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NOTES

AGENCY — SELLING BROKERS ARE SUBAGENTS OF SELLERS IN REAL ESTATE TRANSACTIONS INVOLVING MULTIPLE LISTING SERVICES. *Fennell v. Ross*, 289 Ark. 374, 711 S.W.2d 793 (1986)

The Fennells sought the services of Rainey Realty Co. in locating property where they could reside and Dr. Fennell could carry on his veterinary practice. One of Rainey's real estate agents, Mrs. Whiteman, noticed a promising listing in a multiple listing service (MLS) publication. The Rosses had listed the property through Century 21 Reddick Company; the listing advertised the property's "Commercial Potential! Any type business!" Mrs. Whiteman showed the property to the Fennells, assuring them that they would have no trouble having it rezoned from a residential to a commercial classification. The Fennells and the Rosses then executed an offer and acceptance. Shortly thereafter the Fennells learned that rezoning would be difficult to accomplish since the property was located in a flood plain. The Fennells refused further performance under the contract.

The Rosses brought an action against the Fennells for breach of contract. The Fennells answered that they had properly rescinded the contract and counterclaimed seeking restitution of the earnest money they had paid. They argued that the Rosses had misrepresented the property by advertising its "Commercial Potential!" in the MLS publication.

The Pulaski County Circuit Court awarded the Rosses damages. The court found that Mrs. Whiteman knew, or should have known, of the flooding problem, and that Mrs. Whiteman (and consequently her employer, Rainey Realty Co.) was the Fennells' agent. Thus, the court charged the Fennells with constructive knowledge of the flooding problem, and would not allow rescission on grounds of misrepresentation. The court reasoned that this constructive knowledge negated the Fennells' claim of reliance on the misrepresentation.

The Arkansas Supreme Court, in a case of first impression, reversed the trial court's decision. The court agreed that the crucial ques-

tion was whether Mrs. Whiteman (and consequently Rainey Realty Co.) was the agent of the buyers or the sellers. The supreme court held, as a matter of law, that in an MLS transaction such as this, the selling agent¹ is a subagent of the seller. The court remanded the case for the trial court to apply this law to the facts before it. *Fennell v. Ross*, 289 Ark. 374, 711 S.W.2d 793 (1986).

The Arkansas Supreme Court has defined agency as the relationship resulting from the conduct of "two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act."² The party for whom action is to be taken is the principal, and the party who is to act is the agent.³ "The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control."⁴ The two essential elements of this definition are authorization and control.⁵ Generally, the existence of an agency relationship is a question of fact to be determined by the fact finder; but where the facts are undisputed, and only one inference can be drawn from them, the existence of agency becomes a question of law.⁶

Another actor often found in the agency relationship is the subagent.⁷ A subagent is one for whose conduct the appointing agent is responsible to the principal, and possibly to persons with whom the subagent deals.⁸ However, the term "subagent" has also been applied to persons who are to act for the principal, and who may be more properly characterized as an agent of the principal, despite being appointed by another agent.⁹

In some transactions involving two or more principals, it may be difficult to determine which principal a particular agent is representing. When it is unclear which of two contracting principals the agent repre-

1. The selling agent, also known as the selling broker, is generally the broker who obtains the purchase offer from the buyer. See *infra* text accompanying notes 35-38.

2. *Evans v. White*, 284 Ark. 376, 378, 682 S.W.2d 733, 734 (1985); *Crouch v. Twin City Transit, Inc.*, 245 Ark. 778, 780, 434 S.W.2d 816, 817-18 (1968).

3. *Evans*, 284 Ark. at 378, 682 S.W.2d at 734; RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

4. *Evans*, 284 Ark. at 378, 682 S.W.2d at 734.

5. *Id.*

6. *Id.*; *Campbell v. Bastian*, 236 Ark. 205, 208-09, 365 S.W.2d 249, 251 (1963).

7. See *Demian, Ltd. v. Charles A. Frank Assocs.*, 671 F.2d 720 (2d Cir. 1982); RESTATEMENT (SECOND) OF AGENCY § 5 (1957).

