

1997

Wardley Corporation v. Grant Welsh : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 97-0401-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

WARDLEY CORPORATION,

Plaintiff and Appellee,

vs.

GRANT WELSH,

Defendant and Appellant.

97-0401-CA

Appeal No. 970074

Priority No. 15

BRIEF OF APPELLANT

**APPEAL FROM FINAL JUDGMENT ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT, DIVISION II, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBIN W. REESE PRESIDING**

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On appeal from judgment by the Third Judicial District Court for Salt Lake County, Division II, State of Utah, the Honorable Robin W. Reese, presiding, and a judgment in favor of plaintiff Wardley Corporation and against defendant Grant Welsh.

INTRODUCTION

Defendant and appellant Grant Welsh, ("Welsh") by counsel and pursuant to Rule 24, Utah Rules of Appellate Procedure, submits the following opening brief in support of his appeal from the order entered by the Third Judicial District Court in and for Salt Lake County, Division II, State of Utah on November 15, 1996, granting partial summary judgment in favor of plaintiff/appellee Wardley Corporation ("Wardley") and against Welsh on all issues in the case save one; also, from judgment following trial in favor of Wardley and against Welsh on the remaining issue, on January 8, 1997.

JURISDICTION

This is an appeal from a final order and judgment of the Third Judicial District Court for Salt Lake County, Division II, State of Utah, the Honorable Robin W. Reese, presiding, in favor of Wardley, and against Welsh, based upon Wardley's claims for real estate commissions. The trial court entered partial summary judgment

on all issues in the case save one (whether Wardley had accepted a "net listing", prohibited by law) on November 15, 1996; following trial on the remaining issue on December 16, 1996, the lower court entered judgment in the amount of \$15,173.75 plus interest and costs, on January 8, 1997.

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-2a(2)(j), and pursuant to the Supreme Court's Order of Referral herein, dated June 19, 1997.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW
AND STANDARD OF REVIEW**

1. Whether the trial court erred in ruling that, as a matter of law, neither Wardley nor its agent, Randy Young ("Young"), were acting as agents for the buyer, seller and/or both, in connection with Welsh's sale to Leon Peterson and Associates ("Peterson") of real property located at 4800 West 8600 South, West Jordan, Salt Lake County, State of Utah, under a Real Estate Purchase Contract dated May 31, 1994 (the "Purchase Agreement"). Preserved at R. 116-125; 386-415.

2. Whether the trial court erred in finding that, as a matter of law, neither Wardley nor Young (as its agent) was acting as agent of either Welsh or Peterson (respectively buyer and seller under the Purchase Agreement) or both within the meaning of Utah Code Ann. §§ 61-2-3(12) and (15). Preserved at R. 116-125; 386-415.

3. Whether the trial court erred in finding, as a matter of law, that Wardley (and therefore Young as Wardley's agent) was a "coordinating agent". Preserved at R. 116-125; 386-415.

4. Whether the trial court erred in finding, as a matter of law, that Wardley (and Young as Wardley's agent), as "coordinating agent" or otherwise, owed no fiduciary obligation to either Seller Welsh or Buyer Peterson, notwithstanding provisions of Utah law applicable to licensed real estate brokers and agents operating in the State of Utah. Preserved at R. 116-125; 386-415.

5. Whether the trial court erred in finding that the agreement between Wardley (through Young as its agent), on the one hand, and either Welsh and/or Peterson (as, respectively, buyer and seller under the Purchase Agreement), under which Wardley claimed a right of recovery herein, did not constitute a "listing" as defined by law. Preserved at R. 116-125; 386-415.

6. Whether the court erred in finding that the agreement between Wardley (through Young as its agent), on the one hand, and either Welsh or Peterson (as, respectively, seller and buyer under the Purchase Agreement) did not constitute a "net listing" as defined by law. Preserved at R. 571-758.

7. Whether the trial court erred in holding that, as a matter of law, neither Wardley nor Young were obliged, in connection with their earning of a commission under the Purchase Agreement between Welsh and Peterson, to abide by provisions of state law applicable generally to licensed real estate brokers and agents operating in the state of Utah, including provisions:

- (a) requiring mandatory written disclosure of plaintiff's interest in the transaction as other than an agent of the buyer, seller or both;
- (b) prohibiting the acceptance of a "net listing";
- (c) prohibiting the sale of the property subject to the agreement other than through the listing broker;
- (d) requiring a written agency agreement;
- (e) requiring disclosure to the buyer and the seller under the Purchase Agreement the scope and nature of their agency relationship with the buyer, seller and/or both, and obtaining a written consent thereto;
- (f) requiring written disclosure of any fee not constituting a real estate commission to be received by plaintiff in connection with the transaction, to all parties thereto; and/or

(g) imposing fiduciary obligations upon a seller's agent, buyer's agent and/or limited dual agent.

Preserved at R. 116-125; 386-415.

8. Whether the trial court erred in finding that because Wardley (acting through Young as its agent) was not an agent of either Welsh, Peterson, or both, Wardley was entitled to recover a real estate commission or other compensation in connection with the Purchase Agreement notwithstanding the prohibition against the payment of commissions in real estate transactions which violate state law imposed by Utah Code Ann. § 61-2-17(4). Preserved at R. 69-72; 116-125; 386-415.

9. Whether the trial court erred in denying Welsh's Motion to Amend his Answer to assert Wardley's violations of Utah law under its guise of a "coordinating agent", while still collecting a commission from the parties to the transaction. Preserved at R. 386-415.

All issues as set out above were presented to the lower court on Wardley's motion for summary judgment (R 105-106). Wardley's motion was fully briefed by the parties (R 84-104; 107-142, 192-328). Argument was to the court on November 4, 1996 (R 521-570). On November 14, 1996, the court entered summary judgment on all issues with the exception of issue number 6 above (R 336-338). The

lower court's rational for granting summary judgment as to all issues with the exception of issue number 6 was set out in the court's handwritten notes made part of the record herein (R 180-183), and during the course of oral argument (R 521-570). As to all of these issues, the court reviews the lower court's ruling for correctness, affording the lower court no deference, affirming only where it appears that no genuine dispute existed as to any material issue of fact and where the facts even as contended by the appellant demand that appellee was entitled to judgment as a matter of law. See Themy v. Seagull Enters, Inc., 595 P.2d 526 (Utah 1979), Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988); Hunt v. ESI Engineering, Inc., 808 P.2d 1137 (Utah Ct. App. 1991), cert. denied, 826 P.2d 651 (Utah 1991).

Trial on the single issue set out at paragraph number 6, above, was to the court on December 16, 1996. (R 571-773). At the conclusion of trial, however, the trial court went of record stating that since (1) the court had already found, as a matter of law, that Wardley was not Welsh's agent in the transaction at issue, and (2) that, as a matter of law, there was therefore no listing agreement between Wardley and Welsh, there could be no "net listing", and that Welsh was therefore not entitled to rely upon the provisions of Utah Code Ann. § 61-2-17(4) as a defense to Wardley's

claims (R 764-773). The court's ruling was later set out in its Findings of Fact and Conclusions of Law dated January 8, 1997 (R 462-466).

Since the court's ruling at the conclusion of trial was based upon its prior determinations and response to summary judgment (to wit: that Wardley was not Welsh's agent in the transaction, and therefore had no listing with him), this court must likewise review the court's findings and conclusions as per the standard of review appropriate for orders of summary judgment, under the authority set out above.

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

1. Utah Code Annotated § 61-2-2 (12) and (15).
2. Utah Code Annotated § 61-2-11 (2), (4), (11), (15) and (16).
3. Utah Code Annotated § 61-2-17 (4).
4. Utah Administrative Code § R 162-6.1.3.
5. Utah Administrative Code § R 162-6.1.4.
6. Utah Administrative Code § R 162-6.1.11.
7. Utah Administrative Code § R 162-6.2.7.
8. Utah Administrative Code § R 162-6.2.16.
9. *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041 (Utah App. 1994).

