

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 : Reply Brief

Utah Court of Appeals

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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.**

Defendants-Appellants.

Oral Argument Requested

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

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

Appellate Case No. 20011036-CA

Priority No. 15

Oral Argument Requested

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INTRODUCTION

The arguments advanced by Bearden in support of the jury's verdict are unpersuasive. First, Wardley has satisfied its burden of marshaling the evidence. That evidence is insufficient to support the jury's finding that Wardley breached its fiduciary duty. Second, despite the fact that Wardley's argument on this point was not raised below, important countervailing principles demand that this Court address the validity of the statement in both *Phillips v. JCM Development Co.*, 666 P.2d 876, 881 (Utah 1983), and *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 25, 458 Utah Adv. Rep. 15, that real estate agents are automatically employees of their broker. Third, Wardley's motions for summary judgment and for a directed verdict on the issue of vicarious liability should have been granted by the trial court. Finally, even if summary judgment or a directed verdict was improper, the jury's verdict cannot stand where (1) there is no reasonable basis for the jury's award of damages; and (2) there was no basis for the award of punitive damages against Wardley. For all of these reasons, the jury's verdict should be set aside.

ARGUMENT¹

I. WARDLEY HAS SATISFIED ITS OBLIGATION OF MARSHALING THE EVIDENCE.

Before turning to the substantive arguments, it is necessary to briefly address Bearden's contention that in its 69 paragraphs of marshaled facts, Wardley has failed to marshal the evidence supporting the jury's finding that Wardley breached its fiduciary duty and therefore, the court need not consider the challenge to the sufficiency of the findings.

A. Bearden Has Misinterpreted the Marshaling Requirement.

Primarily, Bearden contends that Wardley has not marshaled all the evidence supporting the jury's finding that Wardley breached its fiduciary duty to Bearden because "the presentation of supporting evidence must also be found in the argument portion of the brief and the appellant must demonstrate why such evidence is insufficient." Brief of Appellees at 14. This is misreading of *Fitzgerald v. Critchfield*, 744 P.2d 301 (Utah Ct. App. 1987). There, the Utah Court of Appeals found that the appellant had not satisfied the marshaling requirement where the "Facts" section of the brief inadequately set forth both parties' "versions" of the facts and where the "[t]he requisite presentation of supporting evidence is also not found in the argument portion of appellant's brief." *Id.* at 304. Most recently, in *Roderick v. Ricks*, 2002 UT 84, 54 P.3d 1119, the Utah Supreme

¹ Wardley's failure to address any of the arguments made in Brief of Appellees should not be treated as a concession as to those arguments but, rather, as an indication that Wardley has nothing new to add beyond what was presented in its opening brief. *See* Utah R. App. P. 24(c).

Court stated: “Though Castleton did mention some evidence favorable to the court’s finding, he generally dispersed this evidence throughout his appellate brief. To comply with the marshaling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding.” *Id.* at ¶ 47, n.11. Similarly in *Tanner v. Carter*, 2001 UT 18, 20 P.3d 332, appellants were criticized for presented only selected facts in a scatter-shot, incoherent, and poorly organized manner. *Id.* at ¶¶ 17-19.

These cases suggest that the evidence supporting the factual findings should be marshaled in a separate section of the brief, not dispersed throughout the argument portion of the brief as argued by Bearden. Rather, the argument section should be used to demonstrate why the previously marshaled evidence remains insufficient to support the factual findings. Wardley has satisfied this requirement.

B. The Evidence Marshaled by Bearden Merely Restates Evidence Previously Marshaled by Wardley in Its Initial Brief.

An examination of the evidence cited by Bearden at pages 14-15 of her brief reveals that little of substance is added to the evidence previously marshaled by Wardley. The best examples of this are Bearden’s paragraphs 6-8 which expressly cite Wardley’s factual presentation. In an attempt to bolster her own legal contentions, in the other paragraphs, Bearden merely restates, in an argumentative tone, facts marshaled by Wardley:

- Compare Bearden’s paragraphs 1-2 with Wardley’s paragraph 7;
- Compare Bearden’s paragraphs 3-4 with Wardley’s paragraphs 23 and 33-35;

- Compare Bearden's paragraph 5 with Wardley's paragraphs 18-19, 22 and 24; and
- Compare Bearden's paragraph 9 with Wardley's paragraphs 7, 27-28 and 31-32.

See generally Brief of Appellants at 20-23. Thus, it appears, based on the lack of new evidence introduced by Bearden that Wardley has actually done a comprehensive marshaling of the facts. Certainly, there is no reason for this Court to dismiss Wardley's arguments on the basis of a failure to marshal. The evidence cited by Wardley in support of the jury's verdict provides the court with the cogent facts and background necessary to accurately decide whether the evidence is sufficient to uphold the jury's verdict.

II. THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT WARDLEY BREACHED ITS FIDUCIARY DUTY TO BEARDEN.

In making her primary argument concerning Wardley's direct liable for breach of its fiduciary duty, Bearden ignores the fact that Wardley sought a directed verdict on this point, arguing that Bearden had not, in its case in chief, produced any evidence regarding the standard of care governing real estate professionals. (R. 708 at 172.) That Bearden failed to produce any evidence of what Wardley's fiduciary duties were is best evidenced by the fact that the only testimony to which she refers in her brief is that of Jeff Sommers, who was examined after the erroneous denial of Wardley's motion. (R. 708 at 180-227.) At the time the motion for directed verdict was made, there was no evidence of Wardley's duty. Without any evidence of duty, there can be no determination of a breach. Therefore, Bearden's breach of fiduciary duty claim against Wardley should not have gone to the jury.

Bearden's argument also ignores Wardley's contention that the confusion created by the jury instructions makes it impossible to determine whether the jury held Wardley responsible for its own breach – as Bearden contends; or whether they confused Gritton's conduct as binding Wardley because the trial court told the jury that Wardley, as a corporation, “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 trial court failed to tell the jury that “agent” meant something different in the context of this instruction, or that Gritton was not an “agent” for purposes of acting on behalf of the corporate entity. Presuming that the jury followed the court's instructions (Brief of Appellees at 16), does not answer Wardley's argument; it makes it.

III. PHILLIPS IS NO LONGER GOOD LAW.

Wardley stands by the contention advanced in its opening brief that *Phillips v. JCM Development Co.*, 666 P.2d 876 (Utah 1983), is no longer good law. In light of this reality, the trial court committed clear error in not conducting an independent analysis of whether Gritton was an employee of Wardley in deciding whether to grant Wardley's motion for summary judgment.

A. The Supreme Court's Statement in *Cannon II* that Real Estate Agents are Employees Did Not Analyze the Revised Statutory Scheme and Is Not Binding in this Case.

Bearden has responded to Wardley's contention by arguing that the Utah Supreme Court's recent decision in *Wardley v. Cannon*, 2002 UT 99, (“*Cannon II*”) reaffirmed the validity of *Phillips'* holding that a real estate agent is an employee of the broker. Even a cursory examination reveals that *Cannon II* is neither persuasive nor dispositive.

Nowhere in the *Cannon II* opinion are the revisions to the statutory scheme mentioned, and they certainly were not analyzed. There is no indication in the opinion (or the record of that case²) that the statutory changes were even brought to the Utah Supreme Court's attention.