8. *Demian, Ltd.*, 671 F.2d 720 (2d Cir. 1982); RESTATEMENT (SECOND) OF AGENCY § 5 comment b (1957).

9. RESTATEMENT (SECOND) OF AGENCY § 5 comment b (1957); see also F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 332 (2d ed. 1914 & photo. reprint 1982).

sents, the court should ascertain the factual relationship of the parties to determine which principal the agent is serving in the transaction.¹⁰ Thus, the question of who the agent represents in the transaction becomes a question of fact.¹¹

Once a party manifests its assent to act as an agent, that agent is a fiduciary with respect to matters within the scope of his agency.¹² Thus, the agent has a duty to act solely for the benefit of the principal in matters connected with his agency.¹³ For example, the Arkansas Supreme Court has held that an agent cannot represent both parties to a transaction without their full knowledge and consent.¹⁴

The Arkansas Supreme Court held in *Morrison v. Bland*¹⁵ that a broker is one type of agent.¹⁶ "A broker is one who is engaged for others, [for] a commission, to negotiate contracts relative to property"¹⁷ The broker has no concern with the custody of this property. There are many kinds of brokers, who are known by the particular class of transactions in which they are engaged, such as stock brokers, insurance brokers, business brokers, and real estate brokers.¹⁸ A broker who begins a transaction as the agent of one party often may become the agent of both parties or of the other party at some time during the transaction.¹⁹ At least one court, however, has held that a broker is the agent of the party who first employs him.²⁰ Since a broker is an agent,²¹ the question of whose agent the broker is could be answered as

10. F. Mechem, *supra* note 9, § 300. See also *Walker v. Huckabee*, 10 Ark. App. 165, 661 S.W.2d 460 (1983); *Restatement (Second) of Agency* § 1 comment b (1957).

11. F. MECHEM, *supra* note 9, § 300. Mechem suggests the following inquiries to determine who the agent represents: Who set the agent in motion originally? Who gave the agent his instructions? Whose interests was the agent primarily to protect? Who was to pay the agent? Who could hold the agent liable for the agent's negligence? Would holding an agent to be the agent of one party leave the other without a representative in the transaction?

12. *B.J. McAdams, Inc. v. Boggs*, 439 F. Supp. 738 (E.D. Pa. 1977); *RESTATEMENT (SECOND) OF AGENCY* § 13 (1957).

13. 439 F. Supp. at 738; *RESTATEMENT (SECOND) OF AGENCY* § 387 (1957).

14. *Ellsworth v. Benedict*, 214 Ark. 367, 374, 216 S.W.2d 392, 395 (1949); *City Nat'l Bank v. McCann*, 193 Ark. 967, 988, 106 S.W.2d 195, 206 (1937); See also *RESTATEMENT (SECOND) OF AGENCY* § 13 comment a (1957).

15. 226 Ark. 514, 291 S.W.2d 243 (1956).

16. *Id.* at 519, 291 S.W.2d at 246.

17. *Frier v. Terry*, 230 Ark. 302, 307, 323 S.W.2d 415, 419 (1959).

18. *Id.* at 308, 323 S.W.2d at 419; F. MECHEM, *supra* note 9, § 73. Arkansas defines a real estate broker as someone, other than a salesman, who for another, and for compensation, handles a variety of given commercial transactions relative to real property. *ARK. STAT. ANN.* § 71-1302 (1979).

19. F. MECHEM, *supra* note 9, § 300.

20. *Menzel v. Morse*, 362 N.W.2d 465, 475 (Iowa 1985); F. MECHEM, *supra* note 9, § 73.

