R. 708 at 183-84.)

In sum, the evidence shows that Gritton was the only person who may have acted willfully, recklessly, or maliciously. His actions cannot be imputed to Wardley for the purposes of punitive damages. Therefore, the jury's award of punitive damages should be set aside.

IV. OTHER PROBLEMS

A. Problems with the Special Verdict Form

The Special Verdict was prejudicial to Wardley for several reasons. Most notably, the Special Verdict instructs the jury to apply an incorrect evidentiary standard for determining fraud. In addition, it compounds the confusion created by the Jury Instructions as to the roles of Gritton and Wardley.

¹¹ Interestingly, although Bearden alleged that Wardley was liable for not adequately supervising Gritton (R. 80-101 at ¶¶ 93, 98 and 111), and submitted jury instructions on the issue of negligent supervision (R. 387-88), the requested instructions were not given to the jury by the trial court. (R. 423-70.) None of the instructions dealt with any claim of reckless hiring or retention of Gritton. (*Id.*)

1. The Special Verdict Form Asks the Jury to Apply an Incorrect Evidentiary Standard.

The Special Verdict form used by the trial court was prejudicial to Wardley because it instructed the jury to apply an incorrect evidentiary standard. Specifically, the introduction starts out by instructing the jury to answer the following questions “from a preponderance of the evidence.” (R. 471.) In Question #1, the Special Verdict form then asks:

Considering all the evidence in this case, do you find that Mr. Gritton defrauded Mrs. Bearden and/or breached a fiduciary duty toward her in the transaction involving the home at 550 Adams Street?

(*Id.*)

In addition to confusing the issues of fraud and breach of fiduciary duty, this compound question is significantly wrong because it instructs the jury to determine fraud by a mere preponderance of the evidence. Utah law is very clear that fraud must be proved by clear and convincing evidence. *Franco v. Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶ 33, 21 P.3d 198; *Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985); *Taylor v. Gasor, Inc.*, Utah, 607 P.2d 293, 294-95 (1980) The Special Verdict form proposed by Wardley made this distinction clear. (R. 413.)

2. The Court Erred When It Did Not Notify or Call the Attorneys Into Court to Consider Questions From the Jury.

As noted above, Question #1 asks whether “Gritton” defrauded Bearden. This confuses Gritton’s acts with those of Wardley. This problem with the Special Verdict form was apparent in a question regarding Special Verdict Question #2 which the jury

had. (R. 421.) This problem was accentuated by the trial court's failure to notify counsel of the fact that a request for additional instruction had come in during jury deliberations.

The determination of the propriety of a trial court's communication with a jury during deliberations is reviewed under a correction-of-error standard, and the trial court will be reversed only if the error is "substantial or prejudicial . . . such that the result would have been different had it not taken place." *Board of Commissioners of the State Bar v. Peterson*, 937 P.2d 1263, 1270 (Utah 1997)(quoting *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979)).

During its deliberations, the jury raised a question regarding Special Verdict Question #2. The jury asked the following two questions:

- (1) Does "acts" means all or any one of the offending actions of Mr. Gritton;
- (2) Does "acts" refer only to the "defrauding and/or fiduciary duties of Mr. Gritton."

(R. 421.) In response, the trial court wrote back:

The term "acts" is intended to refer to the alleged offending conduct described in Ques. #1 only.

(R. 422.)

Rule 47(n) of the Utah Rules of Civil Procedure states:

(n) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

This rule was at issue in *Board of Commissioners of the State Bar v. Peterson*, 937 P.2d 1263 (Utah 1997). There, the jury submitted a written question to the judge regarding jury instructions relating to the definition of “the practice of law” and “the unauthorized practice of law.” *Id.* at 1271. The jury asked whether the definitions in the instructions were to be recognized as law or as the judge’s opinion. *Id.* Without notice to either attorney, the judge responded to the jury in writing as follows: “The law as written in the instructions and as read to you by the court is binding upon you, the jury. A jury decides the facts and applies them to the law.” *Id.* Before the jury returned with a verdict, the attorneys came back to the courtroom, and the judge read the jury’s question to them as well as the judge’s response. Neither attorney raised any objections. On appeal, Peterson claimed that the trial court erred in its response to the jury’s inquiry during deliberations, arguing that under rule 47 of the Utah Rules of Civil Procedure, the court should have at least notified the attorneys before responding to the jury. *Id.* at 1270.

Although the Utah Supreme Court held in *Peterson* that the error was harmless, in this case, the court’s *sua sponte* instruction was not. Here, the jury’s question indicates that it was confused about the very jury instructions to which Wardley had attempted to object and now complains about. The trial court’s failure to notify the parties of the jury’s question was harmful because it failed to give the attorneys a chance to get at the source of the jury’s confusion. The Special Verdict was unclear and confusing, as illustrated by the jury’s question regarding its meaning.