Whether the current real estate statutes alter the conclusion that a real estate agent is always to be deemed an employee of his broker has never been addressed at the appellate level. This Court should not ignore relevant statutory changes on the basis of the Supreme Court's cursory assertion in *Cannon II*, made without any analysis of the issue and where the court did not consider the arguments advanced in this case, before

² This statement can be substantiated by a review of the pleadings and briefs filed in that case before the Supreme Court's opinion was rendered. *See Wardley Better Homes and Gardens v. Cannon*, No. 20010245 (Utah Sup. Ct.); *Wardley Better Homes and Gardens v. Cannon*, No. 20000128-CA (Utah Ct. App.); *Wardley Better Homes and Gardens v. Cannon*, No. 940907000CN (Third Jud. Dist. Ct., Salt Lake County, Utah). After the opinion was handed down, the undersigned counsel for Wardley attempted to bring the issue to the court's attention by way of a Petition for Rehearing. Petition for Rehearing, *Wardley Better Homes and Gardens v. Cannon*, No. 20010245 (Utah Sup. Ct. filed Nov. 8, 2002). A copy of the Petition is attached hereto as Exhibit "A." That Petition was denied without any stated reason or rationale. Order, *Wardley Better Homes and Gardens v. Cannon*, No. 20010245 (Utah Sup. Ct. filed Dec. 11, 2002). A copy of the Order is attached hereto as Exhibit "B."

this Court. At the very least, this Court should acknowledge the revisions and its ultimate decision should analyze their effect with a depth of analysis the issue deserves.³

Upon conducting such an analysis, this Court will undoubtedly conclude that *Phillips* is no longer good law, that whether an employee-employer relationship exists should be determined by reference to the test set forth in section 220 of the Restatement (Second) of Agency, which is the test that has been applied by both this Court and the Utah Supreme Court in most other cases where the nature of such a relationship is at issue. *See e.g., Glover ex rel. Dyson v. Boy Scouts of America*, 923 P.2d 1383, 1385-86 (Utah 1996); *Averett v. Grange*, 909 P.2d 246, 249 (Utah 1996). Pursuant to that established precedent, whether an employer-employee relationship exists depends on whether the alleged employer has a right to control the employee. Several facts are helpful in determining whether that right to control exists, such as the covenants or agreements that exist concerning the right of direction and control over the employee; the right to hire and fire; the method of payment (i.e., wages versus payment for a completed job or project); and the furnishing of equipment. *See id.* If that test is applied to this

³ The record in *Cannon II* also reflects that the Utah Association of Realtors® sought to submit an *amicus curiae* brief asserting, on behalf of its 8,900 licensed real estate professional members, that the Supreme Court's incorrect statement of the current state of the law would fundamentally change the current practices and relationships of real estate brokers and agents in Utah. *See* Memorandum of Points and Authorities in Support of Motion for Leave to File a Brief as *Amicus Curiae*, *Wardley Better Homes and Gardens v. Cannon*, No. 20010245 (Utah Sup. Ct. filed Nov. 8, 2002). A copy of the Utah Association of Realtors'® Memorandum is attached hereto as Exhibit "C." Counsel for Cannon objected to this motion as being untimely. Objection to Motion for Leave to File Brief of Amicus Curiae (filed November 14, 2002). A copy of the Objection is attached hereto as Exhibit "D." The court denied the motion, again without any stated reason or rationale. Order. A copy of the Order is attached hereto as Exhibit "E."

case, Gritton was clearly an independent contractor and not an employee of Wardley. *See* Tr. Ex. 7; R. 707 at 155-57; R. 708 at 181-82; Brief of Appellants at 17, ¶ 1. Thus, the doctrine of *respondeat superior* does not provide a basis for holding Wardley vicariously liable for Gritton's conduct.

B. This Court Can Properly Consider the Revisions to the Statutory Scheme For the First Time on Appeal.

Bearden's argument that Wardley failed to properly preserve this issue for appeal ignores the exceptions to the rule. In *Cox Rock Products v. Walker Pipeline Construction*, 754 P.2d 672 (Utah Ct. App. 1988), the Utah Court of Appeals stated: "Ordinarily, arguments, positions, and issues may not be raised for the first time on appeal. That doctrine is not, however, applied in a vacuum. Where some countervailing principle is to be served, the doctrine must occasionally yield." *Id.* at 676. In *Cox Rock Products*, as in this case, the countervailing principle was the correct interpretation of a Utah statute. The *Cox* court stated: "While parties are ordinarily bound the by logical results of their pleadings and trial positions, such devices cannot be used to enlarge the scope of legislation beyond that determined by the Legislature." *Id.*; *see also Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1988) (recognizing exception to general rule "when to do otherwise would permit deviation from a legislative scheme"); *Kaiserman Assocs. v. Francis Town*, 977 P.2d 462, 464 (Utah 1998) (addressing an issue *sua sponte* because: "In our view, an overlooked or abandoned argument should not compel an erroneous result. We should not be forced to ignore the law just because the parties have not raised or pursued obvious arguments.").

Here, important countervailing principles apply. *See* n. 2, *supra*. This Court should consider Wardley's argument regardless of the manner in which it was raised below.⁴ Already, the law has not been well served by the Utah Supreme Court's inattentive citation of *Phillips*, without any analysis of the issue. The correct interpretation of a legislative scheme is the perfect example of an important countervailing principle that mandates application of the exception to the rule that issues should not be raised for the first time on appeal – especially where the legislative action was an obvious response to the Supreme Court's reasoning in *Phillips*. Significantly, Bearden does not examine the case law, examine either the old or new statutes, or offer any explanation as to why the underlying reasoning in the *Phillips* decision continues to be sound.

IV. THE JURY'S FINDING OF VICARIOUS LIABILITY IS NOT SUPPORTED BY THE EVIDENCE.

Apparently recognizing the weakness of her vicarious liability argument, Bearden devotes the majority of her brief to arguing that Wardley breached its fiduciary duty. When she finally turns to the issue of vicarious liability she devotes the majority of her effort to arguing that the outcome of this appeal is governed by the Utah Supreme Court's recent decision in *Cannon II*. Even ignoring the problems with the Supreme Court's analysis in *Cannon II*, as illustrated in Wardley's Petition for Rehearing in that case, *see*

⁴ Former counsel for Wardley raised the independent contractor argument in support of Wardley's Motion for Summary Judgment (R. 240), and unsuccessfully sought a jury instruction on the issue. (*Compare* R. 411, 412, *with* R. 423-70.)

Exhibit “A,” *Cannon II* does not address the issues under consideration here. Bearden’s other bases for imposing vicarious liability also fail.

A. *Cannon II* Does Not Address the Doctrine of *Respondeat Superior*.

As the Utah Supreme Court recognized in *Cannon II*: “Whether a principal is vicariously liable for an agent’s acts and whether a principal is imputed with his agent’s knowledge are separate legal questions.” 2002 UT 99, ¶ 19 (citation omitted). In fact, the court of appeals was criticized for ignoring this distinction. *Id.*

More significant in the context of this case, the issue of imputation begs the primary question presented by this appeal – what is the scope of Gritton’s authority under the doctrine of *respondeat superior*. Wardley may only be subject to liability for Gritton’s tortious acts which are done within the course and scope of Gritton’s employment, applying the three-part test set forth in *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989). As argued in detail in Wardley’s opening brief, Bearden failed to satisfy both the first and third *Birkner* criteria: Gritton’s conduct was not within the general kind he was employed to perform; and Gritton was not acting, even in part, for Wardley’s benefit. *See* Brief of Appellants at 30-40.