21. See *supra* note 16 and accompanying text.

it is for any other agent—by an examination of the facts to see if an agency relationship exists,²² and, if so, which party plays which role.²³

Real estate brokerage originated in the land marketing practices of the nineteenth century.²⁴ Specialists in real estate brokerage appeared during the last half of the nineteenth century, closely followed by real estate firms.²⁵ These firms gained additional support when state licensure laws appeared just after the First World War.²⁶ The early real estate brokers also created “real estate exchanges,” modeled on stock exchanges, to help with their local transactions.²⁷ “By the 1920s, [real estate exchanges] had evolved into what are now known as Multiple Listing Services.”²⁸

A Multiple Listing Service (MLS) has been defined “as an arrangement between a number of real-estate brokers in a given [geographical] area whereby any member broker is authorized to sell property exclusively listed with any other member broker.”²⁹ Initially, a broker will procure an exclusive right-to-sell listing contract with the seller.³⁰ This contract generally authorizes the broker to submit the listing to the MLS.³¹ If the listing is submitted to an MLS, any other broker who is a member of the MLS is authorized to sell the property.³² When a sale of a listed property is consummated, the fee is usually split among the selling broker, the listing broker, and the MLS administrative office.³³ Listing property with an MLS is intended to broaden the market exposure for each property listed, theoretically resulting in a higher price and a quicker sale.³⁴

One of the legal problems raised by MLS operations is that of

22. See *supra* note 6 and accompanying text.

23. See *supra* note 10 and accompanying text.

24. D. BURKE, *LAW OF REAL ESTATE BROKERS* § 1.1, at 1 (1982).

25. *Id.* at 2.

26. *Id.* at 3.

27. *Id.* § 1.4, at 7.

28. *Id.*

29. *Frisell v. Newman*, 71 Wash. 2d 520, 527, 429 P.2d 864, 868 (1967).

30. D. BURKE, *supra* note 24, § 1.5.

31. *Id.* The relevant language in a form “Real Estate Contract (Exclusive Right to Sell),” on file with the office of the Arkansas Realtors Association in Little Rock at the time this Note was written, states in Paragraph 12:

“12. OTHER AUTHORIZATION: Unless otherwise specified, Owner authorizes the following: . . . (c) Offering of the property in multi-list or co-op brokerage.”

32. D. BURKE, *supra* note 24, § 1.5.

33. *Frisell*, 71 Wash. 2d at 527, 429 P.2d at 868; see also D. BURKE, *supra* note 24, § 1.5 at 14.

34. D. BURKE, *supra* note 24, § 1.4; see also Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1329 (1970).

assigning agency roles to the brokers involved in order to ascertain their legal duties.³⁵ As noted above, one broker will secure a listing contract with the seller;³⁶ this broker is thus known as the "listing broker," and he is deemed to be the agent of the seller by virtue of the listing contract and the relationship it evidences.³⁷ The second broker in the MLS transaction is known as the "selling broker," since he is the broker who obtains the offer to purchase from the buyer.³⁸ This "selling broker" causes problems for courts. An issue often raised in real estate transactions involving an MLS arrangement, where the listing broker has listed the property at the seller's direction and the selling broker has worked with the buyer to locate and show the property, is this: for which party is the selling broker an agent?³⁹

The resolution of this issue can be significant. One line of reasoning holds the selling broker to be the subagent of the seller.⁴⁰ The listing broker, who is the seller's agent by virtue of the listing contract, coconstructively "appoints" the selling broker as a subagent when the listing broker submits the listing to the MLS and the selling broker finds a buyer.⁴¹ If the selling broker is a subagent of the seller, the the selling broker owes his primary duties to the seller.⁴² Thus, the buyer would have no representation in the transaction, and would be left to the effects of *caveat emptor*.⁴³ The buyer would retain his remedies of rescission and restitution—the seller would become liable for any misrepresentation of his subagent by virtue of the "ratification doctrine,"⁴⁴ so that the buyer could rescind on the basis of misrepresentation.⁴⁵

On the other hand, the selling broker could be found to be the buyer's agent, depending on the facts of the transaction.⁴⁶ If the selling broker is the agent of the buyer, then the buyer would lose his remedies

35. E.g., D. BURKE, *supra* note 24, § 1.5; Note, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

36. See *supra* note 30 and accompanying text.

37. Note, *supra* note 25, at 771 n.22.

38. *Id.*, n.23.

