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IN THE SUPREME COURT OF THE STATE OF OREGON

MAR - 4 2003

PAUL A. KERLEY,

Petitioner,
Respondent on Review,

v.

REAL ESTATE AGENCY

Respondent,
Petitioner on Review.

Supreme Court No. S49995

Court of Appeals No. A115200

Agency No. 200003-R-098C

BRIEF OF *AMICUS CURIAE*
OREGON ASSOCIATION OF REALTORS®

Appeal from the Final Order of the Real Estate Agency

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I. INTRODUCTION

The issue of concern to *Amicus* in this case is a narrow issue of law. That narrow issue is whether discipline under ORS 696.301(31) can be based on conduct not undertaken as a real estate licensee in the course of the licensee's professional real estate activities. The Court of Appeals has, relying on this Court's decision in *Dearborn v. Real Estate Agency*, 334 Or 493, 53 P3d 436 (2002), answered that question categorically in the negative. *Amicus* believes the Court of Appeals' ruling is erroneous and may, in the future, lead to the licensing of individuals who lack the trustworthiness or competence to engage in professional real estate activity.

The facts of this case are not in dispute. The conduct for which Kerley was disciplined involved alleged malfeasance as an attorney in connection with real estate dealings. There is no real disagreement the conduct, at the time it was committed, demonstrated "untrustworthiness" or "improper dealings" as an attorney.¹ There is disagreement over whether, as the Court of Appeals put it, Kerley's conduct as an attorney was "within the regulatory ambit of ORS 696.301(31)." *Dearborn v. Real Estate Agency*, 165 Or App 433, 997 P2d 239 (2000).

The Court of Appeals believed this Court's decision in *Dearborn* "compelled" its decision that "even though [Kerley's] conduct demonstrated untrustworthiness and improper dealings, that conduct did not occur while he held a real estate license and therefore did not relate to professional real estate activity." *Kerley v. Real Estate Agency*, 184 Or App 163, 169, 55 P3d 549 (2002). Accordingly, the Court ruled the Commissioner was without authority under ORS 696.301(31) to revoke the license. *Amicus* believes the Court of

¹The State Bar alleged such conduct. In the face of the allegation, Kerley submitted a Form B resignation.

Appeals has misconstrued the statute and this Court's decision in *Dearborn*. *Amicus*, therefore, urges this Court to rule that the Commissioner has the authority under ORS 696.301(31) to consider conduct prior to licensure.

II. ARGUMENT

1. Whether the Commissioner has the legal authority to revoke a real estate license based on the licensee's conduct prior to receiving the license?

The most significant appellate decision for understanding the Court of Appeals' error in this case is *Klein v. Real Estate Commissioner Holbrook*, 19 Or App 646, 528 P2d 1355 (1974). In *Klein*, the Court of Appeals held that the conduct referred to in the statutory predecessor to ORS 696.301(31), *former* ORS 696.301(1)(q), is "limited to acts by the licensee in his capacity as a broker or salesman, excepting where the licensee is acting in a private capacity."² *Klein*, 19 Or App at 653.

Notwithstanding its ruling on *former* ORS 696.300(1)(q), the Court of Appeals in *Klein* upheld the suspension of two real estate licenses based on the licensees' dishonest conduct while operating a real estate vocational school. The suspensions, according to the Court of Appeals, were proper because the licensees' dishonesty, which did not involve professional real estate activity, was inconsistent with *former* ORS 696.300(2). *Former* ORS 696.300(2) explicitly allowed the suspension or revocation of a real estate license for any

² The "private capacity" exception applies when a real estate licensee is acting in a real estate transaction on their own behalf. See *Blank v. Black*, 14 Or App 470, 512 P2d 1016 (1973).

conduct that would have allowed the Commissioner to refuse to issue a license.³ *Klein*, 19 Or App at 654.

The Court of Appeals' ruling in *Klein* must be considered in the statutory context that existed in 1974. At that time, *former* ORS 696.300(1) applied, by its own terms, only to a real estate licensee. *Former* ORS 696.300(2) gave the Commissioner the "additional" power to revoke or suspend any license "where the licensee performs any act or offer, attempts or agrees to do any act, for which the Commissioner lawfully may refuse to issue a license to any applicant." The standard for refusing to issue a license was, in 1974, found in *former* ORS 696.050(1).⁴ See *Klein* at 654.