In *Cannon II*, the Supreme Court repeatedly made it clear that “[a] principal is imputed with ‘[a]n agent’s knowledge of matters **within the scope of his or her authority . . .**’” 2002 UT 99, ¶ 16 (quoting *Macris v. Sculpted Software, Inc.*, 2001 UT 43, ¶ 21, 24 P.3d 984). Later in the opinion, the Court noted:

Under principles of vicarious liability, a principal is held responsible for the tortious acts of an agent acting within the scope of the agent’s authority. [Citations omitted.] Under

principles of imputation, a principal is held responsible for his own act, which is deemed to have been committed with the knowledge his agent had at the time of the principal's act, **assuming the agent obtained such knowledge while acting within the scope of his authority.**

2002 UT 99, ¶ 19 (citations omitted). The same requirement was noted with respect to the Supreme Court's imputing the knowledge as an agent of the corporate entity. *Id.*

¶ 23.

Cannon II is not the least bit relevant to the determination of whether Gritton's conduct was of the general type he was employed to perform. The facts at issue there are completely distinguishable. *Cannon II* involved the actions of an agent in obtaining a listing agreement. *Id.* ¶ 27 (the agent's conduct clearly was of the 'general kind' that he was employed to perform because real estate agents routinely procure listing agreements in the process of selling real estate." (Citation omitted.)).

In the instant case, however, the fraud involved not a listing agreement, but a fraudulently obtained warranty deed. Ordinarily real estate agents have nothing to do with the actual preparation of the warranty deeds and there is no evidence in the record to indicate this was a routine or general practice. (R. 707 at 162; R. 708 at 196.) Thus, *Cannon II* is not persuasive in this case.

Therefore, either the motion for summary judgment or the motion for directed verdict should have been granted.

B. Subagency Does Not Provide a Basis for Liability Because Gritton's Conduct Was Outside the Scope of His Agency.

In order for Wardley to be liable on the subagency theory it was necessary for Gritton to be acting within the scope of his agency when he defrauded Bearden. However, just as Gritton's conduct was outside the scope of his employment, it was also outside the scope of his agency. Although procuring listing agreements may have been within the scope of his agency, fraudulently tricking Bearden into signing a warranty deed clearly was not. In fact, there was no testimony at trial supporting the conclusion that real estate agents generally prepare or record warranty deeds. (R. 708 at 196.) Therefore subagency does not provide a basis for the imposition of vicarious liability on Wardley.

C. Wardley Did Not Cloak Gritton With the Apparent Authority to Defraud Bearden.

Finally, Appellees argument regarding Gritton's apparent authority is similarly unconvincing. Gritton did not have apparent authority to obtain a warranty deed from Bearden and, thus, defraud her. Preparation of warranty deeds were the responsibility of the title company, not the real estate agent. (R. 707 at 162.) This is a fact Bearden was aware of, as she had some experience with real estate transactions. (R. 707 at 42-44; 64-65.)

Significantly, Bearden never checked with Wardley concerning Gritton's authority. (R. 707 at 28; 30; 65-67.) Rather, she trusted Gritton and "accepted **his** word." (*Id.* at 67 (emphasis added).) "[O]ne who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations."

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)).

Finally, Bearden's citation of *Cannon II* for the proposition that Gritton was acting within the scope of his authority, *see* Brief of Appellees at 28, is a red herring. The circumstances under which it is proper to impute the knowledge of an agent to his principal for purposes of direct liability are, as noted above, "separate legal questions." *Cannon II*, 2002 UT 99, ¶ 19.

V. THE JURY'S DAMAGES AWARD IS NOT SUPPORTED BY THE EVIDENCE.

A. The Award of Compensatory Damages is Not Supported by the Evidence.

In this case, the damages award is not supported by competent evidence. At best, the evidence in the record supports an award of only \$59,621.15, the amount of money Mr. Harold Bearden borrowed to pay off Gritton's loans. The remainder of the award is speculative, not tied to evidence in the record and, by Bearden's own admission, "somewhat confusing." (Brief of Appellees at 30 n. 11.) Bearden's suggestion that this Court hold Wardley directly liable for Gritton's rent based on a presumed breach of fiduciary duty is a novel theory Bearden does not even attempt to support with case law.

Bearden attempts to justify the failure to adjust for the amount paid by the defendants with whom Bearden settled by referring to matters wholly outside the record of this case and, more importantly, outside of the evidence within the jury's

consideration. (Brief of Appellees at 30-31.) That Bearden has somewhere, somehow accounted for this in her mind is not relevant. The jury did not.

B. Punitive Damages Should Not Have Been Awarded Against Wardley.

Bearden correctly notes that Wardley has not challenged the amount of the punitive damages award against it. Rather, Wardley contends that there is an insufficient legal basis for the award. As noted above, the evidence presented to the jury was insufficient to find that Wardley breached its fiduciary duty to Bearden. Therefore, the only basis for the award of punitive damages is vicarious liability.

Bearden contends that the punitive damages can be awarded against Wardley based on Gritton's acts because Wardley was reckless in employing or retaining him.⁵ (Brief of Appellees at 32-33.) She argues that Gritton should not have been hired because, (1) he was in bankruptcy; (2) there was an outstanding federal tax lien against his home; (3) he had bad credit; and (4) he was being sued by his former real estate broker. Even if all of this is true, it does not establish that Gritton was unfit to act as a real estate agent or that Wardley was reckless in employing him, assuming that the issue could even have been considered by the jury.

⁵ As discussed in Wardley's opening brief, Section 909 of the Restatement (Second) of Torts sets forth the test of whether punitive damages can be awarded against a principal because of an act by an agent. Under that test there are four bases for imposing vicarious liability, including the reckless hiring or retention of an unfit agent. *See* Appellant's Brief at 47. While that issue was proposed to be presented to the jury, it ultimately was not. Bearden makes no argument that any of the three other bases are satisfied.

Just because an agent is in bankruptcy, can't pay his taxes, and has bad credit does not mean he is unfit. In fact, these circumstances do not even provide grounds for the Division of Real Estate to take disciplinary action against an agent. *See* Utah Code Ann. § 61-2-11 (setting forth grounds for disciplinary action). Gritton had his real estate license and came to Wardley with an excellent reputation. (R. 708 at 183-84.) The evidence was insufficient for the jury to determine that Wardley was reckless in hiring him.

Furthermore, when Wardley discovered that Gritton had not deposited the \$500 earnest money as required by its internal policies, it confronted Gritton, and was told that the deal had failed. (R. 708 at 226.) When Wardley became aware of Gritton's fraudulent conduct in March 1998, it terminated its relationship with him. (R. 707 at 145.) Therefore, the evidence was insufficient for the jury to determine that Wardley was reckless in retaining Gritton.

In light of the foregoing, the jury's award of \$15,000 in punitive damages against Wardley should be set aside.