39. See *Wise v. Dawson*, 353 A.2d 207 (Del. Super. Ct. 1975); *Frisell v. Newman*, 71 Wash. 2d 520, 429 P.2d 864 (1967); D. BURKE, *supra* note 24, § 1.5.

40. See *infra* notes 52-60 and accompanying text.

41. See D. BURKE, *supra* note 24, § 1.5.

42. See *supra* notes 12-14 and accompanying text.

43. Note, *Real Estate Brokers' Duties to Prospective Purchasers*, 1976 B.Y.U. L. REV. 513 (1976); See Comment, *A Reexamination of the Real Estate Broker-Buyer Seller Relationship*, 18 WAYNE L. REV. 1343 (1972).

44. Note, *supra* note 35, at 773 n.33.

45. *Miller v. Boeger*, 1 Ariz. App. 554, 405 P.2d 573 (1965); RESTATEMENT (SECOND) OF AGENCY § 259 (1957); Note, *supra* note 35, at 773 n.33.

46. See *infra* notes 62-66 and accompanying text.

of rescission and restitution for the selling broker's misrepresentations, for two reasons. First, since the selling broker's knowledge would be imputed to the buyer,⁴⁷ the buyer would constructively know the facts of the transaction and would not be justified in relying upon any misrepresentation.⁴⁸ Second, the buyer could not rescind against the seller since the "ratification doctrine" would not be applicable—the selling broker would not be the seller's subagent, so the seller could not ratify his acts.⁴⁹ Thus, the buyer's only recourse would be a suit against the selling broker for damages resulting from the misrepresentation.⁵⁰

A majority of decisions has found the selling broker to be the subagent of the seller in MLS transactions;⁵¹ one leading case to that effect is *Frisell v. Newman*,⁵² decided by the Washington Supreme Court. In *Frisell* a seller sought to set aside a sale of property to a partnership; one of the partners was a member of the selling broker's firm, and had noticed the property when it was presented at an MLS meeting by the listing broker. When the seller became dissatisfied with the contract of sale, she sought to set aside the transaction on allegations of breach of fiduciary duty by the partner/broker, whom the seller claimed was her subagent by virtue of the MLS agreement.⁵³

The court in *Frisell* examined the terms of the MLS agreement itself to settle the issue.⁵⁴ The court noted that the listing broker was obligated by the listing contract to submit the listing to the MLS; then, any MLS member had the right to sell the property.⁵⁵ If an MLS member sold the property, the seller had to pay a commission, which would be divided among the listing broker, selling broker, and MLS office; here, the selling broker was claiming the right to such a commission.⁵⁶ These facts led the court to hold that the selling broker was the subagent of the seller in this MLS transaction, with corresponding fiduciary duties that could not be circumvented by designations in the MLS agreement itself.⁵⁷ At least two subsequent Washington decisions

47. See *M.F.A. Mut. Ins. Co. v. Jackson*, 271 F.2d 180 (8th Cir. 1959); RESTATEMENT (SECOND) OF AGENCY § 9(3) (1957).

48. See *Gilbertson v. Clark*, 175 Ark. 1118, 1 S.W.2d 823 (1928) (vendee cannot complain of a misrepresentation if, before the sale of land, he knew the facts).

49. Note, *supra* note 35, at 773 n.33.

50. *Id.*

51. D. BURKE, *supra* note 24, §§ 1.5, 1.6.

52. 71 Wash. 2d 520, 429 P.2d 864 (1967).

53. *Id.* at 522-25, 429 P.2d at 865-67.

54. *Id.* at 527-29, 429 P.2d at 868-69.

55. *Id.* at 528, 429 P.2d at 869.

56. *Id.* at 528-29, 429 P.2d at 869.