10. *Diversified General Corporation v. White Barn Golf Course, Inc.*, 584 P.2d 848 (Utah 1978).
11. *Foster v. Blake Heights Corporation*, 530 P.2d 815 (Utah 1974).
12. *Hal Taylor & Assoc. v. Unionamerica, Inc.*, 657 P.2d 743 (Utah 1982).
13. *Ross v. Producers Mutual Insurance Company*, 4 Utah 2d 396, 295 P.2d 339 (Utah 1956).
14. *Short v. Bullion-Beck & Champion Mining Company*, 57 P. 720 (Utah 1899).
15. *State v. Pelkey*, 794 P.2d 1286 (Wash. App. 1990).

STATEMENT OF THE CASE

Wardley brought this action to recover a commission in a real estate transaction between Welsh (as seller) and Leon Peterson (as buyer). Wardley contended that it was not an agent for purposes of the transaction, did not hold a listing on the property to be sold, had no fiduciary obligation to either buyer or seller, was required to abide by none of the legal and regulatory restrictions upon real estate agents and brokers in the State of Utah concerning disclosures to principles in real estate transactions--yet was entitled to recover a real estate commission from Welsh on

the transaction. Welsh resisted Wardley's claims, asserting that, under Utah law, Wardley had failed to comport itself in accordance with rules and regulations incumbent on real estate agents and brokers in the State of Utah, and had therefore forfeited its right to claim a commission on the transaction under Utah Code Ann. § 61-2-17(4).

Wardley moved for summary judgment on its entire claim. Argument was held before the court on November 4, 1996 (R 521-570). By order dated November 14, 1996 (R 336-338), the court granted summary judgment on all aspects of Wardley's claim save one: whether Wardley's contract claim for commission on the transaction (which, according to Wardley's testimony, permitted it to retain all sales proceeds in excess of \$18,000 per lot) was a "net listing" prohibited by Utah law, which--if shown--would deprive plaintiff/appellee of its right to collect the commission.

Prior to the day of trial, Welsh moved to amend his Answer to assert Wardley's numerous violations of laws and regulations governing real estate brokers and agents in dealing with principals in real estate transactions (R 386-398).

Trial on the issue not resolved by summary judgment was held before the court on December 16, 1996 (R 571-773). At the outset of trial, the lower court

denied Welsh's motion to amend his Answer, and ruled that trial would deal with the single issue of whether Wardley was attempting to collect a commission on a "net listing" (R 578-579). At the conclusion of trial, the trial court observed that, since (as the court had already found incident to Wardley's motion for summary judgment) Wardley was not Welsh's "agent", and since, according to trial testimony, a "listing" implies an agency relationship, Wardley did not have a "listing" on the subject property at all, and could not therefore have had a "net listing" (R 764-773). A transcript of the court's ruling is attached as Attachment 1 hereto. On the basis of this finding, the court entered its Findings and Conclusions (R 462-466) and Judgment (R 467-468) on January 8, 1997 (Attachments 2 and 3 hereto).

Welsh filed his Notice of Appeal on February 3, 1997 (Attachment 4 hereto).

STATEMENT OF FACTS

As noted above, the court's Findings of Fact, Conclusions of Law and Judgment were based almost completely on findings made in response to Wardley's Motion for Summary Judgment herein. Accordingly, the following facts are taken from the record, and construed in light most favorable to Welsh:

1. Welsh is an individual who, at all times prior to May 31, 1994, was the owner of a parcel of real property located approximately 4800 West and 8400 South in West Jordan, Salt Lake County, State of Utah, known as the Dorilee Acres subdivision property (the "Subject Property"). Complaint (R 1) at paragraph 4; Answer (R 69) at paragraph 4.

2. Wardley is a real estate brokerage; Randy Young is a real estate agent licensed through Wardley. Complaint (R 1) at paragraph 5; Answer (R 69) at paragraph 5.

3. Randy Young, who knew Welsh from contacts at a private real estate agent school in Salt Lake City, frequently contacted Welsh and asked to be given listings on properties being developed, held or sold by Welsh. Trial Testimony of Grant Welsh ("Welsh Testimony") (R 616-17); Trial Testimony of Randy Young ("Young Testimony") (R 583-84).

4. In or around the spring of 1994, Mr. Young notified Welsh that he (Young) knew of a buyer or prospective buyer of real property, and asked if Welsh had property for sale. Welsh Testimony (R 616-19); Young Testimony (R 584-85).

5. Welsh responded that he was interested in selling the Subject Property. Welsh Testimony (R 618-19); Young Testimony (R 588).

6. Young asked whether Welsh would give Wardley a listing on the property, to which Welsh responded that he would not, as prices on the property were fluctuating. Welsh Testimony (R 618); Young Testimony (R 588).

7. Young represented to Welsh, however, that Wardley and/or Young had an agency agreement with their prospective buyers, who would take care of the commission. Welsh Affidavit (R 192-95) at ¶ 3.

8. The foregoing exchange was consistent with exchanges between Welsh and Young on numerous other properties, where Young had located buyers for Welsh's properties and had been paid no commission from him. Welsh Testimony (R 618-19; 622).

9. Mr. Young asked Welsh what he (Welsh) would be willing to sell the Subject Property for. Welsh responded that he needed to realize \$18,500 per acre. Excerpt of Deposition of Randy Young submitted in opposition to motion for summary judgment (R 196) at page 24 (R 208).

10. Mr. Young then introduced Welsh to Leon Peterson, the prospective buyer for the Subject Property. Affidavit of Grant Welsh (R 192) at paragraph 3; Welsh Testimony (R 620); Young Testimony (R 590-92).

11. On or about May 31, 1994, Welsh and Peterson entered into the Purchase Agreement, a Real Estate Purchase Contract under which defendant/appellant Welsh agreed to sell, and Peterson agreed to buy, the Subject Property. Welsh Testimony (R 623-24); Defendant's Exhibit 2 (R 350).

12. Immediately prior to executing the Real Estate Purchase Contract, Welsh learned from Peterson, for the first time, that Peterson had not retained Wardley or Young as his agent in the transaction. Welsh Testimony (R 627-28).

13. Young later testified that, in fact, his role in the transaction was as "coordinating agent", which he described as follows:

"Q. Please look at the line that says "Selling Agent."

A. O.K.

Q. Does it not list you as selling agent?

A. It looks like it does.

Q. Based on your prior testimony today, you were not a selling agent in this transaction; is that correct?

A. That's correct.

Q. So this document is incorrect?

A. It must be. It looks as though she had crossed out "selling agent" and didn't do it under my name. Did it under Wardley, for the record.

Q. Did you tell Ms. Stern, you were an agent for either party in this transaction?

A. *I told them I represented both parties, I brang [sic] them together."*

Excerpt of Deposition of Randy Young attached to Supplemental Memorandum in Opposition to Motion for Summary Judgment (R 196) at page 19 (R 206), lines 1-18 (emphasis added).

14. In deposition testimony submitted to the lower court in opposition to Wardley's motion for summary judgment herein, Wardley's designated representative, Lee Stern, agreed that, by his own representation, Young had been acting as a limited, dual agent:

Q. I would like you to assume for purposes of this question, that Mr. Young stated to you as representing both buyer and seller in this transaction. Assuming he made that statement, would you consider him a dual agent?

A. A limited agent, uh huh (affirmative).

Q. Is a limited agent the same as a dual agent?

A. Yes.

Excerpt from Deposition of Lee Stern submitted in opposition to Motion for Summary Judgment (R 196) at page 19, lines 9-17 (R 213).

15. Both Young and Stern, however, took the position that Young was a "coordinating agent"--*and therefore had no fiduciary duty to either buyer or seller.* Excerpt from Deposition of Randy Young, submitted in opposition to Wardley's Motion for Summary Judgment (R 196) at pp. 19-20 (R 206-207); excerpt from the Deposition of Lee Stern submitted in opposition to Wardley's Motion for Summary Judgment (R 196) at page 19 (R 213).