VI. THE COURT ERRED IN HOW IT HANDLED THE QUESTIONS FROM THE JURY.

Bearden mistakenly blames Wardley's counsel for her counsel's failure to ensure that parts of the transcript which it felt were necessary to the appeal were included in the record. Utah R. Civ. P. 11(e)(3). Rather than presume the trial court acted appropriately, this Court should presume that if there was anything in the proceeding which would have

salvaged this matter from being re-tried, Bearden's counsel would have designated those additional parts of the transcript to be included in the record.

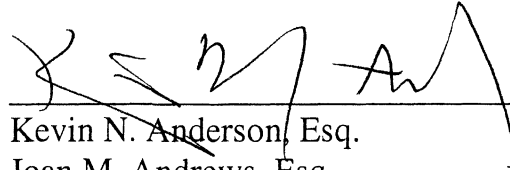
That the question presented by the jury is not part of the record is patently incorrect. The questions and the trial court's response were properly included by the clerk of the trial court under Utah R. App. P. 11(b)(1)(C), as part of the "original papers" in the trial court's file. (R. 421 and 422.) What is missing from the record is any indication that counsel for the parties were notified or that there were further proceedings on the questions. Bearden's counsel's unsubstantiated statements as to his recollection are an inadequate substitute for his obligation under Utah R. App. P. 11.

The jury's question and the trial court's response were not harmless. They indicate that the jury was confused about the jury instructions as to which Wardley had attempted to object and about which it now complains. The trial court failed to give Wardley's attorneys a chance to get at the source of the jury's confusion.

CONCLUSION

The arguments advanced by Bearden are an insufficient basis to deny Wardley the requested relief. Wardley respectfully submits that the denial of its motions for summary judgment and direct verdict should be reversed and requests that the jury verdict and judgment based thereon be overturned.

DATED this 23rd day of January, 2003.



Kevin N. Anderson, Esq.

Joan M. Andrews, Esq.

FABIAN & CLENDENIN

a Professional Corporation

Attorneys for Defendant-Appellant Wardley

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2003, I caused to be filed the original of the foregoing APPELLANT'S REPLY BRIEF 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:

Thomas R. Barton, Esq.
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Exhibit A

WARDLEY BETTER HOMES &
GARDENS,

V.

Defendants/Appellants.

Civil Case No. 940907000 CN

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SUMMARY OF PROCEEDINGS

This Court issued an opinion in this case on October 11, 2002. *See Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, 458 UAR 15. In its opinion, this Court held that the Court of Appeals erred in affirming the trial court's refusal to impute the knowledge of a real estate agent, Arles Hansen ("Hansen"), to the broker with whom he was affiliated, Wardley Better Homes & Gardens ("Wardley"). This Court further held that the Court of Appeals erred in upholding the trial court's determination that Wardley did not act in bad faith in bringing its action against Tracey Cannon and Cannon Associates, Inc. ("Cannon"), and remanded the case to the Court of Appeals with instructions that the case be remanded to the trial court to allow the trial court the opportunity to exercise its discretion under Utah Code Ann. § 78-27-56(2) (1996), and to award reasonable attorney fees to Cannon unless, relying on a legally sufficient reason, it declines to do so under Utah Code Ann. § 78-27-56(2) (1996).

POINTS OF LAW NEEDING CLARIFICATION

This Petition for Rehearing presents the following points of law which Wardley contends this Court has overlooked or misapprehended, warranting further consideration by the Court:

Issue #1: The Court's conclusion that the knowledge of Wardley's agent concerning the fraud he had committed should be imputed to Wardley merits re-examination. The Court's opinion cited several cases and treatises setting forth the general rule that a principal is deemed to have constructive knowledge of all material facts of which his agent receives notice or acquires knowledge while

acting in the scope of his employment, even if the agent does not in fact inform his principal of those facts. However, the Court failed to acknowledge the applicability of the well-established exceptions to that general rule or to discuss whether any of those exceptions should be applied here. Based on the facts here presented, the well-recognized exception that an agent's knowledge is not imputed where the agent has an independent motivation not to disclose the information to the principal – such as to conceal his fraudulent activities – should apply.

Issue #2: The Court's conclusion that the knowledge of a corporation's agents and officers should be imputed to the corporation because the corporation cannot have a belief or intent independent of that of its officers and agents also fails to consider an exception to the general which arises when a corporation's agent or officer is acting in a transaction in which his interests are adverse to the corporation, such as where the officer or agent is engaged in the perpetration of a fraud. Under these circumstances, it would be in the interest of the officer or agent to conceal his knowledge related to such a transaction. It is unreasonable to presume that the officer or agent will communicate his knowledge to the corporation.

Issue #3: The Court's blanket statement that the relationship between a real estate broker and its agents is that of employer and employee also deserves reconsideration. In support of this conclusion, the Court's opinion cited the cases of *White v. Fox*, 665 P.2d 1297 (Utah 1983) and *Phillips v. JCM Development Corp.*, 666 P.2d 876, 881 (Utah 1983). However, the real estate statutes on which

the conclusion in those cases was based were subsequently amended to clarify that real estate agents can indeed be independent contractors. In light of this fact, the issue deserves a more thorough analysis.

ARGUMENT

I. THE COURT’S OPINION DOES NOT PAY SUFFICIENT ATTENTION TO THE EXCEPTIONS TO THE GENERAL RULE REGARDING IMPUTATION OF AN AGENT’S KNOWLEDGE.

A. There Is a Well Established Exception to the Imputation of an Agent’s Knowledge Where the Agent Presumably Will Not Communicate His Fraudulent Activities to His Principal.

Wardley’s Petition for Rehearing should be granted because the Court’s opinion failed to address the exceptions to the general rule regarding the imputation of knowledge of an agent to his principal which apply on the facts of this case. The opinion correctly cited *First National Bank v. Foote* for the general rule that “the knowledge of an agent concerning the business which he is transacting for his principal is to be imputed to his principal.” 2002 UT 99, ¶ 16 (quoting *First National Bank v. Foote*, 12 Utah 157, 168, 42 P. 205, 207 (1895)). The very next sentence in *First National Bank v. Foote*, not quoted by the Court’s opinion, noted that: “There are, however, exceptions to the general rule no less well established.” 42 P. at 207. These well established exceptions are directly implicated in this case.

The Court’s opinion recognizes that the imputation of knowledge from an agent to his principal is premised upon a presumption that an agent will discuss with and inform his principal of all material facts acquired during the course of the agency. 2002 UT 99, ¶ 16. As noted in *Foote*, “the exceptions to the rule [are based] upon the contrary

presumption, that the agent will not communicate to his principal his knowledge of his own independent frauds, committed in the course of transacting the principal's business." 42 P. at 207. *See also Evona Investment Co., v. Brummitt*, 240 P. 1105, 1110 (Utah 1925) (recognizing but not applying the exception based on the facts there presented).

