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NEWS

## NJ Court Sides With Real Estate Broker in Dispute Over Employee Classification Under Wage Payment Law

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Employment Law



Colleen Murphy



The New Jersey Supreme Court unanimously held that an agreement between a realtor and a real estate broker is enforceable under the Brokers Act but as an independent contractor, the realtor is not subject to the Wage Payment Law.

The plaintiff, James Kennedy II, was a fully commissioned real estate salesman with real estate broker Weichert Co. Kennedy entered into two written agreements, agreeing to work as an independent contractor.

In a putative class action claim filed in March 2019, Kennedy alleged that Weichert violated a provision of the Wage Payment Law "by deducting marketing, insurance, and other expenses" from his wages without authorization. Weichert moved to dismiss his claim, *Kennedy v. Weichert*, filed in Essex County Superior Court, for failure to state a claim. Weichert argued that "fully commissioned real estate salespersons are independent contractors, whom the WPL does not cover," the opinion said.

The trial court denied Weichert's motion because the question of Kennedy's status was governed by the legal standard that governs employee classification under the Wage Payment Law, not by the contract. The company appealed.

The state high court considered whether an agreement between the real estate broker and independent contractor salesman excluded the salesperson from the WPL.

"In this appeal, we must determine whether an agreement between a real estate broker and a real estate salesperson identifying the salesperson as an independent contractor excludes the salesperson from the Wage Payment Law, a statute that governs compensation paid to employees but does not apply to independent contractors," Justice Anne M. Patterson wrote for the court, remanding the case to be dismissed.

In January 2023, the Appellate Division affirmed the trial court's ruling. In a published opinion, the court held that the New Jersey Supreme Court's 2015 holding in *Hargrove v. Sleepy's* did not apply to WPL claims asserted by the fully commissioned real estate salespeople because the Brokers Act forecloses the use of the "ABC test" to distinguish

between employees and independent contractors.

In *Hargrove*, the court answered a certified question from the U.S. Court of Appeals for the Third Circuit, which asked the court to identify the test to determine an employee's status under the WPL and the Wage and Hour Law. The state high court responded by holding that "employment-status issues raised under the WPL or WHL—i.e., whether a person retained to provide services to an employer is an employee or independent contractor—are governed by the 'ABC' test."

Before the New Jersey Supreme Court, Kennedy argued that the Appellate Division decision regarding the ABC test adopted in *Hargrove* should be reversed because, absent express language in the Brokers Act prescribing an exception to *Hargrove* for real estate salespeople, the appeals court should have held that the ABC test governs misclassification disputes under the WPL, the opinion said.

Weichert argued that it agreed with the Appellate Division holding that *Hargrove* does not apply to WPL disputes with real estate salespeople. However, the company argued that the appeals court departed from the legislative mandate by declining to enforce the parties' agreement that Kennedy was an independent contractor.

According to the opinion, the parties' agreement to enter into an independent contractor business affiliation is enforceable under the Brokers Act, and Kennedy is not subject to the WPL. Patterson said that, in the Brokers Act, the New Jersey Legislature clearly intended that if the parties' business affiliation agreement under the act conflicts with another law, rule or regulation, the agreement will prevail.

"Under the Brokers Act, the parties' agreement to an independent contractor affiliation is not merely one of several factors in the analysis, as the Appellate Division viewed it to be," Patterson said. "To the contrary, if the parties have agreed in writing to a business affiliation in compliance with the Brokers Act, that agreement is dispositive."

Patterson said that Kennedy was not subject to the ABC test that governs employee classification disputes under the WPL laid out in *Hargrove* or any other statute, regulation or case law during the period that Kennedy worked for Weichert as a real estate salesperson.

"Because he was an independent contractor when he was affiliated with Weichert, Kennedy may not be deemed to have been Weichert's employee under the WPL, and he was not covered by that statute," Patterson said. "He cannot assert the claim set forth in his complaint, a misclassification claim premised on the WPL."

Patterson concluded that the trial court erred by failing to grant Weichert's motion to dismiss the complaint. She was joined in her opinion by Chief Justice Stuart Rabner and Associate Justices Lee A. Solomon, Fabiana Pierre-Louis, Rachel Wainer Apter, Douglas M. Fasciale and Michael Noriega.

Counsel for Weichert, John F. Birmingham of Foley & Lardner, was admitted pro hac vice from the Michigan bar.

"Weichert is pleased with the New Jersey Supreme Court's thorough and well-reasoned opinion. It recognizes and effectuates the Legislature's intent that real estate brokers and salespeople can decide the nature of their relationship," Birmingham said in an email to the Law Journal. "Weichert is also grateful that after five years of litigation, the real estate industry now has clarity on this important issue."

Barry S. Goodman of Greenbaum, Rowe, Smith & Davis argued the cause for amicus curiae New Jersey Realtors. He said his client is pleased that the New Jersey Supreme Court adopted its position. Even more so, the court relied on the legislation that New Jersey Realtors has worked on with the Legislature and governor to protect the status of New Jersey's realty salespersons, Goodman said.

"This is the first case in the country to decide on this issue and could have a great effect around the country," Goodman said. "If they found that real estate agents were employees, many brokers have said they would let go salespersons who were not high producers. There would have been real-life consequences if they found salespersons are employees

in New Jersey.”

The Office of the New Jersey Attorney General argued for amicus curiae New Jersey Department of Labor and Workforce Development that the Brokers Act recognizes the business affiliation outlined in the parties’ contract to be a relevant but not dispositive factor in determining whether a real estate salesperson is an independent contractor or an employee for purposes of the WPL.

“While we are disappointed in today’s ruling, the New Jersey Supreme Court thankfully limited its decision to the context of real estate salespersons alone,” a spokesperson for the Attorney General’s Office said. “We remain committed, in partnership with the Department of Labor, to rooting out and combating misclassification across industries and across New Jersey.”

Kennedy’s counsel, Ravi Sattiraju of Sattiraju & Tharney, did not immediately return a request for comment.

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