16. At no time prior to the execution of the Purchase Agreement had Wardley, or Young on its behalf, made any written disclosure to Welsh that either was acting as a limited or dual agent; that the nature or scope of Wardley's fiduciary obligations to either buyer or seller in the transaction would in any way be affected or modified by virtue of any relationship with the buyer and the seller, nor did Wardley or Mr. Young obtain, from defendant/appellant Welsh and/or Peterson, written consent to any joint, dual or "coordinating agent" relationship. Welsh Testimony (R 627-30; Young Testimony (R 594-96).

17. Upon learning that Wardley had not been functioning as Peterson's agent, Welsh, in order to close the transaction, agreed to the insertion in the Purchase Agreement of a clause providing for payment of a one-time fee of \$500 per acre sold to plaintiff/appellee Wardley. Welsh Testimony (R 627-28; 646-48; 670-71).

18. Thereafter, a dispute arose between Welsh and Peterson concerning the interpretation of the terms and conditions of the Purchase Agreement. Affidavit of Grant Welsh (R 192) at paragraph 5; Welsh Testimony (R 673).

19. Young, on Welsh's behalf, became involved in negotiations; incident thereto, Young made representations to Peterson and his counsel which were untrue, and which disadvantaged Welsh, causing him to communicate his dissatisfaction to Young and advise him of his intent to hold Wardley responsible for damages resulting from Mr. Young's conduct. Affidavit of Grant Welsh (R 192) at paragraph 5; Plaintiff's Exhibit 2.

20. During the time in which Young was involved in negotiations between Welsh and Peterson regarding the terms and interpretation of the Purchase Agreement, Wardley had still failed to notify either Welsh or Peterson, in writing, of the nature and scope of its agency relationship of either the buyer or the seller and had not obtained written consent of either party to dual representation. Young Testimony (R 591, 595-596).

21. Welsh and Peterson finally reconciled their disagreement over the meaning of the Purchase Agreement through a subsequent written agreement, that settled and compromised their dispute. Complaint (R 1) at Exhibit B.

22. Welsh therefore notified Wardley that, under the circumstances, he rejected their claim for commissions, whereupon this action was filed. Welsh Testimony (R 672-73).

23. During argument of Wardley's Motion for Summary Judgment, the lower court (in handwritten notes) observed that:

(a) as a matter of law, no fiduciary relationship existed between plaintiff/appellee Wardley and defendant/appellant Welsh;

(b) as a matter of law, the Purchase Agreement (Defendant's Exhibit 2) was unambiguous, and governed the parties' relationship in strict accordance with its terms;

(c) as a matter of law, Young merely brought the parties together, and was a "coordinating agent", not a dual agent; but

(d) a question of fact existed whether the transaction involved a "net listing" prohibited by law. (R 180-183).

24. At the conclusion of trial, which the court had limited to the issue of whether a "net listing" existed, the lower court issued the following bench ruling:

In my judgment ... Mr. Welsh never considered Mr. Young to be his selling agent and therefore he didn't list the property with him. Because there was not listing, again there could be no net listing. Because there was no net listing, there was no violation of the rules

and there was no violation of the statute. Therefore, the plaintiff is entitled to recover its commission as a third-party beneficiary under the contract between Mr. Peterson and Mr. Welsh.

(R 768). See Attachment 1.

25. Had the lower court reached the question of whether Wardley's arrangement with Welsh and Peterson was a "net listing", testimony from expert witnesses clarified that any listing agreement under which an agent receives, as commission, any sales proceeds net of a specified amount to go to the seller, a "net listing" has been created. Trial testimony of Arnold Stringham (R. 682-687).

RELATED OR PRIOR APPEALS

There are no related or prior appeals relative to this action.

SUMMARY OF ARGUMENT

Wardley's position is that, while Welsh is contractually bound to pay a real estate agent's commission on Peterson's purchase of Welsh's property, that commission does not arise from Wardley's acts as a real estate agent. Wardley asserts that it earned its supposed commission by locating buyer and seller, bringing them together, and even establishing the price which Mr. Peterson would pay per lot, with the understanding that Welsh needed to realize \$18,500 per lot. When a dispute arose between buyer and seller, moreover, Wardley undertook to mediate a resolution on

both parties' behalf. While now demanding that Welsh pay its commission, though, Wardley is unwilling to answer for the fact that it failed outright to abide by strict legal requirements laid down in the Utah Real Estate Code (Utah Code Ann. § 61-1-1, *et seq.*), and regulations promulgated thereunder, governing real estate agents and brokers in Utah.

Evasion of all restrictions imposed by the Utah Real Estate Code and regulations, of course, was crucial to Wardley's recovery before the trial court--Utah law imposes a severe penalty upon agents and brokers who seek to recover commissions where violations of applicable code or regulatory restrictions have occurred:

If any person receives any money or its equivalent, as commission, compensation, or profit by or in consequence of a violation of this chapter, that person is liable for an additional penalty of not less than the amount of the money received and not more than three times the amount of money received, as may be determined by the court. This penalty may be sued for in any court of competent jurisdiction, and recovered by any person aggrieved for his own use and benefit.

Utah Code Ann. § 61-2-17 (4). The foregoing provision (as the lower court properly concluded) mandates--at the very least--that Wardley may not recover a commission earned through a violation of statutory and regulatory requirements. Among such requirements are strict standards for making full, written disclosures of limited, dual

agency relationships; obtaining informed, written consent of the parties to undertake such dual representation; in short, a full and clear articulation, up front and with the assent of all parties involved, of who the agent represents, and in what capacity.

In particular, moreover, an agent may not seek compensation under a "net listing", by which the agent pockets any sales proceeds net of a predetermined payment to the seller. The undisputed evidence in this case was that plaintiff/appellee undertook to find plaintiff/appellant a buyer with the expectation of itself setting the sales price, and retaining all sales proceeds over \$18,500 per lot. Moreover, the parties reached the point of finalizing the real estate contract before discovering that each had been led to believe that plaintiff/appellee represented the other. As more fully set out below, such violations of law are more than sufficient to trigger the penalty provided by Utah Code Ann. § 61-2-17 (4), and deny plaintiff/appellee's commission claim.

Plaintiff/appellant solved this problem at trial by convincing the court that its role in defendant/appellant's sale to Peterson was not as buyer's agent (even though plaintiff/appellee located the buyer and set the sales price), nor as seller's agent (even though plaintiff/appellee located a buyer for defendant/appellant's benefit, and now demands a commission from him), nor as a dual or limited agent; instead,

plaintiff/appellee argues that it was acting as a "coordinating agent", owing no one a fiduciary obligation, and enjoying absolute immunity from laws governing other real estate agents in Utah.

Utah law, though, has never recognized--and in fact prohibits--"coordinating agents" whose activities are beyond the reach of law. An agent in a real estate transaction may represent buyer, seller or both; by definition, however, the agent (unless acting on its own behalf, in which case it is not an agent but a principal) must have *some* principal in the transaction, and the Utah Real Estate Code--not mere contract provisions--governs its dealings in that relationship.

In this case, in fact, plaintiff/appellee was acting as a dual agent. Plaintiff/appellee's admitted failure to act according to law in that role is sufficient to invoke the penalty provisions of the Real Estate Code, and prohibit the recovery of any commission herein.

ARGUMENT

- I. UNDER UTAH LAW, WARDLEY MUST REPRESENT EITHER BUYER, SELLER, OR BOTH, AND CANNOT CLAIM TO HAVE REPRESENTED NEITHER PARTY IN THE SALE OF WELSH'S PROPERTY TO PETERSON.

Utah Code Annotated § 61-2-2 defines "principal real estate broker" and "real estate sales agent" broadly, bringing a wide range of activities under the

regulatory scheme of Title 61 and the administrative rules promulgated thereunder. A broker includes any person:

- (a)(i) who sells or lists for sale ... real estate ... with the expectation of receiving valuable consideration; or
- (a)(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (i);
...
- (d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a).