B. Amount of Damages.

1. The Jury's Damage Award is Not Supported By the Evidence.

Even if this Court upholds the jury's determination that Wardley is vicariously liable for Gritton's conduct, the damages award should be set aside or remitted.

Although juries are generally allowed wide discretion in their assessment of damages, those damages must still be supported by competent evidence. *See Cornia v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) (on appeal, the court "view[s] the evidence in the light most favorable to the jury's findings and will uphold the jury's calculation of damages, so long as there is competent evidence to sustain it.") (additional citations omitted). In this case, the damages award is not so supported. Rather, the basis of the damages award is a mystery, with the final figure appearing to have been pulled out of thin air.

The Special Verdict asked the jury to "state the amount of damages, if any, suffered by the Bearden as a proximate result of the Defendants' conduct." (R. 473.) The jury hand wrote in an amount of \$75,000. (*Id.*) However, the evidence in the record supports an award of only \$59,621.15, the amount of money Harold Bearden borrowed to pay off the loans Gritton took out using the property as collateral. This is shown when the evidence supporting the award of damages is marshaled. The following facts could conceivably support the award of damages:

1. In order to avoid foreclosure, Bearden's husband, Harold Bearden, was required to take out two loans. (R. 707 at 94-97.) These loans were used to pay off the loans Gritton had taken out using the property as collateral. The first loan was in the amount of \$50,000. (R. 420, Tr. Ex. 21.) The second loan was in the amount of \$9,621.15. (*Id.*, Tr. Ex. 22.)

2. Harold Bearden's loans were variable interest rate loans charging rates of 8% to 10½% (R. 707 at 98.)
3. Harold Bearden testified that each time he got a notice from the bank, the interest rate would be higher, but did not produce the statements from the bank. (*Id.* at 98, 100.)
4. Harold Bearden testified that he had paid \$8,000 to \$10,000 interest on the loans. (*Id.* at 98-99.)
5. The loans were paid off within 18 months when Harold Bearden sold other property to pay them off. (*Id.*)
6. Lucille Bearden testified that at the time she and Gritton were conducting their initial negotiations regarding the purchase of the house by Gritton, she was renting it for \$600 to \$625 per month. (*Id.* at 10-11.)
7. Gritton lived in the house for approximately 13 months, moving out on November 3, 1998 (*Id.* at 38.)
8. The purchase contract with Gritton set rent in the amount of \$400 per month for five years. (R. 420, Tr. Ex. 8.)
9. Lucille Bearden testified that after Gritton moved out and the Beardens fixed up the house it rented for \$850 to \$900 per month. (R. 707 at 38-39.)

2. **Bearden's Own Motion Could Not Discern the Basis for the Jury's Damage Award.**

The fact that the \$75,000 damages award against Wardley and Gritton is not based on the evidence in the record was acknowledged in Bearden's own Memorandum in Support of Plaintiffs' Motion for Attorney's Fees and Costs and Prejudgment Interest ("Motion for Attorney's Fees"), filed after the verdict was returned (R. 482-85.) There, Bearden divined that the jury made the following calculation when it wrote \$75,000 on the Special Verdict form, stating:

- "Plaintiffs **estimate** that \$59,719.00 of the damages were awarded as compensation for money borrowed by the plaintiffs' to pay off two loans taken by Gritton." (R. 484 (emphasis added).)

Wardley does not contest that the evidence generally supports this figure.¹²

Bearden's Motion for Attorney's Fees then stated:

- "Plaintiffs **further estimate** that \$7,600.00 of the damages were awarded as compensation for rental income lost as a result of Gritton and Wardley's actions." (R. 484 (emphasis added).)

This estimate is problematic because nowhere in the jury's verdict does there appear a basis for holding Wardley vicariously liable for rent Gritton did not pay during the approximately 13 months he lived in the house. Furthermore, even if there was such a basis, the \$7,600 figure does not take into account the fact that Gritton paid the Beardens \$3,200 in rent under the purchase contract. Specifically, Lucille Bearden testified that Gritton paid rent from October of '97 through May of '98. (R. 707 at 33.) Since he moved out in November of '98, (*Id.* at 38), this resulted in six months of unpaid rent at \$400 per month for a total of \$2400. This figure bears no reasonable relationship to the \$7,600 figure.