The exception to the general rule, and the presumption that the agent will **not** communicate his fraudulent activities to his principal, are well recognized in the various treatises cited by the Court in its opinion. For example, the Court cites section 272 of the Restatement (Second) of Agency for the principle that "the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information." 2002 UT 99, ¶ 20. Section 272 expressly notes that its statement of the general rule is "subject to the rules stated in this Topic." Restatement (Second) of Agency, § 272 (1958). Section 280 of that Topic states: "If an agent has done an unauthorized act ... the principal is not affected by the agent's knowledge that he has done ... the act." *Id.* Thus, an unauthorized act by the agent, such as the fraud committed by Hansen in this case, should not generally be imputed to the principal.¹

¹ Comment a to section 280 makes an important distinction, also made by the Court in its opinion. While the principal may be liable for its agent's wrongful acts, "knowledge of the agent in question as to his past acts or his intent as to the future does not affect the principal." Restatement (Second) of Agency, § 280, cmt. a. As correctly noted by the Court's opinion, "[w]hether a principal is vicariously liable for an agent's acts and whether a principal is imputed with his agent's knowledge are separate legal questions." 2002 UT 99, ¶ 19 (citation omitted).

Similarly, section 432 of *Corpus Juris Secundum*, another treatise cited by the Court, *see* 2002 UT 99, ¶ 16, sets forth the same general rule.² Section 434, however, modifies this rule by stating: “The rule imputing to a principal notice or knowledge of his agent is not one of universal application and does not apply where the circumstances are such as to raise a presumption that the agent will not transmit his knowledge to his principal.” 3 C.J.S. Agency § 434 (1973). Additionally, section 441 states: “An agent’s knowledge of fraud is not imputed to his principal where he . . . is engaged in an independent fraud.” *Id.* § 441.

Thus, a thorough examination of the authorities cited in the Court’s opinion in support of the conclusion that Hansen’s knowledge should be imputed to Wardley, reveals that in fact, the opposite is true. In the absence of compelling evidence sufficient to overcome the contrary presumption, Hansen’s knowledge should not have been imputed to Wardley. As Cannon failed to marshal any evidence relevant to overcoming the presumption, her appeal should have been rejected.

² Section 432 states in relevant part:

A principal is affected with constructive knowledge, regardless of his actual knowledge, of all material facts of which his agent receives notice or acquires knowledge while acting in the scope of his employment and within the scope of his authority, although the agent does not inform his principal thereof.

3 C.J.S. Agency § 432 (1973).

B. The Fact that Only the Broker Can Sue to Collect a Commission Weighs Against Imputing the Agent's Knowledge to Wardley.

In light of the well-recognized exception to the general rule regarding imputation of knowledge, the fact that Utah law precluded Hansen, a real estate agent, from independently filing suit to recover a commission on the sale of property, *see* Utah Code Ann. § 61-2-18(1) (1993), cuts against the imputation of knowledge; not in favor of it as the Court's opinion suggests. *See* 2002 UT 99, ¶ 31.

Because Hansen could not sue in his own name to recover a commission, he had to deceive Wardley, his broker, in order to obtain the commission.³ There was no evidence⁴ from the record presented to show that any managerial agent of Wardley "had either altered listing agreement dates or taken full advantage of an opportunity to deceive." *Wardley Better Homes & Gardens v. Cannon*, 2001 UT App. 48, ¶ 5, n. 1, 21 P.3d 235.

The Court's opinion incorrectly viewed this circumstance as weighing in favor of finding Wardley liable for attorney fees under section 78-27-56. In fact, it more likely

³ Wardley does not mean to suggest or imply that Hansen had some responsibility for or participation in making the decision to file the lawsuit to seek the commission. Without a factual or evidentiary basis, the Court's opinion noted that Hansen "was an active participant in Wardley's decision to file this action against Cannon," 2002 UT 99, ¶ 31, and that Wardley "initiated the suit at the employee's urging." *Id.*, ¶ 20. The Court apparently adopted the unsubstantiated assertion to this effect set forth in Cannon's brief. Reply Brief of Appellants at 1. The Court of Appeals, however, noted "Appellants indicate that Hansen urged Wardley to initiate its suit, but provide no citations to the record to support that assertion." *Wardley Better Homes & Gardens v. Cannon*, 2001 UT App. 48, ¶ 5, n. 1, 21 P.3d 235. It was patently sufficient for Wardley's management to have in its files the listing agreements which "[o]n their face . . . seemed legitimate," *Id.* at ¶ 8, n. 4, coupled with the knowledge that the seller had closed on a sale during what appeared to be the operative term of the listing agreements.

⁴ Cannon relied solely on the legal fiction of imputing Hansen's actions to Wardley. 2001 UT App. 48, ¶ 4.

motivated Hansen to withhold information from Wardley. If Wardley did not sue Cannon, Hansen would not reap the benefit of his fraud. Under the circumstances of this case, Hansen had no incentive to inform Wardley that a fraud had been committed. Thus, “the contrary presumption, that the agent will **not** communicate to his principal his knowledge of his own independent frauds, committed in the course of transacting the principal’s business” logically applies. *First National Bank v. Foote*, 12 Utah at 168, 42 P. at 207 (emphasis added).

Because of the presumption that Hansen would not tell Wardley of his fraud, Cannon should have been required to marshal the evidence and establish, if she could, the evidentiary basis for overcoming that presumption.

In sum, it is undisputed that Wardley’s agent, Hansen, committed a fraudulent act by altering the expiration dates on the listing agreements. If Hansen’s fraud occurred within the scope of the agency relationship, and the other requirements of vicarious liability were satisfied, Wardley could be held accountable for any damages caused by its agent’s fraud. These damages do not include an award of attorney fees in this case.⁵ The

⁵ Attorney fees are not ordinarily recoverable in fraud cases. *See R.T. Nielsen v. Cook*, 2002 UT 11, ¶ 17, 40 P.3d 1119 (“In Utah, attorney fees are awardable only if authorized by statute or contract.”); *Brown v. David K. Richards & Co.*, 1999 UT App. 109, ¶ 22, 978 P.2d 470 (attorney fees proper where attorney’s efforts went to prove facts common to recoverable contract claim and non-recoverable fraud claim). An award of punitive damages can include attorney fees. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 966 (Ut. Ct. App. 1989) (“In addition to the possible statutory bases, Utah courts have also permitted the amount of attorney fees expended to be considered in calculating punitive damages when punitive damages are warranted.”). (*Cont’d*)

Court's opinion, however, incorrectly relied on the general rule regarding imputation of an agent's knowledge to his principal. Based on long-standing Utah case law, as well as black letter principles of agency law, it appears that the exception to the general rule regarding imputation of knowledge should apply.

Because the Court's opinion fails even to acknowledge the well-established exception to the rule, there is a strong possibility that the Court reached the wrong conclusion based on the facts properly presented to it. In any case, the failure to address these exceptions to the general rule regarding the imputation of knowledge will create confusion. Therefore, Wardley's Petition for Rehearing should be granted.

II. THE SUBJECTIVE MENTAL STATE OF A CORPORATION SHOULD NOT BE IMPUTED FROM AN AGENT WHO IS ACTING ADVERSE TO THE CORPORATION'S INTERESTS.