Utah Code Ann. § 61-2-2(12)(a). A real estate sales agent is 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 courts have applied these statutory definitions to give real estate regulations a comprehensive scope. See Diversified Gen. v. White Barn Golf, 584 P.2d 848, 851 (Utah 1978); Machan v. Western Real Estate, 779 P.2d 230 (Utah Ct. App. 1989). Diverse activities such as acting as a "finder" in the sale of coal leases, or furnishing names of prospective purchasers to a hotel developer, are subject to rules applicable to real estate brokers. See Andalex Resources, Inc. v. Myers, 871 P.2d 1041 (Utah Ct. App. 1994); C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah Ct. App. 1988). Further, under 61-2-4, even "one act, for valuable consideration, of

buying [or] selling real estate for another, or for offering for another to buy [or] sell real estate," requires the person engaging in that act to be licensed as a broker or agent in Utah. In short, Utah law does not favor permitting brokers to escape regulation by defining themselves as mere "middlemen" or "coordinating agents."

Young clearly acted as a real estate agent under § 61-2-2. He represented to Welsh on numerous occasions that he was engaged in selling real property (R 616-17); he "procured" Peterson as a prospective buyer for Welsh's property (R 592); eventually he became embroiled in negotiations under the Purchase Agreement between Welsh and Young (R 272). Further, Young and Wardley are licensed (R 94), subject not only to Title 61, but to the rules of conduct for real estate licensees contained in the Utah Administrative Code at R 162. See Utah Code Ann. §§ 61-2-5.5.

R162-6-2.7 recognizes brokers and agents who act for buyers, or sellers, or both buyer and seller, but does not acknowledge the status of "coordinating agent" claimed by Young, Wardley's agent in this transaction. For example, R 162-6-2.7 states that agency must be disclosed in *every* real estate transaction involving a licensed agent. This written disclosure "*shall* be made prior to the buyer and seller ... entering into a binding agreement with each other," and shall be "confirmed in a

separate provision incorporated in or attached to that agreement, which shall be as follows:

AGENCY DISCLOSURE: At the signing of this contract the listing agent represents ☐Buyer ☐Seller, and the selling agent represents ☐Buyer ☐Seller. Buyer and Seller confirm that prior to signing this contract written disclosure of the agency relationship(s) was provided to him/her. [parties' initials.]

There is no place in this mandatory notice for an agent to indicate that she is a "coordinating agent"; the language suggests that licensed real estate agents are limited to the agency relationships contained in the required provision. R 162-6-1.11, listing "failure to have written agency agreement" as an "improper practice" supports this interpretation by listing possible relationships of broker/seller, broker/buyer, and broker/seller & buyer (dual or "limited" agency). R 162-6-2.16 similarly limits the options by listing fiduciary duties for "seller's agent," "buyer's agent" and "limited agent [acting for both buyer and seller]." See also Foster v. Blake Heights Corporation, 530 P.2d 815, 817 (Utah 1974) (implying that real estate agents have three possible roles: representing buyers, representing sellers, or acting as limited agent for both.)

While some jurisdictions do offer "contract broker" or "coordinating broker" as an option under their agency disclosure provisions,¹ Utah left this choice out of its statutes and rules, perhaps following the lead of industry watchdogs like the National Association of Realtors (NAR), which has failed to endorse the concept.² Neither the statute nor Utah case law recognizes a middleman real estate agent. Indeed, some commentators have called the middleman status "both unnecessary and illogical. Rather than one party being underrepresented or not represented, the result of classifying a broker as a middleman is simply that neither party is represented at all."³ If this court upheld the trial court's finding that Wardley acted as a coordinating broker, it would be making a change in the law that is more appropriately left to the legislature.

¹See, e.g., Alabama's Real Estate Consumer's Agency and Disclosure Act, Ala. Code §§ 34-27-80 to -88 (Supp. 1995) (effective October 1, 1996). In Alabama "the four possible broker roles" are (1) single agent for either buyer or seller; (2) subagent of listing broker (and thereby an agent of the seller); (3) consensual dual agent of both buyer and seller; or (4) contract broker, with no fiduciary duties. Id.

²See, *Buyers' Brokers*, 29 Creighton Law Review 25, 51 (1995) (reporting that NAR favors agency disclosure rules, but rejects the notion of facilitators or brokers who act as middlemen and charge commissions without owing clients any fiduciary duties).

³Minick & Parada, *Real Estate Broker's Fiduciary Duties*, 12 PEPPERDINE LAW REVIEW 145 (1984). See also Stambler & Stein, *The Real Estate Broker: Schizophrenia or Conflict of Interests*, 28 D.C.B.J. 16, 17 (1961).

The facts show that even Young saw his role as that of a limited agent. In his deposition, Young stated that he told his supervisor, Lee Stern, that "I represented both parties, I brang [them] together." Deposition of Randy Young at 19 (R 206). Similarly, Ms. Stern testified that if Young had made that representation, she would assume that he was a "limited agent." Deposition of Lee Stern at 19 (R 213).

In Utah, "a real estate broker is held to be the agent of the property owner for whom he acts. As an agent, he owes a fiduciary duty to his principal." Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982). Clearly a licensed agent, like Young, who "brings parties together" in any real estate transaction is acting as an agent under Utah Code Annotated § 61-2-2, which states that an agent is one "who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the [property sales] transaction." Utah Code Ann. 61-2-2(12)(d). Therefore, Young must have represented at least one of the parties and had the accompanying fiduciary duties set forth in R 162-6-2.16.

The trial court based its ruling granting Plaintiff's Motion for Summary Judgment on the mistaken conclusion that Young could be a "coordinating agent" (R 182). Yet under Utah law, if Young did not act as agent for the seller, he must have

been either buyer's agent or a limited agent. The trial court thus erred in finding that Young and Wardley, as Young's broker, had no fiduciary duty to either Welsh or Peterson under the Real Estate Purchase Agreement.

II. EVEN IF UTAH DID RECOGNIZE A "COORDINATING AGENT" OR "MIDDLEMAN" STATUS, YOUNG AND WARDLEY PARTICIPATED TOO ACTIVELY IN THE TRANSACTION TO QUALIFY.

If Utah law did give agents the option to work for neither buyer nor seller in a real estate transaction, Young and Wardley cannot claim to be mere "coordinating agents" where they participated in the initial negotiations between Welsh and Peterson, made representations about the transaction to both parties, and intervened to protect their commission when a dispute arose between Welsh and Peterson about the terms of that Agreement.

The last (and perhaps only) Utah case to mention the possibility that a broker might escape fiduciary responsibilities by merely facilitating a real estate transaction appears to be Van Leeuwen v. Huffaker, 5 P.2d 714 (1931). In Van Leeuwen, the court noted that agents may "bring the principals together that they may make their own contract upon such terms as they may agree," thereby avoiding the "elementary rule of law" that dual agency must be disclosed to each principal. Id. at 719-20. Under this facilitating relationship, the agent "is given no discretionary power to

negotiate the sale" and the parties must place no reliance on the agent in the transaction. Id. at 720. The majority in Van Leeuwen, however, rejected the argument that the agent there fell within this definition, stating that the agent's fiduciary duties of disclosure arose where he

assumed to do and did more than merely bringing [the parties] together, [such as] his continued efforts to bring the parties ... to an agreement, his examining and inspecting the properties ..., participating in the discussions and negotiations between the parties [and] preparing a contract for the exchange or trade of the properties.

Similarly in the instant case, Young did much more than introduce Peterson to Welsh. He made representations to Peterson that later jeopardized the transaction (R 349); he was involved in subsequent negotiations about the meaning of the contract (R 210-11); he attended one of the closings under the contract with the buyer in order "to see it close," attempting to protect his commission because he "knew there was a dispute." Deposition of Randy Young at 38 (R 211). In fact, Young had the discretion of supplying a material term of the Purchase Agreement--the price. Deposition of Randy Young at 24 (R 208). In short he "did more" than facilitate. His involvement rose to the level of agent in the transaction and he was thus subject to the fiduciary duties accompanying that role.

III. EVEN AS A "COORDINATING AGENT", WARDLEY AND YOUNG VIOLATED DUTIES TO ACT ACCORDING TO THE STANDARDS OF THEIR PROFESSION.