Bearden's Motion for Attorney's Fees added lost rent to the amount of the loans to reach the total of \$67,319.00 in damages. They then add:

- "Prejudgment interest of 10% on that amount from May 21, 1998, (the date on which Gritton took out the second of his two loans) through September 6, 2001, (the date on which the jury's verdict was reached) totals \$14,883.00." (R. 484.)
- Since this amount totals in excess of what the jury actually awarded (\$67,319.00 + \$14,883.00 = \$82,202.00), Bearden asked that the difference between the \$14,883.00 calculated as the amount of interest

¹² The evidence was that there were two loans in the amount of \$50,000 (R. 420, Tr. Ex. 21) and \$9,621.15 (*Id.*, Tr. Ex. 22). These two loans therefore only total **\$59,621.15**. The difference of \$97.85 is only significant in terms of the confusion it reflects in the record relating to the amount of damages awarded by the jury.

the jury should have awarded and the \$7,680.00¹³ Bearden assumed the jury had already awarded as interest (\$75,000 – \$67,319.00) – or \$7,203.00¹⁴ - be added to the jury award. The trial court's final judgment reflects this calculation. (R. 643-44.)

Again, this calculation is problematic. According to the plaintiffs, there were damages in the amount of \$67,319.00 for money borrowed to pay off the loans, and lost rental income. To this, plaintiffs add prejudgment interest. It is impossible to determine, however, why the interest is determined from the date Gritton took out the second of his two loans. In fact, Bearden's damage would only have occurred from the date Harold Bearden took out the loans to pay off the loans initially taken out by Gritton. And, as Harold Bearden testified, he probably paid only \$8,000 to \$10,000 in interest at a rate that there is no evidence of. (No bank statements or other corroborating evidence was introduced to substantiate these figures.) Thus, the \$14,883.00 figure is in reality, not tied to any evidence in the record.

The final problem with the jury's damages award is that there was no way for the jury to account for damages caused by the settling defendants, Backman Stuart Title Company, Charlene Burns-Nielson, and the Old Republic Surety Group. Whereas Wardley's proposed Special Verdict form clearly asked the jury to state what percentage of the negligence was attributable to each party (R. 419), there was no way for the jury to do so in the Special Verdict form used by the trial court (R. 471-76.) Failure to account

¹³ Bearden's math was off. \$75,000 – \$67,319.00 actually totals \$7,681.00.

¹⁴ The correct number should have been \$7,202.00. See footnote 2, above.

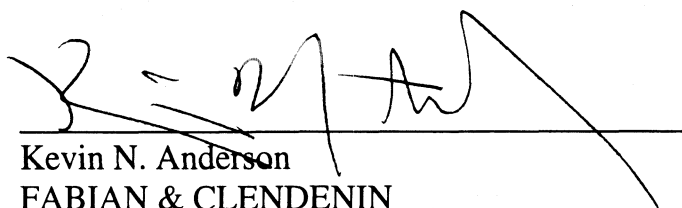
for the damages caused by the settling parties may have led to a double recovery for Bearden.

With all of the errors made in the instant case, the damages award in this case is similar to the one that was set aside as not supported by competent evidence in *Cornia v. Wilcox*, 898 P.2d 1379 (Utah 1995). There, the plaintiffs brought an action for the loss of and damage to their cattle that grazed on defendant's property. *Id.* at 1381. The jury awarded damages for 90 cows at a rate of \$715 each, which was the average market price for a pregnant mature cow. *Id.* at 1386. On appeal the defendant argued that the jury could not conclude that every missing cow should have been returned pregnant and that a fifty percent pregnancy rate was the only rate supported by the evidence. *Id.* The Utah Supreme Court agreed, stating that even plaintiff's own expert conceded on cross-examination that an unknown number of nonpregnant cows must be expected, resulting in a corresponding deduction in value per head. *Id.* In light of this, and because there was no other evidence supporting a 100% pregnancy rate, the court concluded that the jury's calculation of damages was not supported by competent evidence, and that the defendant was entitled to a remittitur. *Id.* The same conclusion should be reached here. The evidence in the record supports damages only in the amount of the loans taken out by Harold Bearden. In the event this Court upholds the jury's imposition of vicarious liability against Wardley, Wardley is at least entitled to have the damages award accurately reflect the damages sustained by the Beardens. Therefore, the damages award should be set aside, or at the very least remitted to the trial court for redetermination.

CONCLUSION

For the foregoing reasons, the denial of summary judgment and motion for directed verdict should be reversed and the jury verdict and the judgment based thereon should be overturned.

DATED this 14th day of August, 2002.



Kevin N. Anderson
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A Professional Corporation
Attorneys for Defendant-Appellant Wardley

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2002, I caused to be filed the original of the foregoing and seven copies with the Clerk of the Utah Court of Appeals:

Utah Court of Appeals
Office of the Clerk of the Court
450 South State Street, 5th Floor
Salt Lake City, Utah 84111

and to be served via hand-delivery, two true and correct copies of the foregoing, to:

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