57. *Id.*

have followed this holding as a matter of law.⁵⁸ Other decisions within the majority have assumed the selling broker to be the subagent of the seller in MLS transactions with little or no discussion.⁵⁹ Most of the scholarly writing on this issue supports the majority decisions in finding the selling broker to be the subagent of the seller in MLS transactions.⁶⁰

A minority of jurisdictions have found no agency relationship between the selling broker and the seller (or between the selling broker and the listing broker).⁶¹ In *Wise v. Dawson*,⁶² the buyers brought an action against the sellers, the listing broker, and the selling broker for fraudulent misrepresentation. The listing broker moved for summary judgment, arguing that a listing broker in an MLS transaction has no liability for the selling broker's misrepresentations.⁶³ The court in *Wise* examined the MLS arrangement and found no "indicia of agency" establishing an agent-subagent relationship between the two brokers.⁶⁴ It noted that the local MLS defined itself as an "information exchange;" that the MLS had no provision for control of the selling broker by the listing broker, as is required in an agency relationship; and that the splitting of the commission was no "indicia of agency," since independent contractors split fees, too.⁶⁵ The court held that there was no agency relationship created by the MLS arrangement, and allowed the listing broker's motion.⁶⁶

Menzel v. Morse,⁶⁷ an Iowa Supreme Court decision, provides alternate grounds for following the minority view. In *Menzel*, the selling broker offered his services to the buyers, and found property for them

58. *Pilling v. Eastern and Pac. Enters. Trust*, 41 Wash. App. 158, 702 P.2d 1232 (1985); *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 574 P.2d 1211 (1978). The court in *Pilling* noted that "[i]n a multiple listing situation, the selling broker is an authorized subagent of the listing broker (citation omitted). Thus, a selling agent in a multiple listing system also owes the seller the same duties owed by the listing broker." *Pilling*, 41 Wash. App. at 162, 702 P.2d at 1236.

59. See *Marmis v. Solut Co.*, 117 Ariz. 499, 573 P.2d 899 (Ariz. Ct. App. 1977) (both brokers owe an overriding duty to the seller to obtain the best price possible); *Vanderschoot v. Christiana*, 10 A.D.2d 188, 198 N.Y.S.2d 768 (N.Y. App. Div. 1960); *Reich v. Christopoulos*, 123 Utah 137, 256 P.2d 238 (1953).

60. E.g., D. BURKE, *supra* note 24, § 1.5; Note, *supra* note 35, at 771-73.

61. See e.g., *Wise v. Dawson*, 353 A.2d 207 (Del. Super. Ct. 1975) and *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985).

62. 353 A.2d 207 (Del. Super. Ct. 1975).

63. *Id.* at 208.

64. *Id.* at 209.

65. *Id.*

66. *Id.* at 210. See also *Pumphrey v. Quillen*, 102 Ohio App. 173, 141 N.E.2d 675 (1955) (examining the facts surrounding an MLS transaction to reach the same holding).

67. 362 N.W.2d 465 (Iowa 1985).

through the local MLS.⁶⁸ When they subsequently became dissatisfied with the house they had purchased, the buyers brought an action against the selling broker for malpractice.⁶⁹ The court in *Menzel* adhered to the rule that a "real estate broker is the agent of the party who first employs him or her, and this may be the buyer even though it is anticipated the fee will be received from the seller."⁷⁰ The court noted that the MLS arrangement meant only that the selling broker would receive some commission from the listing broker.⁷¹ The court found no agency relationship between the selling broker and the seller; it held the selling broker liable to the buyers.⁷²

In *Fennell v. Ross*,⁷³ the Arkansas Supreme Court for the first time faced the issue of the agency duties of the selling broker in an MLS transaction. The court was convinced that the listing broker and his salesman were agents of the seller, but was unsure of the status of the selling broker and his employee, Mrs. Whiteman.⁷⁴ The court regarded this question as one of law rather than fact.⁷⁵ It quoted a discussion by a student writer as being "a good statement of the problem."⁷⁶ This student writer concluded that the selling broker was the subagent of the seller in MLS transactions, based upon the majority decisions and upon the wording of a listing contract from the writer's hometown.⁷⁷ The writer conceded that the agency relationship created was contrary to the buyer's expectations and beliefs, and unknown to many selling brokers.⁷⁸

After noting that "[w]e have not previously decided this issue, and there is a dearth of authority from other jurisdictions,"⁷⁹ the court in *Fennell* reviewed other relevant authorities it could find. The court cited a California case in which the court found the selling broker a subagent of the seller "in these circumstances."⁸⁰ The court determined

68. *Id.* at 467.