If Wardley can redefine its responsibilities and escape the broad regulatory scope of Utah's Division of Real Estate merely by calling itself a "coordinating agent," or by failing to provide mandatory agency disclosure and collecting commissions based merely on a clause awarding it a one-time fee in sales agreements, it easily thwarts the whole purpose of statutes and standards governing real estate professionals to protect the public.

As the Utah Supreme Court noted in Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980), "[i]n this state, it is apparent that the rule of *caveat emptor* does not apply to those dealing with a licensed real estate agent." The Court went on to hold that *even in the absence of any fiduciary relationship*, the agent "is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public." See also Rogers v. Division of Real Estate, 790 P.2d 102, 106-07 (Utah 1990) (holding sales agent's duty to potential purchaser of property does not hinge upon written agency agreement or statutory fiduciary responsibility). The Utah Administrative Code also prohibits an agent from acting unprofessionally "whether acting as an agent or on his own account":

"No licensee shall engage in any [prohibited practice, including failure to obtain agency disclosure], ... in a manner which fails to conform with accepted standards of the real estate ... industr[y] and which could jeopardize the public health, safety, or welfare and includes the violation of any provision of [Utah Code and Rules governing real estate agents.]

Young and Wardley breached their duty to the public at the very least by failing to provide the written agency agreement required in *every* real estate transaction involving a licensed agent (R 162-6-2.7; R 162-6-1.11) and, as argued below, by placing their interests in a commission before interests of sellers and buyers by agreeing to accept Welsh's property on a "net listing" basis. Wardley and Young should not be allowed to escape their statutory duties by profiting from their failure to meet even the most limited view of the standards of their profession.

In Property House, Inc. v. Kelley, 715 P.2d 805 (Hawaii 1986), the Hawaii Supreme Court faced a similar issue. In Kelley, a broker claimed commission from both parties to a property sale. The seller refused to pay its share, arguing that the agent breached his duty to disclose that he was, in effect, a dual agent. The trial court found that the agent acted "solely as a middleman and was not precluded from receiving compensation from both parties." Id. at 810. On appeal, the supreme court described a "middleman" as "one whose employment is limited to bringing parties

together so that they may negotiate their own contract.... He must not be invested with the least discretion in the matter of advising or negotiating the sale." The supreme court sharply limited the freedom of agents to claim any shelter from fiduciary duties that an agent may claim via middleman status, and held that even if the broker *had* acted merely to facilitate the transaction,

"we choose not to recognize a middleman exception to the real estate broker's duty of full disclosure. The disclosure and consent requirements, while certainly not burdensome, serve to reduce the risk of misconduct by an intermediary. By keeping all parties fully informed, they reduce the potential for misunderstanding and dispute.

Id. at 811. The Hawaii court is not alone in encouraging full disclosure in every real estate transaction. In at least one state that does recognize middleman status, the agent must still disclose agency status to a prospective buyer or seller "as soon as reasonably possible and before any confidential information is disclosed"; that disclosure must be sufficient to allow a consumer to give *informed* consent to the impact the agency status will have on the transaction.⁴

⁴Ala. Code. § 34-27-81(11) (Supp. 1995). See also Huijers v. DeMarris, 14 Cal. Rptr. 2d 232, 238 (Cal. Ct. App. 1992) ("[I]t is not enough to disclose only the fact of ... representation. The agent must disclose all facts which would reasonably affect the judgment of each party in permitting the representation).

The court in Property House went on to hold that even the limited duties of a middleman are regulated by Hawaii real estate law, which defines a broker in part as one who "solicits for prospective purchasers [for] any real estate." Id. Thus, the court found that under Hawaii's legal definition of "broker" an agent who merely solicits prospective purchasers "act[s] as a real estate broker in [the] transaction" with accompanying fiduciary duties like agency disclosure.

As noted above, Utah law also provides that an agent who shops for purchasers acts as a broker. Utah Code Ann. 61-2-2(12)(d). Young's and Wardley's actions herein are therefore regulated by Utah rules and regulations regardless of whether an agency relationship existed with either Welsh or Peterson. This court should acknowledge public policy behind real estate regulations, and follow the lead of the Hawaii Supreme Court by holding that full written agency disclosure, and the informed consent of all parties, is mandatory whenever a licensed agent is involved in a real estate transaction.

IV. WARDLEY CANNOT CLAIM A COMMISSION WHERE
WARDLEY AND YOUNG VIOLATED MANDATORY
DISCLOSURE AND OTHER PROVISIONS APPLICABLE TO
LICENSED REAL ESTATE PROFESSIONALS IN UTAH.

In its role as agent for defendant/appellant Welsh, Leon Peterson, or both, plaintiff/appellee openly disregarded numerous obligations imposed by law upon

licensed agents and brokers in Utah. Utah Code Ann. Section 61-2-17(4) (set out at p. 16 above) is very specific in its prohibition against a licensed agent collecting a commission if the agent violated Utah's real estate statutes and rules. Case law likewise provides that real estate agents are not entitled to commissions where they breach their duties to principals. Reich v. Christopulos, 256 P.2d 238, 240-41 (Utah 1953); see also T-A-L-L, Inc. v. Moore & Co., 765 P.2d 1039, 1042 (Colo. App. 1988) (holding that where broker breaches a fiduciary duty, broker is not entitled to commission since broker has not acted with "utmost good faith" toward his principal); Watson v. Fultz, 782 P.2d 361 (Mont. 1989).

The facts show that at all times pertinent hereto, Wardley and Young were licensed brokers or agents (R 2), bound by the provisions of state law applicable generally to licensed real estate brokers and agents operating in Utah. As such, they violated at least the following provisions:

(a) R162-6-2.7 "Agency Disclosure": by failing to disclose in writing to Welsh and Peterson their agency relationship(s) to the parties. This disclosure is required in every real estate transaction involving a licensed agent in Utah. R 162-6-2.7 provides:

In every real estate transaction involving a licensee, as agent or principal, the licensee shall clearly disclose in writing to the buyer

and seller ... his agency relationship(s). The disclosure shall be made prior to the buyer and seller ... entering into a binding agreement with each other. The disclosure shall become part of the permanent file.

In spite of Young's active role in "bringing the parties together," (R 206) neither Wardley nor Young ever made this mandatory written disclosure to Welsh or Peterson; it is undisputed that no written disclosure had been made when Welsh and Peterson sat down to execute the Purchase Agreement (R 594-96; 626-27).

(b) R162-6-2.7.1 "Agency Disclosure": by failing to confirm their agency when the parties executed the Purchase Agreement by incorporating or attaching to the agreement the agency disclosure provision mandated by this section.

R 162-6-2.7.1 provides:

When a binding agreement is signed in a sales transaction, the prior agency disclosure shall be confirmed in a separate provision incorporated in or attached to that agreement, which shall be as follows: "AGENCY DISCLOSURE: At the signing of this contract, the listing agent represents () Buyer () Seller, and the selling agent represents () Buyer () Seller. Buyer and Seller confirm that prior to signing this contract written disclosure of the agency relationship(s) was provided to him/her."

Although Welsh and Peterson ultimately attached an addendum to the purchase agreement that stated that Wardley "has no agency relationship with neither [sic] the seller nor the buyer," this language, drafted and incorporated at the last minute in

order to close the transaction, (R 627) did not rise to the duty or level of disclosure required of real estate agents by the Rules. R 162-6-2.7.1 speaks in mandatory terms of a form of disclosure that *shall* be used to ensure that parties to a real estate transaction receive full disclosure from professionals working in the field. Neither Wardley nor Young came close to meeting the mandates of R 162-6-2.7.1.

(c) R162-6-1.11 "Failure to have written agency agreement" to avoid representing more than one party without the informed consent of all parties. R 162-6-1.11 works to underline R 162-6-2.7.1, and anticipates the type of problem that can arise where, as here, a real estate professional is involved with both sides of the transaction. To avoid all nondisclosure problems, R 162-6-1.11 provides:

To avoid representing more than one party without the informed consent of all parties, principal brokers and licensees acting on their behalf shall have written agency agreements with their principals. The failure to define an agency relationship in writing will be considered unprofessional conduct and grounds for disciplinary action by the Division.