Under *former* ORS 696.050(1), a real estate license could be "granted only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such a manner as to safeguard the interests of the public. . ." *Id.* Thus, in *Klein*, the Court of Appeals ruled that while the conduct at issue was not relevant under the predecessor to ORS 696.301(31), it could be the basis for suspension because it demonstrated the kind of "untrustworthiness" that would have allowed the Commissioner to refuse to issue the license under *former* ORS 696.050(1). That was the case in 1974 because *former* ORS 696.300(2) expressly allowed the suspension of a license for any act of untrustworthiness for which the Commissioner could refuse to issue a license.

ORS 696.301 was enacted in lieu of ORS 696.300 in 1975. *Oregon Laws 1975*
Chapter 746 § 22 "ORS 696.300 is repealed and section 23 of this Act is enacted in lieu

³ *Former* ORS 696.300(2) provided: "The Commissioner shall, in addition, have power to revoke or suspend any license issued under the provisions of ORS 696.010 to 696.490 and 696.610 to 696.730, at any time, where the licensee performs any act or offers, attempts or agrees to do any act, for which the Commissioner lawfully may refuse to issue a license to any applicant."

⁴ ORS 696.050 was repealed July 1, 2002. *Oregon Laws 2001 Chapter 300* § 84 & § 85.

thereof.”) The new statutory provision combined, in one provision, the power to revoke or suspend with the power to “deny the issuance of a license to an applicant.” No separate provision was made for suspending or revoking a license on grounds that would support denying the license. Instead, the conduct prohibited in the new statutory provision, which included present day ORS 696.301(31), provided the only grounds for either denying a license or suspending or revoking an existing one.

Once the legislature made the same conduct grounds for revocation of an existing license or refusal to issue one in the first place, there was no need for a provision like *former* ORS 696.300(2). There was no need to expressly couple revocation with the power to deny the license because the same conduct would now serve to support either action. Thus, under what is now ORS 696.301(31), conduct of the character prohibited (e.g. untrustworthiness) could justify denying a license or revoking an existing one. There is nothing here, however, to suggest the legislature intended to repeal the power of the Commissioner to revoke a license for an act for which the Commissioner could refuse to issue a license. Indeed, such a result would be completely at odds with the legislature’s continued demand that all licensees demonstrate trustworthiness. *Former ORS 696.050(1); see ORS 696.022(5).*

The licensee in *Dearborn* challenged the Commissioner’s authority to revoke his broker’s license by citing *Klein. Dearborn*, 165 Or App at 437. The Commissioner countered by questioning the “continuing validity” of *Klein. Id.* The Court of Appeals declined the invitation to revisit *Klein*, believing the matter better resolved as a substantial evidence question. *Klein* at 438 (“We conclude that, on this record, we need not resolve this dispute between the parties or determine whether our reading of the statute in *Klein* remains correct”). After reviewing the record, the Court of Appeals reversed and remanded, finding

that “[a]lthough a conviction for possession of a controlled substance may possibly be linked to a licensee’s trustworthiness or competence to engage in professional real estate activity, here the facts simply do not support the nexus between past criminal conduct and future risk that are cited by the Commissioner.” *Klein* at 441.

On review in *Dearborn*, this Court did not follow the Court of Appeals’ substantial evidence approach. Instead, the Court considered as a matter of law the statutory question of “what kind of nexus must exist between particular conduct and real estate activity for the conduct to fall into one of the categories described in ORS 696.301.” *Dearborn* 334 at 498-499 citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). This Court rejected as “unlikely” the “idea that section (31) extends to *any* instance of general untrustworthiness, incompetence, or bad faith.” *Dearborn* 334 at 500. Instead, considering the text and context of ORS 696.301, the Court reached the conclusion that “there must be a substantial relationship between the conduct at issue and a real estate licensee’s real estate activities.” *Dearborn* at 502.