69. *Id.* at 467-69.

70. *Id.* at 475.

71. *Id.*

72. *Id.*

73. 289 Ark. 374, 711 S.W.2d 793 (1986).

74. *Id.* at 377-78, 711 S.W.2d at 795.

75. *Id.* at 377, 711 S.W.2d at 795.

76. *Id.* at 378-79, 711 S.W.2d at 795-96 (citing Note, *supra* note 35, at 771-73).

77. Note, *supra* note 35, at 771 nn. 25-26. The listing contract relied on specifically labeled brokers other than the listing broker as subagents. *Id.* at 768-69 n.18. This contract should be contrasted with the Arkansas Realtors Association listing contract cited *supra* note 31.

78. *Fennell*, 289 Ark. at 378, 711 S.W.2d at 796 (citing Note, *supra* note 35, at 772-73).

79. 289 Ark. at 379, 711 S.W.2d at 796.

80. *Id.* (citing *Kruse v. Miller*, 143 Cal. App. 2d 656, 300 P.2d 855 (Cal. Dist. Ct. App. 1956)). A reading of *Kruse* does not disclose the use of an MLS; rather, a broker who had a

that most scholarly articles, including the one quoted, supported the California court's holding.⁸¹ The court cited *Wise v. Dawson*, which held that the selling broker was the buyer's agent, as an opinion to the contrary, but did not otherwise discuss it.⁸² Finally, the court noted criticism of one proposal to impose a dual fiduciary duty on the selling broker.⁸³

The court pointed out that an agent may only serve one principal with respect to any one transaction.⁸⁴ Stating that it agreed with the authorities "who have reached the conclusion that in an MLS transaction like this one the selling agent is a subagent of the sellers," the court reversed the trial court's decision.⁸⁵ The court offered no other reasoning or policy considerations. Since the court had reversed the trial court on a matter of law, the case was remanded for a new trial.⁸⁶

Special Justice Brantley concurred in the result, but on different grounds.⁸⁷ Brantley argued that it was unnecessary to decide the agency question, which, she noted, can arise in MLS transactions in many different ways, resulting in complex problems.⁸⁸ Pointing out that there had been a material misrepresentation of fact as to the location of the property in a flood plain, Special Justice Brantley would have allowed rescission under the rule that a contract may be rescinded if there is a mutual mistake of a material fact.⁸⁹ This would be possible since the brokers had not detected the misrepresentation, but had made a mutual mistake.⁹⁰

Justice Hays dissented, expressing primary concern over the majority's treatment of the agency question. He thought it was a mistake to treat the selling broker as a subagent of the seller as a matter of law, since the existence of an agency relationship is a question of fact.⁹¹ Justice Hays believed that the selling broker was the buyers' agent on

"listing" on a house expressly requested the other broker to show the property.

81. *Fennell*, 289 Ark. at 379, 711 S.W.2d at 796 (citing D. BURKE, *supra* note 24, § 1.5; Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260, 263, 265 (1981)).

82. 289 Ark. at 379, 711 S.W. 2d at 796 (citing *Wise v. Dawson*, 353 A.2d 207 (Del. Super. Ct. 1975)).

83. 289 Ark. at 379, 711 S.W.2d at 796 (citing Note, *supra* note 35 at 773, n.33).

84. 289 Ark. at 379, 711 S.W.2d at 796.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 379-80, 711 S.W.2d at 796.

89. *Id.* at 380, 711 S.W.2d at 797.