While it is generally true that "a corporation has no belief or intent independent of that of its officers and agents," 2002 UT 99, ¶ 22 (citation omitted), this rule also has exceptions. A similar exception to imputing knowledge of an agent to a principal has long been recognized in the corporate context – and for similar reasons. As noted in Fletcher Cyclopedia of Private Corporations:

One well-established exception to the rule that a corporation is charged with knowledge of its officers and agents, is where the

However, as noted in Wardley's Brief of Appellee, Wardley could not be held vicariously liable for punitive damages based on the standard adopted by this Court in *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 163 (Utah 1991), which was based on section 909 of the Restatement (Second) of Torts, and section 217C(c) of the Restatement (Second) of Agency. *See also* 10 Fletcher Cyclopedia of Private Corporations § 4882 (perm. ed., rev. vol. 2001) ("a corporate master held vicariously liable for the actions of its employees is subject to punitive damages for willful and wanton misconduct only if a superior officer of the corporation ordered, participated in, or ratified the misconduct of the employee.").

officers and agents are engaged in committing an independent fraudulent act upon their own account and the facts to be imputed relate to the fraudulent act.

3 Fletcher Encyclopedia of Private Corporations § 826 (perm. ed., rev. vol. 2002). *See also Western Securities Co. v. Silver King Consolidated Min. Co.*, 57 Utah 88, 103, 192 P. 664, 670 (1920) (“It is accordingly well settled in the law that a corporation is not chargeable with notice of facts because of knowledge on the part of the officer or agent, where the officer or agent is dealing with a corporation in his own interest, and where for other reasons, his interest is adverse to that of his corporation, so that communication of knowledge by him cannot be presumed”).

Similarly, one of the treatises relied upon by the Court’s opinion notes, in a different section, that:

An exception to the general rule that the knowledge of an officer or agent will be imputed to the corporation arises when an officer, director, employee, or agent is acting in a transaction in which he is personally or adversely interested or is engaged in the perpetration of an independent fraudulent transaction, where the knowledge relates to such transaction and it would be to his interest to conceal it. In this type of situation it is unreasonable to presume that the officer or agent will communicate such knowledge to the corporation.

18B Am. Jur. 2d, Corporations, § 1680 (1985).

Corporations, like real people, can be principals and have agents; can be employers and have employees. Corporations, like real people, can limit the scope of authority of its agents and employees. Not every agent or employee of a corporation can think, act or “know” on behalf of a corporation; just like with real people. While, unlike real people, a corporation’s “knowledge” can only happen by way of imputation, the

Court's opinion goes too far in stating that "[k]nowledge can always be imputed to a corporation." 2002 UT 99, ¶ 22. When trying to determine the subjective belief or intent of a corporation, the employees or agents of a corporation whose subjective beliefs or intent – *i.e.* whose "knowledge" – should be imputed to the corporation should be limited by more than the employee's or agent's scope of authority. As with determining the intent of a corporation for purposes of imposing punitive damages, a corporation's subjective belief or intent for purposes of determining whether attorney fees should be awarded under section 78-27-56 should be limited to those of "a superior officer of the corporation [who] ordered, participated in, or ratified the misconduct of the employee." 10 Fletcher Encyclopedia of Private Corporations § 4882 (perm. ed., rev. vol. 2001). *Cf. Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 163 (Utah 1991) (punitive damages against a corporate employer on the basis of vicarious liability must be based on the conduct of a managerial agent who must also be acting within the scope of his employment/agency); *accord* Restatement (Second) of Torts, § 909 (1976); Restatement (Second) of Agency § 217C (1958).

As noted in Fletcher Encyclopedia of Private Corporations, "[c]orporations can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their agents and servant **in the same degree as natural persons** are liable for the acts of their servants and agents." 10 Fletcher Encyclopedia of Private Corporations § 4877 (emphasis added). The knowledge of a corporation can be that of "individual officers and employees **at a certain level of responsibility.**" 18B Am. Jur. 2d, Corporations, § 1673 (1985) (emphasis added). At what level "depends on the degree of discretion the

employee has in making decisions that will ultimately determine corporate policy.” *Id.*

The knowledge of a real estate broker’s agent who is an independent contractor does not, as a matter of law, rise to such a level.

III. AMENDMENTS TO UTAH’S REAL ESTATE STATUTES CAST DOUBT ON THE COURT’S CONCLUSION THAT REAL ESTATE AGENTS ARE EMPLOYEES OF THEIR BROKER.

A third issue that needs clarification involves Part II, C of the Court’s opinion.

2002 UT 99, ¶ 25. There, the Court concluded that Wardley’s argument that Hansen’s knowledge cannot be imputed to Wardley because Hansen was an independent contractor and not an employee “fails because we have clearly held that ‘the relationship between a real estate broker and its agents is that of an employer and employee.’” *Id.* (quoting *White v. Fox*, 665 P.2d 1297, 1301 (Utah 1983), and citing *Phillips v. JCM Development Corp.*, 666 P.2d 876, 881 (Utah 1983)). Regardless of whether an independent contractor’s knowledge can be imputed to his principal, the Court’s analysis on this point, which has a great deal of significance to the real estate industry, deserves much more attention than it was given in this one sentence conclusion.

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. 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 (emphasis added). Therefore, the court concluded that the real estate agent in that case was an employee of the broker and, as a result, the broker was responsible for the

tortious actions of the agent which were done within the course and scope of employment. *See id.*

The statutory scheme relied upon by the court in *Phillips* was, however, amended by the Utah Legislature shortly after that decision to specifically allow for an independent contractor relationship. The definition of “real estate sales agent” now set forth in Utah Code Ann. § 61-2-2(15) (2000), includes: “any person employed **or engaged as an independent contractor** by or on behalf of a licensed principal real estate broker.” (Emphasis added.) 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.” *Phillips*, 666 P.2d at 881. 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) (emphasis added).

These changes were enacted in 1985. *See* L. 1985, ch. 162 § 2. Thus, in an obvious response to this Court’s reasoning in *Phillips*, the Utah Legislature clearly and explicitly modified the statutory scheme governing real estate brokers and agents to allow for independent contractor relationships and other forms of affiliation. In light of these changes to the statutory scheme upon which *Phillips* and *White* were based, the Court should have re-examined the issue of whether real estate agents with independent contractor relationships are automatically “employees” of their broker. The Court should have applied the body of case law that has developed to determine whether or not an

employer-employee relationship exists; or whether a worker is an independent contractor.⁶

A. Whether An Agent is an Independent Contractor or Employee Has Important Ramifications With Respect to Wardley's Liability.

Although the Court's opinion was premised on principles governing the imputation of knowledge, its statement that real estate agents are employees has important ramifications with respect to the vicarious liability of a principal for the negligent conduct of his agents. In this context a principal is ordinarily not responsible for negligent physical harm caused by an independent contractor who, although he may be an agent, is not an employee. *See* Restatement (Second) of Agency, § 250 (distinguishing between servants and non-servant agents). Thus, when the Court states that real estate agents are employees of their broker, it is virtually tantamount to imposing liability on the broker for the negligent physical conduct of the real estate agent.

In sum, the Court's cursory conclusion that a real estate agent is an employee of the broker ignores changes to the relevant statutory language expressly stating that a real estate agent can also be an independent contractor. If the Court's opinion is truly based on imputation of knowledge as opposed to vicarious liability, the Court should avoid

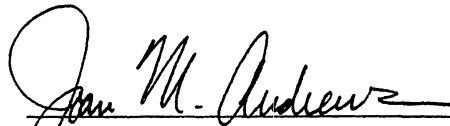
⁶ Along these lines, this Court has held that "whether an employer-employee relationship exists . . . is determined by whether the alleged employer had the right to control the employee." *Glover ex rel. Dyson v. Boy Scouts of Am.*, 923 P.2d 1383, 1385 (Utah 1996) (sustaining summary judgment finding 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). *See also Averett v. Grange*, 909 P.2d 246, 249 (Utah 1996).

blanket pronouncements that are unnecessary to its decision, and which rely on cases that are, based on the statutory changes, no longer good law.