Having, in the manner just described, established the standard to be applied, the Court turned to considering whether the conduct at issue (drug conviction and admitted illegal sexual contact with a minor) would support revocation of a real estate license. According to the Court, subsection (31) authorizes the Commissioner to revoke for any conduct that “demonstrates” untrustworthiness, incompetence or bad faith as long as the “**conduct in question relate substantially to the broker’s fitness and ability to engage in real estate activity.**” At 505 (Emphasis added). Thus, it is the nexus between the conduct (assuming it

is of the required character) and the licensee's "fitness and ability" to engage in real estate activity which is critical.⁵

The Commissioner's error in *Dearborn* was believing it enough that drug use and deviant sexual behavior demonstrate "untrustworthiness." Few would disagree, but that is not enough. Because he believed the evidence presented showed the licensee to be a generally untrustworthy person, the Commissioner supported the revocation by conjecture about how a generally untrustworthy person **might** harm real estate clients and customers. This doomed the Commissioner's decision. What the Commissioner had to show was the conduct at the time it occurred demonstrated untrustworthiness with respect to real estate activity. Because the broker had practiced real estate for many years without incident of any kind while engaging in this "private" behavior, the showing was not possible in that case.

The Court of Appeals felt compelled by its understanding of the *Dearborn* decision to reverse the Commissioner's decision in this case. According to the Court of Appeals, that result was required because the "conduct did not occur while he [Kerley] held a real estate license." *Kerley*, 184 Or App at 169. This goes too far. The Court of Appeals mistakenly imported its 1974 *Klein* decision regarding the predecessor to ORS 696.301(31) into modern law without consideration of ORS 696.301 being enacted in lieu of ORS 696.300. The proof of this error is the Court of Appeals' need to admonish by footnote that its ruling cannot be applied "to applicants to whom a license has not yet been issued." *Kerley* at 169, Note 4.

⁵ This is essentially the same standard demanded by the legislature when considering the impact of a criminal conviction on most state-issued professional or occupational licenses. ORS 670.280 prohibits suspension or revocation solely because of a criminal conviction, but allows consideration of facts that support the conviction "in determining the fitness of the person to receive or hold such license or certificate." See *Dearborn*, 165 Or App at 438.

("That construction need not – indeed, should not, – be understood to extend to applicants to whom a license has not yet been issued.")

As explained by this Court in *Dearborn*, a licensee's conduct cannot just be labeled "untrustworthy," "incompetent" or "improper" even if most people would agree the conduct is just that. To support discipline under ORS 696.301(31), the conduct must not only be of the *character* required by the statute but be substantially related to fitness to practice real estate. Conduct of the character referenced in the statute engaged in while practicing real estate is, of course, the strongest, most direct connection between the behavior and professional real estate activity. The weakest and most indirect connection may well be the one Justice Gillette proposed in *Dearborn*: mechanical "incompetence" in repairing the family lawnmower. Between these extremes lies conduct that may not itself be professional real estate activity but is nevertheless "substantially related" to fitness to engage in professional real estate activity.

Because the provisions of ORS 696.301 provide the only basis for refusing to issue a license, the Commissioner cannot comply with the legislative demand that only those trustworthy and competent be licensed to engage in professional real estate activity unless ORS 696.301(31) applies to non-licensed activity. There is, therefore, nothing in ORS 696.301, or this Court's decision in *Dearborn*, that demands the limitation the Court of Appeals has imposed on the Commissioner. The Court of Appeals has evidently mistaken a particular application of the "substantial relationship" rule for a general limitation on the scope of ORS 696.301(31).

ORS 696.301(31) requires "a substantial relationship between the conduct at issue and a licensee's real estate activities." *Dearborn*, Or at 502. A relationship is "substantial"

when it is not "imaginary," or "illusive" but instead is "material," "real," "true," "essential" or "soundly based." *Id.* citing *Webster's Third New Int'l Dictionary*. That being the case, the issue here, cast in its simplest terms, is whether Kerley's conduct as an attorney prior to becoming a real estate licensee is material to his fitness to practice real estate. This is a classic "mixed question" of law and fact.⁶

An attorney who uses his professional position to misappropriate his clients' funds demonstrates untrustworthiness. That particular untrustworthiness -- misappropriation of client funds -- is highly material to fitness to engage in professional real estate activity because professional real estate activity involves the handling of client funds. Were this case before the Court on the Commissioner's decision to refuse to grant a license based on the circumstance surrounding Kerley's resignation from the Bar, few (including the Court of Appeals) would claim the demands of ORS 696.301(31) were not met.⁷