Wardley will be quick to point out that the Rule's requirements only arise where agents are representing "their principals," and that as "coordinating agents" they had no principal in the transaction. Yet that claim goes against the spirit, if not the letter, of all of the disclosure provisions contained in the Rules. R 162-6-1.11 is preventive-- it is promulgated *to avoid any possible* unethical misrepresentation of parties by

licensed professionals. As argued above, Wardley and Young took an active role in this transaction; accompanying this type of representation is the very danger of misrepresentation R 162-6-1.11 seeks to avoid. Moreover, as noted by the Hawaii court in Property House, Inc. v. Kelley, *supra*, this important disclosure is "certainly not burdensome," yet serves the important role of "reduc[ing] the risk of misconduct by an intermediary [and] the potential for misunderstanding and dispute." 715 P.2d at 811.

(d) R 162-6-2.16(1) or (2) (if Young and Wardley are held to have represented either Welsh or Peterson) "Duties of a seller's or buyer's agent." R 162-6-2.16(1) and (2) set forth the fiduciary duties that seller's or buyer's agents owe to their principals in a real estate transaction, including the duties of:

Loyalty, which obligates the agent to act in the best interest of the [seller or buyer] instead of all other interests, including the agent's own; Obedience, which obligates the agent to obey all lawful instructions from the [seller or buyer]; Full disclosure, which obligates the agent to tell the [seller or buyer] all material information which the agent learns about the [other party] or about the transaction; Confidentiality, which prohibits the agent from disclosing any information given to the agent by the [seller or buyer] which would weaken [seller or buyer's] bargaining position if it were known.

Whether Wardley and Young were acting for buyer or seller, they violated the paramount duty of Loyalty when Young put his own interests ahead of the other

parties by agreeing to sell Welsh's property for a price "over and above" a minimum set by Welsh, with the understanding that his commission would be "anything over and above the \$18,500" per lot (R 208). Similarly, when Young later became involved in the dispute between Welsh and Peterson, he acted to make sure that the transaction closed, "attending it for my money," (R 211), again putting his own interests before those of the party or parties he was statutorily bound to protect. In doing so, he also violated the duty of Confidentiality if he represented Welsh when he disclosed information to Peterson to "save" the transaction (R 349).

Wardley and Young also violated the duties of full disclosure: to Welsh and/or Peterson at the very least by failing to disclose how their commission would be paid and by whom (R 626-27).

(e) R 162-6-2.16(3) (if Young and Wardley are held to have represented both parties to the transaction) "Duties of a limited agent," by failing to obtain written, informed consent of both Welsh and Peterson to the "inherently contradictory" nature of a limited agent's representation. When Wardley and Young "brang the parties together," (R 206-07), they triggered their statutory duty under R 162-6-2.16(3) "to obtain informed consent of both buyer and seller" to their diminished capacity to represent either party. Welsh and Peterson were entitled to an

explanation from Wardley and Young that both buyer and seller were "giving up their right to demand undivided loyalty from the agent and ... that there will be a conflict as a limited agent's duties of confidentiality and full disclosure." R 162-6-2.16.3.1(a)-(b). Under R 162-6-2.16.3.1, brokers or agents must "clearly explain" this to both parties, but it was not at all clear to Welsh or Peterson that Young and Wardley were attempting to limit their fiduciary duties. Rather, Welsh thought that Young owed those duties to Peterson (R 627), while Peterson assumed that Welsh was Young's client (R 627). This material misunderstanding is at the core of this dispute, a dispute that could have been avoided by Wardley and Young if they had merely followed the rules of their profession.

(f) R 162-6-1.4.1 "Net Listing," by agreeing to market Welsh's property on a net listing basis. (See discussion of this violation in Argument Part V below.)

In sum, plaintiff/appellee and its agent did not comply with the minimum requirements imposed by law on agents and brokers in all Utah real estate transactions--yet prevailed below in obtaining a commission from defendant/appellant. By operation of law, that commission--even if it had been paid--is forfeit as a penalty for plaintiff/appellant's violations.

V. THE COMMISSION PROVISION IN THE PURCHASE AGREEMENT MEMORIALIZES AN ILLEGAL NET LISTING THAT YOUNG ACCEPTED IN VIOLATION OF STATUTORY DUTIES AND ACCEPTED STANDARDS OF HIS PROFESSION.

Most telling in plaintiff/appellee's improper conduct was its plain, knowing acceptance of a "net listing". When Young agreed to sell Welsh's property for the net price of \$18,500 per lot, he essentially created a net listing agreement between Wardley and Welsh. Because net listings are prohibited in Utah, the commission provision is void as against public policy and Young and Wardley must forfeit any commission claimed as a result of the transaction.

A "net listing" is defined in the Utah Administrative Code at R 162-1-2.11 as "a listing wherein the amount of real estate commission is the difference between the selling price of the property and a minimum price set by the seller." Net listings "are prohibited and shall not be taken by a licensee." R 162-6-1.4.1.

Notwithstanding this prohibition against net listings, Young agreed to sell Welsh's property for a price over and above \$18,500, a figure Welsh set as a minimum. Young described his understanding of the arrangement in his deposition:

Q. So in other words, if you'd been able to negotiate a purchase price of, say, \$20,000.00, your understanding was that you could keep or your commission would be anything over and above the \$18,500.00?

A. That's correct.

* * *

Q. So who came up with the \$19,000.00 [sales price] figure?

A. I did.

* * *

Q. That was tied to the \$18,500.00 figure which would be net, without your commission, to Mr. Welsh, correct?

A. Anything over \$18,500.00 would go to me, yes.

Deposition of Randy Young at 24-25 (R 208-09).

The agreement between the parties that defined Young's participation in the sales transaction, therefore, created a net listing situation--it gave Young a stake in the sales price he ultimately represented to a buyer. The higher the offer he procured, the higher his own compensation. This differs from a situation where a seller's agent, bound by fiduciary duties to get the best price for her principal, assists the seller in setting a sales price. With a net listing, the final price is set by the agent, and includes consideration of the agent's own interests. Similarly, if Young had represented the buyer, as Welsh initially believed, there would be no conflict because Welsh could merely accept or reject any offer that Young brought him that would

"net" him his minimum price: Young's commission would be negotiated by Young and the buyer.

At the time the parties sat down to memorialize the transaction in the Purchase Agreement, however, it became clear that each thought Young represented the other party. In order to close the transaction, they amended their agreement to provide as follows:

While Wardley BH&G has no agency relationship with neither [sic] the seller nor the Buyer, the Seller agrees to pay \$500 per acre to Wardley BH&G at settlement.

Addendum to Purchase Agreement (R-328).⁵ Though that provision itself may not constitute a net listing, it memorialized a *de facto* one if Young (as he claims) was not working for the buyer. The transaction closed at the price inappropriately set by the agent Young, and Welsh, not the buyer, ended up being responsible for paying the commission.

Yet the trial court held that since plaintiff repeatedly refused to enter into a written listing agreement with Wardley and Young, there could be no agency, no listing between the parties and, as a result, no net listing. Based on that rationale, the

⁵The trial court makes much of the fact that Welsh agreed to pay Wardley's commission in this addendum. Yet Welsh testified that he agreed to the provision reflecting that he owed Wardley's commission as a concession to Peterson's financing requirements. Welsh Testimony (R-627-629).

court upheld the commission provision in the Purchase Agreement as part of a valid contract between Welsh and Peterson. In doing so, the trial court not only failed to consider the agency issues discussed above, but ignored the well-settled principle that parties cannot recover for breach of a contract made in violation of statute or ordinance.

A contract may be completely proper in execution and form, but if it is made in violation of statute or ordinance it is void. Neil v. Utah Wholesale Grocery Co., 210 P. 201 (Utah 1922); Frailey v. McGarry, 211 P.2d 840 (Utah 1949). See also Lamb v. Bangart, 525 P.2d 602 (Utah 1974); Failor's Pharmacy v. DSHS, 886 P.2d 147 (Wash 1994). Further, a party benefitting from an illegal bargain cannot recover damages for its breach, even where another party will reap a windfall from the breach. Ross v. Producers Mutual Insurance Co., 295 P.2d 339, 341-42 (Utah 1956). In determining whether a contract contravenes public policy, it is necessary "to consider not only the terms and provisions of the act, but the purpose and object sought to be accomplished by its enactment." Neil, 210 P. at 203.