CONCLUSION

The Court's original opinion in this case misapprehends or otherwise fails to address several points of law that are important not only for the purposes of this case, but also with respect to real estate law generally. For the foregoing reasons, the Court should grant Wardley's Petition for Rehearing.

DATED this 8th day of November, 2002.

A handwritten signature in cursive script, appearing to read "Joan M. Andrews", is written over a horizontal line.

Kevin N. Anderson

Joan M. Andrews

FABIAN & CLENDENIN

A Professional Corporation

Attorneys for Plaintiff-Appellee Wardley

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2002, I caused to be filed the original and six copies of the foregoing Petition for Rehearing with the Utah Supreme Court:

Utah Supreme Court
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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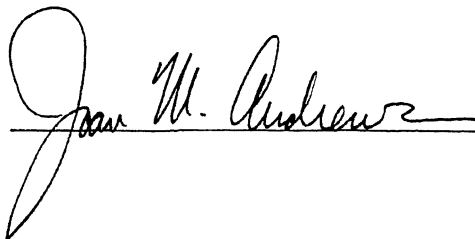


Exhibit B

IN THE SUPREME COURT OF THE STATE OF UTAH

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Wardley Better Homes and Garden,
Respondent,

v.

No. 20010245-SC
20000128-CA
940907000

Leland Mascaro, Sheri Mascaro,
Tracy Cannon and Cannon Associates,
Inc., a Utah corporation,
Petitioner.

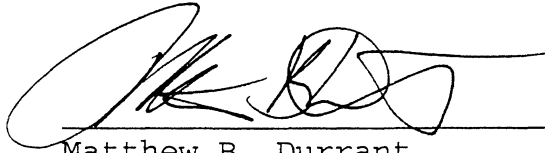
ORDER

This matter is before the court upon a Petition for Rehearing
filed on November 8, 2002, by Appellee.

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

FOR THE COURT:

12-11-02
Date


Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on 12/12 , 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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and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court listed below:

THIRD DISTRICT, SALT LAKE
ATTN: SOPHIE ORVIN /KATHY SHUPE
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By 
Deputy Clerk

Case No. 20010245-SC
THIRD DISTRICT, SALT LAKE , 940907000

Exhibit C

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IN THE SUPREME COURT OF UTAH

**WARDLEY BETTER HOMES AND
GARDENS,**

Plaintiff/Respondent,

vs.

**TRACY CANNON; CANNON
ASSOCIATES, INC., a Utah
corporation; LELAND J. MASCARO;
and SHERI MASCARO;**

Defendants/Petitioners.

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION FOR LEAVE TO
FILE A BRIEF AS AMICUS
CURIAE**

**(This Memorandum is Filed on Behalf
of the Utah Association of Realtors®)**

Supreme Court No. 20010245

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF
PROPOSED AMICUS CURIAE, UTAH ASSOCIATION OF REALTORS®**

The Utah Association of Realtors® (the “Association”), by and through its counsel, Christopher J. Kyler, and its co-counsel, Jeffrey Weston Shields and Paxton R. Guymon of Ballard Spahr Andrews and Ingersoll, LLP, submits this memorandum of points and authorities in support of its motion for leave to file a brief as Amicus Curiae. The Association seeks leave of Court to file an Amicus Curiae brief to be considered by the Court in connection with the Petition for Rehearing filed by Wardley Better Homes and Gardens (“Wardley”) regarding the Court’s opinion filed on October 11, 2002 as opinion 2002 UT 99 (the “Opinion”).

ARGUMENT

I. THE ASSOCIATION’S INTEREST IN THE OPINION IS SUBSTANTIAL.

The Association has a substantial interest in the Court’s Opinion. The Association’s membership consists of approximately eight thousand nine hundred (8,900) licensed real estate professionals conducting real estate business throughout the State of Utah. Real estate licensees in Utah rely heavily upon the Association and its sister companies to protect the interests of real estate professionals in this State, and to provide continuing education, business forms, and legal guidance. Furthermore, through its lobbying and other efforts during the past thirty (30) years, the Association has been extensively involved in creating and refining statutory law in Utah regarding real estate professionals and real estate practices, as well as various administrative rules for the Utah Division of Real Estate. The pronouncements of law made by this Court in the Opinion have far-reaching and potentially very negative implications on the Association and its approximately 8,900 members, as explained below.

II. THE OPINION, IF LEFT UNMODIFIED, WILL FUNDAMENTALLY ALTER CURRENT PRACTICES AND BROKER-AGENT RELATIONSHIPS IN UTAH'S REAL ESTATE INDUSTRY.

The Association is deeply concerned about the following language in the Opinion:

Wardley, nevertheless, contends that Hansen's knowledge cannot be imputed to it because Hansen was an independent contractor and not an employee. This argument fails because we have clearly held that '[t]he relationship between a real estate broker and its agents is that of employer and employee.' White v. Fox, 665 P.2d 1297, 1301 (Utah 1983); see also Phillips v. JCM Dev. Corp., 666 P.2d 876, 881 (Utah 1983).

See 2002 UT 99 at ¶ 25.

This language represents an incorrect statement of Utah law. If allowed to stand, this language will fundamentally change the current practices and relationships of real estate brokers and agents in this State. Moreover, this language conflicts with current provisions of the Utah Code pertaining to real estate licensees, and is based on outdated and inapplicable case law.

The above-quoted language of the Opinion cites Phillips v. JCM Dev. Corp., 666 P.2d 881, 876 (Utah 1983), as authority. The holding of that decision, however, was based upon the language of the Utah Code as it existed in 1983. Indeed, in addressing whether agents are employees or independent contractors, the Phillips opinion cites to and relies upon three different sections of the Utah Code as they existed in 1983, each of which contained language indicating that sales agents were employees of brokers. See id. at 881 (citing language from the 1983 version of Utah Code Ann. §§ 61-2-3, 61-2-8 and 61-2-10).

In response to the Phillips decision, the Utah Legislature amended each of these three sections of the Utah Code to expressly allow for sales agents to be engaged as independent contractors. See 1985 Laws of Utah, Chapter 162 § 2 (1985 House Bill 284). Following the

Legislature's enactment of 1985 House Bill 284, the Phillips case had no further value as precedent for whether sales agents are employees or independent contractors under Utah law.

The present version of the Utah Code expressly provides that sales agents can be engaged by brokers as independent contractors. Section 61-2-2(15) of the Utah Code provides:

‘Real estate sales agent’ and ‘sales agent’ means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12).

Utah Code Ann. § 61-2-2(15) (emphasis added). In other words, the Utah Legislature has determined legislatively that brokers may engage sales agents as independent contractors. The Opinion incorrectly assumes that sales agents are always employees of brokers.