This case, however, is not before the Court on the Commissioner's refusal to issue a license to an attorney who resigns the Bar in the face of allegations of misappropriation of client funds.⁸ Nor is the case before the Court on a decision to revoke a license based on misrepresentation on a license application.⁹ Instead, this case is before the Court on a

⁶The relevant facts are the conduct Kerley engaged in, while the question whether these facts are "substantially related" to the licensee's fitness to engage in real estate activity is one of law. See e.g., *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). That the "relationship" question here is one of law can be seen in the difference between this Court's ruling in *Dearborn* and the Court of Appeals' ruling in this matter. Although both courts reversed, this Court, unlike the Court of Appeals, found no need to remand the matter back to the Commissioner.

⁷The public policy expressed in former ORS 696.050(1) is not self executing. The source of the Commissioner's authority to refuse to grant a license is the same source of the Commissioner's authority to revoke one. ORS 696.301(31) applies to refusal to issue decisions no less than revocation decisions.

⁸See *Klein*, 19 Or App at 652 ("A person who is licensed to engage in several occupations may commit a single unlawful act which simultaneously would constitute statutory grounds for suspending or revoking his license to engage in more than one of the occupations he is licensed to practice.")

⁹"I find that the Agency neither charged nor argued Kerley should be found in violation of ORS 696.301(25) or (31) for his misstated broker's application." Final Order § III.

decision to revoke based on a single five-year old incident of misconduct in a related occupation. These facts matter. They matter in exactly the same way the broker's years of actual practice of real estate mattered in *Dearborn*.

When "substantially related" is the standard, facts matter. Time matters. Circumstance matters. Accepting responsibility for a single prior bad act, making restitution and resigning the Bar is not the same as denying the conduct and being disbarred. An act five years ago does not have the same probative value as one committed last week, or last year. A single act is not the same thing as the sum of a person's actions over a number of years. When what is tested is fitness to engage in professional real estate activity, one's actual history of engaging in that activity will be highly material in determining fitness. This is all part of the substantial relationship analysis.

Because the conduct must be substantially related to the licensee's fitness to engage in real estate activity, there is no reason to limit ORS 696.301(31) to acts by the licensee as a licensee. This Court has never imposed such a limitation. There is nothing in the statutory scheme that demands such a limit. Acts as a licensee during the performance of professional real estate activity are by definition highly relevant when considering the trustworthiness and competence required to engage in professional real estate activity. The Commissioner shoulders, and ought to shoulder, a heavy burden when he proposes to discipline on the basis of conduct other than that engaged in as a licensee. The legislature has made that clear. e.g., ORS 670.280. This Court has made that clear. *Dearborn*, 334 Or at 505. ("... the range of acts to which subsection (31) applies is limited by the implicit requirement that the conduct in question relate substantially to the broker's fitness and ability to engage in real estate activity.")

These limitations do not mean, however, that in the proper case the Commissioner cannot meet the statutory burden by reference to pre-license conduct. The Court of Appeals erred by eliminating the Commissioner's ability to even consider conduct not undertaken as a licensee. This Court should reverse the Court of Appeals on the narrow question of whether conduct other than as a licensee can be considered when proposing to suspend or revoke a license under ORS 696.301(31). *Amicus* asks that this Court rule that such conduct may be considered as long as the conduct is of the character required by the statute and material to the licensee's fitness and ability to engage in professional real estate activity.¹⁰

RESPECTFULLY SUBMITTED,

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¹⁰ *Amicus* takes no position on whether in this case the Commissioner, considering the whole record, carried the burden of showing a substantial relationship between Kerley's conduct and his fitness or ability to practice real estate. Unlike *Dearborn*, possible future harm has not been used to support the decision to revoke. Instead, the question is whether, considered in context, Kerley's pre-license conduct is substantially related to Kerley's present ability or fitness to engage in professional real estate activity.

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Dated this 4th day of March, 2003

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CERTIFICATE OF FILING

I hereby certify that on March 4th, 2003, I filed foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF REALTORS® by hand delivering the original and twenty (20) copies to the:

Records Section
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Dated: March 4, 2003

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CERTIFICATE OF SERVICE

I further certify that I served the foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF REALTORS® on the following attorneys on the 4th day of March, 2003, by mailing two copies.

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