90. *Id.*

91. *Id.* at 381, 711 S.W.2d at 797 (Hays, J., dissenting).

these facts. He noted that Mrs. Whiteman had been utilized by the buyers for more than a year, that both Mrs. Whiteman and Dr. Fennell considered Mrs. Whiteman to be the Fennells' agent, and that Mrs. Whiteman had signed the offer and acceptance as the buyers' agent. Justice Hays predicted that the court would regret establishing its holding as a rule of law in later cases.⁹²

Fennell may represent a new exception to the method of determining agency relationships. Prior Arkansas law settled the question of who an agent represented by examining the facts, where more than one reasonable inference could be drawn.⁹³ In MLS transactions, more than one inference can generally be drawn. The selling broker may be paid out of the commission received from the seller, and the listing contract may specify that the selling broker is a subagent of the seller. But, the buyer may contact the selling broker first; these two will then work together, and both may intend and expect that the selling broker will be the buyer's agent, working under his authorization and control. *Fennell* cuts through these facts, and holds that, as a matter of law, the selling broker is the seller's subagent in an MLS transaction. As Justice Hays pointed out, this holding is contrary to prior Arkansas law, which usually has required an examination of the facts to determine if an agency relationship was present.⁹⁴

An alternative approach, which Justice Hays endorsed, would be to examine the given part of the transaction at issue to determine whose agent the selling broker was.⁹⁵ Thus, the selling broker could be the buyer's agent for some purposes, and the seller's subagent for others, depending on the particular part of the transaction being examined. *Fennell* forecloses this approach by holding that the selling broker is the seller's subagent for all parts of the MLS transaction.

This new exception announced in *Fennell* rests on fragile ground. The court cited one case in support of its decision,⁹⁶ but it is distinguishable. Although in the cited case the court found a selling broker to be the subagent of the seller, there is no mention of an MLS agreement; rather, the listing broker had expressly requested the selling broker to show the property.⁹⁷ As noted above, there are cases in the majority view that squarely discuss agency relationships in the context of

92. *Id.* at 382, 711 S.W.2d at 798.

93. *See supra* note 6 and accompanying text.

94. 289 Ark. at 381, 711 S.W.2d at 797-98.

95. *Id.* at 382, 711 S.W.2d at 798.

96. *See supra* note 80 and accompanying text.

97. *Kruse v. Miller*, 143 Cal. App. 2d 656, 657, 300 P.2d 855, 856 (Cal. Dist. Ct. App. 1956).

an MLS on which the court in *Fennell* could have relied. In addition, the court in *Fennell* failed to distinguish *Wise*, which also discussed agency relationships in the context of an MLS but reached the opposite result.

As a practical matter, the holding in *Fennell* means that buyers may be left without adequate representation in real estate transactions. Usually a buyer contacts a broker and asks for his help in locating a home; the buyer and the broker spend quite a bit of time working together, and often both think that the broker is the buyer's agent.⁹⁸ Under *Fennell*, this selling broker is now the seller's subagent, as a matter of law, and may owe the buyer no duties in an MLS transaction. Thus, a buyer may be forced to bring in a third broker, who has no connection with the transaction, in order to have disinterested and reliable representation. However, the buyer retains the remedies of rescission and restitution against the seller, while the seller is liable for the misrepresentations of the selling broker.

This practical aspect of *Fennell* should have a broad impact on residential real estate transactions in Arkansas. A recent nation-wide government study⁹⁹ reported that approximately eighty-one percent of all sellers of single-family residences use brokers. Ninety-two percent of these sellers using brokers have their property listed on a local MLS. Once listed on the MLS, fifty-three percent of the resulting sales involve two brokers who are MLS members. Thus, *Fennell* will have a significant impact on the parties to MLS real estate transactions such as this in terms of their legal relationships and duties to each other.

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98. See Note, *supra* note 35, at 772; D. BURKE, *supra* note 24, § 1.6.

99. D. BURKE, *supra* note 24, § 1.4 (Supp. 1985) (citing FEDERAL TRADE COMMISSION, LOS ANGELES REGIONAL OFFICE, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY, at 9, 28-29 (1983)).