As a general practice in this State, a large percentage of brokers and sales agents have chosen to structure their relationships as independent contractors. The federal and state tax status for many agents and brokers is based on the understanding that agents can be independent contractors. Such agents track their income and expenses and make their business decisions based on their independent contractor status. Such brokers do not withhold income taxes for their independent contractor sales agents. In addition, these brokers' premium payments and policies for workers compensation insurance, unemployment insurance, and errors and omissions insurance are based upon the independent contractor status of their real estate agents. All of these issues are implicated by the Opinion's broad-sweeping and incorrect statement of law.

Instead of concluding categorically that the relationship between all brokers and agents is that of employer and employee, the Court should analyze the facts and circumstances of the relationship at issue, including such factors as how the relationship has been structured, any agreements between the parties, whether the broker has the right to control the sales agent, how

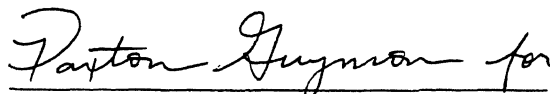
the broker pays the sales agent, and other such factors that are traditionally considered in determining whether a person is an employee or independent contractor. See, e.g. Utah Home Fire Insurance Co. v. Manning, 985 P.2d 243, 246-47 (Utah 1999) (listing factors to consider in determining whether a person is an employee or independent contractor); Harry L. Young & Sons v. Ashton, 538 P.2d 316, 318 (Utah 1975) (same).

In short, the designations of real estate brokers and sales agents are simply matters of licensing, based on real estate education, experience and testing requirements. See Utah Code Ann. § 61-2-6. Such licensing designations are not determinative in and of themselves of the kind of legal relationship that exists between a broker and an agent. This Court should reconsider and correct the misstatements of law contained in the Opinion.¹

CONCLUSION

Based upon the foregoing, the Association respectfully requests the Court to grant it leave to file an amicus brief in connection with the Petition for Rehearing filed by Wardley.

DATED this 8th day of November, 2002.


Christopher J. Kyler

Ballard Spahr Andrews & Ingersoll, LLP
Jeffrey Weston Shields, Esq.
Paxton R. Guymon, Esq.

Attorneys for Utah Association of Realtors®

¹ If the Court grants the Association leave to file an amicus brief, the Association intends to address other legal conclusions of the opinion, such as whether knowledge of a sales agent's fraudulent activities can be automatically imputed to a broker.

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of November, 2002, I caused to be served a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE** upon the following addressees by first-class mail, postage prepaid:

Joan Andrews, Esq.
Fabian & Clendenin
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215 South State #1200
Salt Lake City, Utah 84111

Mark O. Morris
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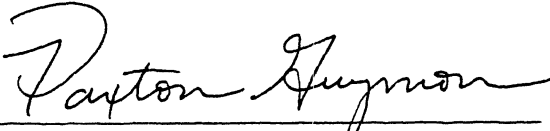


Exhibit D

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Attorneys for Defendants/Appellees
Tracy Cannon and Cannon Associates, Inc.

IN THE UTAH SUPREME COURT

WARDLEY BETTER HOMES and
GARDEN,

Plaintiffs/Respondent,

v.

LELAND J. MASCARO, SHERI
MASCARO, TRACY CANNON and
CANNON ASSOCIATES, INC., a Utah
Corporation,

Defendants/Petitioner.

OBJECTION TO MOTION FOR LEAVE
TO FILE BRIEF OF AMICUS CURIAE

Supreme Court Case No.: 20010245-SC

Petitioners Tracey Cannon and Cannon Associates, Inc., pursuant to Rules 23, 25 and 35 of the Utah Rules of Appellate Procedure, hereby object to the Motion of the Utah Association of Realtors for Leave to File a Brief As Amicus Curiae in this matter, for the reason that such motion is untimely. Rule 25 required the Utah Association of Realtors to “file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae . . . will support.” Rule 25 also presupposes that prior to such time, a person desiring to file a brief of an amicus curiae would file a motion seeking leave to do so. Here, the Utah Association of Realtors met neither requirement.

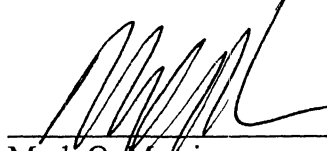
The subject decision of this court was issued on October 11, 2002. Under Rule 35, a petition for rehearing was required to be filed by October 25, 2002. Wardley Better Homes and Gardens, and only Wardley Better Homes and Gardens, sought and obtained leave for additional time until November 8, 2002 within which to file its petition for rehearing. That petition was filed on November 8, 2002. In order to timely file a petition for rehearing on behalf of an amicus curiae, the Utah Association of Realtors was required first to file a motion seeking leave to file such a petition, and obtain leave of this court prior to the original date of Wardley Better Homes and Gardens' original petition for rehearing, which date was October 25, 2002. Of course, the Utah Association of Realtors filed nothing before October 25, 2002, and only sought leave on the same date Wardley's Petition was due.

CONCLUSION

For the foregoing reasons, Cannon respectfully asks this court to deny the motion of the Utah Association of Realtors for Leave to File a Petition for Rehearing by an Amicus Curiae for the reason that such motion, and ultimately such petition, are untimely.

DATED this 14th day of November, 2002.

SNELL & WILMER L.L.P.



Mark O. Morris


David N. Wolf

Attorney for Defendants/Petitioners Cannon

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2002, I caused to be served a true and correct copy of the foregoing Objection to Motion for Leave to File Brief of Amicus Curiae upon the following by first-class mail, postage prepaid:

Kevin N. Anderson, Esq. Joan Andrews, Esq. Fabian & Ciendenin 215 South Sate #1200 Salt Lake City, UT 84111 Attorneys for Wardley Better Homes & Gardens	Steven B. Smith, Esq. Scalley & Reading, P.C. 261 East 300 South, Suite 200 Salt Lake City, UT 84111 Attorneys for Wardley Better Homes & Gardens
John R. Bucher, Esq. 1343 South 1100 East Salt Lake City, UT 84105 Attorney for Hansens, Third Party Defendants	James C. Haskins, Esq. 357 South 200 East #300 Salt Lake City, UT 84111 Attorney for Leland J. and Sheri Mascaro
Christopher J. Kyler, Esq. Utah Association of Realtors 5710 South Green Street Murray, UT 84123 Attorney for Utah Association of Realtors	Jeffrey Weston Shields, Esq. Paxton R. Guymon, Esq. Ballard Spahr Andrews & Ingersoll, LLP One Utah Center, Suite 600 201 South Main Street Salt Lake City, UT 84111-2221 Attorneys for Utah Association of Realtors



Mark O. Morris

Exhibit E

CERTIFICATE OF MAILING


I hereby certify that on November 20, 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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DAVID N. WOLF
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15 W S TEMPLE #1200
GATEWAY TOWER W
SALT LAKE CITY UT 84101

Dated this November 20, 2002.

By 
Deputy Clerk

Case No. 20010245-SC District Court No. 940907000

IN THE SUPREME COURT OF THE STATE OF UTAH

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Wardley Better Homes and Garden,
Plaintiff/Respondent,

v.

Case No. 20010245-SC

Tracy Cannon, Cannon Associates,
Inc., a Utah corporation; Leland
J. Mascaro; and Sheri Mascaro,
Defendants/Petitioners.

ORDER

The Utah Association of Realtors' motion for leave to file a
brief as amicus curiae is denied.

FOR THE COURT:

Date

11-18-02

Leonard H. Russon
Justice