Clearly, the prohibition against net listings is designed to quell the incentive a real estate agent would have in such a situation to act in his or her own interest in conflict with the interests of the buyer and/or seller. For that reason it is company

policy--aside from Utah law--even at defendant Wardley, not "to do them."

Deposition of Lee Stern at 20. The net listings prohibition, like all conduct defined as "improper" in the Administrative Code's rules regulating real estate agents, ensures that agents "whether acting as an agent or on [their] own account" do not act in a manner "which could jeopardize the public health, safety, or welfare." Utah Admin. Code R 162-6-1.8. See also Diversified General, 584 P.2d 848, 851 (construing real estate statute liberally to accomplish its "underlying purpose ... to protect the public from unqualified and unscrupulous people.") In the instant case, the rule and its underlying policies would be contravened by upholding the commission provision of the Purchase Agreement because it would encourage real estate transactions where agents put their own interests before the interests of the parties. Licensed agents must acknowledge and respect this public interest, regardless of whether an agency agreement exists at all. Dugan, 615 P.2d at 1248.

The trial court should not have favored form over substance by perpetuating an unenforceable *de facto* net listing merely because no written listing agreement existed between the parties. As an earlier Utah court noted in a similar situation: "The vice of the situation, where an agent represents both parties without their knowledge and consent, is that he is representing interests which are adverse to each

other and his duties are conflicting, and it is no less vicious because his contract with one side or the other happens to be void because not in writing." Van Leeuwen, 5 P. at 720. In the instant case, Young was representing his *own* interests, placing them above the other parties' interests. A Montana court described this as inappropriate in Watson v. Fultz, 782 P.2d 361, 363 (Mont. 1989): the agent "breached his fiduciary duty to [the seller] because he acquired a personal stake in the sale by which his personal interests became paramount to the [seller's] interests." As shown above, Young took part in the transaction without the parties' informed consent as to his true role. If this court wishes properly to continue to discourage "maverick" real estate agents protecting their own interests, it must not allow Young and Wardley to claim commissions based on a provision memorializing an unenforceable, if unwritten, agreement.

VI. THE LOWER COURT ERRED IN REFUSING TO GRANT WELSH LEAVE TO AMEND HIS ANSWER TO ASSERT CLAIMS ALREADY AT ISSUE IN THE CASE.

Under Rule 15 (b), Utah Rules of Civil Procedure, issues presented by the express or implied consent of the parties may, upon motion of a party, be reflected in amendments to the pleadings, and this may be accomplished at any point in the proceedings, even after the entry of judgment. By moving, before trial, to amend his

Answer to set out his theories regarding the illegality of Wardley's conduct in this action, Welsh was seeking merely to have the pleadings reflect issues which had already been presented, argued and decided on Wardley's Motion for Summary Judgment, and to preserve those issues both for presentation at trial (where appropriate) or on appeal. By denying Welsh's Motion to Amend, though, the lower court confirmed once again its unwillingness to re-examine, during the trial, the possibility that Wardley was not functioning as a "coordinating agent", what a "coordinating agent" even *was*, and whether, in fact, the transaction was marked by more badges of illegality than the limited question of whether or not it constituted a "net listing" (when the trial court had already ruled, as a matter of law, that no "listing" of any sort existed).

CONCLUSION

Statutes and regulations applicable to licensed real estate professionals in Utah are broadly applied to protect the welfare of buyers and sellers of real estate and the public at large. Self-serving conduct, or conduct that breaches duties under these regulations by licensed agents are prohibited and should be discouraged by this court. When Wardley, and Young, its agent, agreed to sell Welsh's property for a sum "over and above" a minimum set by Welsh, they effectively accepted a prohibited net listing

in violation of Utah law. Further, their true role in the transaction was never made known to the parties. This failure to disclose agency is likewise prohibited in Utah. Although Wardley and Young claim they can escape this duty to disclose by acting as mere "coordinating agents" in sales transactions, this role is neither defined, recognized, nor favored by Utah law. Allowing real estate professionals to act as coordinating agents perpetuates the possibility that agents will inappropriately put their own self-interests in the transaction ahead of those of the consumers they are licensed to serve.

The trial court in this matter granted Wardley's motion for summary judgment on the mistaken and ill-advised conclusion that Utah law allows licensed real estate agents to act as "coordinating agents." The court further favored form over substance by allowing Wardley to claim a commission based on a provision that memorialized a prohibited net listing arrangement in violation of public policy and law. This court must reverse the trial court because in Utah, Wardley and Young are not allowed to escape the regulatory scope of real estate statutes and rules by claiming to be mere coordinators of the transaction. If they represented either one or both parties to the transaction--as they must under the facts of the case--they failed in numerous fiduciary duties owed to the parties. Even if Utah law did recognize a

coordinating agent status, plaintiff/appellee's involvement in the transaction was too great to qualify therefor, and rises to the level of agency without written agreement. In any event, their potentially self-dealing conduct breaches general duties they owed as licensed professionals to the general public. The trial court erred in awarding this behavior by allowing them to recover commission in the transaction between Welsh and Peterson.

Based on the foregoing, it is submitted that the Judgment entered by the lower court in this action on January 8, 1997 be reversed, and the matter remanded with direction to enter judgment in favor of Welsh and against Wardley.

DATED this 18th day of August, 1997.

JONES, WALDO, HOLBROOK &
McDONOUGH

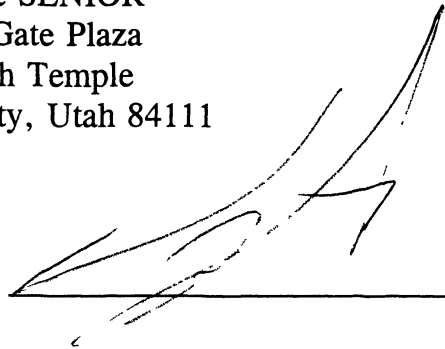
By

Vincent C. Rampton
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 1997, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT to the following:

Neil R. Sabin
NIELSON & SENIOR
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111



Tab A

1 December 16, 1996

2 P R O C E E D I N G S

3
4 (Beginning of tape 2763.)

5 THE CLERK: Please stand. Court is now
6 in session. You may be seated.

7 THE COURT: Given the lateness of the
8 hour, I'll be quick and to the point. The first and
9 sole issue, as we discussed at the beginning, left to
10 be tried was whether or not this was a net listing.
11 If it is, it's a violation of the rules and,
12 therefore, in my judgment at least, the plaintiff is
13 not entitled to sue for a commission under Utah law.

14 The question whether this is a net
15 listing really has two components: Number one, is it
16 a listing at all; and number two, if it's a listing,
17 is it a net listing. The definition of a net listing
18 has been provided, and it's pretty straightforward,
19 but it does require finding first that there was a
20 listing.

21 The question, therefore, as to whether
22 this is a listing I would respond to as follows:
23 Mr. Stringham said in his testimony that listing and
24 agency are more or less synonymous. In fact, he kept
25 saying, "I don't really understand why we're

1 approaching it this way. The real question is whether
2 or not Mr. Young was the agent of Mr. Welsh. That's
3 what I think we ought to be focusing on," words to
4 that effect that he kept saying. And he said that
5 agency can be implied. There doesn't have to be a
6 written agreement for purposes of agency, that if you
7 act like an agent, then you probably are one, I think
8 was his summary or words to that effect.

9 But to have a listing, he said in this
10 case, that Mr. Young must have been an agent of
11 Mr. Welsh. He must have in effect listed the
12 property. Mr. Welsh must have listed the property
13 with Mr. Young, otherwise ergo you have no net listing
14 because you don't have a listing. I'm persuaded by
15 all the evidence in this case that Mr. Welsh and
16 Mr. Young did not have a listing agreement. There was
17 no listing, so there could be no net listing.

18 My responsibility, of course, is to look
19 at all the evidence, to reconcile the evidence where
20 it can be reconciled and where it can't be
21 reconciled to decide between competing two pieces of
22 evidence what in fact the truth is. And I find the
23 following evidence to be persuasive: Number one, that
24 during Mr. Welsh's testimony today he indicated that
25 his only instructions to Mr. Young was that the

1 property must sell for at least \$18,500, and that
2 there would be no written listing agreement, that he
3 wouldn't give it in writing, that that was never his
4 intention. In fact, he assumed that Mr. Young had
5 written agreements with the prospective buyers and
6 that they would be responsible for the commission, and
7 therefore he would not enter any sort of listing
8 agreement with Mr. Young. That was his testimony
9 today, and, of course, that certainly has a bearing on
10 what --whether there was a listing or not because that
11 was their -- Mr. Young's intention at the time he
12 first dealt with Mr. Young regarding the property in
13 question here.

14 Number two, Mr. Young, when he signed the
15 contract on May 31st of 1994, his own handwriting
16 stated that Mr. Young -- Mr. Welsh said in his -- in
17 writing in his own hand that Mr. Young was not his
18 agent. In other words, he said there was no agreement
19 between the two of them for Young to list the
20 property.

21 I found it interesting that this language
22 was added by Mr. Welsh because Mr. Peterson, the
23 prospective buyer, didn't want to be seen as paying a
24 commission. He wanted the seller to pay the
25 commission so that he could obtain financing for the

1 full 19,000 per acre. If it were broken out, as I
2 understand it, he was paying only eighteen five but
3 paying a commission of five, that he couldn't get
4 financing for the full 19,000 per acre, so he wanted
5 to be shown that Mr. Welsh was in fact paying the
6 commission.

7 But the language regarding the agency
8 that was included in that addendum -- and I believe it
9 was paragraph twelve of the addendum -- appears to be
10 entirely gratuitous and was added by Mr. Welsh. No
11 reason to do that based on the instruction to
12 Mr. Peterson. He just didn't want to be seen as
13 paying the commission. But the language of the agency
14 was written there by Mr. Welsh in his own hand and
15 that would seem to reflect his intention. Even though
16 the contract between the buyer and the seller is not
17 an agency agreement -- we kept hearing the witnesses
18 saying that over and over -- the language in
19 Mr. Welsh's own hand would certainly indicate what his
20 intention was when he dealt with Mr. Young initially,
21 and therefore would have some bearing and be relevant
22 on the issue of whether or not there was ever a
23 listing.

24 And finally, I found it persuasive that
25 in the letter dated March 23rd, 1995, Mr. Welsh

1 notified Mr. Young that, "You do not represent me."
2 All of this in my judgment adds up to show that
3 Mr. Welsh never considered Mr. Young to be his selling
4 agent and therefore he didn't list the property with
5 him. Because there was no listing, again there could
6 be no net listing. Because there was no net listing,
7 there was no violation of the rules and there was no
8 violation of the statute. Therefore, the plaintiff is
9 entitled to recover its commission as a third-party
10 beneficiary under the contract between Mr. Peterson
11 and Mr. Welsh.

12 And I would ask counsel for the plaintiff
13 if you would prepare -- I know I've just given a short
14 summary, but I would ask you to prepare findings and
15 conclusions consistent with those that I've
16 articulated here from the bench today. The plaintiff
17 would also be entitled to costs of court. Now the
18 issue remains as to the attorney's fee and whether or
19 not the plaintiff as a third-party beneficiary is
20 entitled to recover attorney's fees. I'm going to
21 take that issue still under advisement and ask you
22 each to address it.

23 I do have the Tracy Collins case that was
24 submitted by the defendant today, and there was some
25 other material on that issue submitted by the

1 plaintiff earlier when the motion for summary judgment
2 -- but I'm still not quite sure what the state of the
3 law is in Utah.

4 It would be clear to me that neither
5 Mr. Peterson nor Mr. Welsh even thought of whether or
6 not the third-party beneficiary would be entitled to
7 attorney's fees. I'm sure that that issue never
8 crossed their minds. If it would require some proof
9 that they intended and thought about that point when
10 they drafted this contract and the addendum, then it
11 wouldn't seem to me that the plaintiff is entitled to
12 prevail on the issue of attorney's fees, but I'll give
13 you each a chance to brief that if you would like to.
14 And maybe the best way to do that, to save time, is to
15 have you within 14 days, if you think that's fair,
16 just submit a memoranda, each -- submit it at the same
17 time for me to consider, and then I'll rule on that
18 point after I've had a chance to read your
19 memorandum. Any objection to that?

20 MR. RAMPTON(?): No, your Honor.

21 THE COURT: Counsel?

22 MR. SABIN(?): No, your Honor.

23 THE COURT: Okay, 14 days I'll expect a
24 memorandum from each of you on that point, and then
25 I'll address the issue of attorneys' fees. But,

1 Counsel, you can go ahead and begin drafting the
2 findings and conclusions if you would.

3 Since you've been asked to prepare those,
4 do you have any questions? Is there anything I need
5 to address that would assist you in that?

6 MR. SABIN(?): One thing that we also
7 perhaps ought to brief: We had passed previously in
8 the memorandum before the Court that we treat the
9 depositions as (unintelligible) under the
10 circumstances. And I'm wondering if we maybe should
11 address that also in court.

12 THE COURT: Counsel?

13 MR. RAMPTON(?): This is my first news on
14 it, your Honor, and I'm happy to read the question.

15 THE COURT: Okay. Why don't you include
16 that.

17 MR. SABIN(?): We raised that very
18 briefly in the previous memorandum, but the reason for
19 that being that that arose after the first summary
20 judgment hearing.

21 THE COURT: All right.

22 MR. SABIN(?): At least we would like to
23 address it in order to have everything before the
24 Court in one document.

25 THE COURT: Okay. I'll ask you to

1 include that in your memorandum as well.

2 MR. SABIN(?): Thank you.

3 THE COURT: Okay.

4 (End of proceedings on tape 2763.)

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Tab B

Neil R. Sabin, USB No. 2840
Annette F. Sorensen, USB No. 6989
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1100 Eagle Gate Plaza
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Telephone: (801) 532-1900
Facsimile: (801) 532-1913

FILED
JAN - 8 1997
Third District Court
Salt Lake Department
Time of Day 11:52 A.M.

Attorneys for Plaintiff

IN THE THIRD DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT, DIVISION II

WARDLEY CORPORATION,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	
GRANT WELSH,)	Civil No. 950007889CV
)	
Defendant.)	Judge Robin W. Reese

This matter came for trial before the above-entitled Court on December 16, 1996, the Honorable Robin Reese, Judge, presiding. The Plaintiff appeared by and through its counsel Neil R. Sabin, and the Defendant appeared personally and by and through his counsel Vincent Rampton. Pursuant to the Order of Summary Judgment in this matter, entered November 14, 1996, the issues reserved for trial were (1) whether or not the arrangements by which the Plaintiff claimed a commission constituted an unlawful "net listing" and if so, whether such a determination would preclude a commission; and (2) issues of attorney's fees.

The Defendant called the following witnesses: Randy Young, of Wardley Better Homes & Gardens; the Defendant Grant Welsh, and Arnold Stringham. The Defendant then rested.

The Plaintiff then called Nick Scott as its witness. The Court, having heard testimony, examined the witnesses and the credibility thereof, having examined the documents submitted as evidence, having heard oral argument, having examined the admissions of the Defendant on file herein, and being fully advised in the premises now enters the following:

FINDINGS OF FACT

1. Prior to May 31, 1994, the Defendant Grant Welsh owned an interest in certain real property situated at approximately 4800 West and 8600 South in Salt Lake County, Utah, and commonly referred to as Dorilee Acres (the "Subject Property").

2. Wardley Better Homes & Gardens is a Utah corporation doing business as a licensed real estate brokerage.

3. Randy Young is a licensed real estate agent with Wardley Better Homes & Gardens.

4. Prior to May 31, 1994, Randy Young and the Defendant had discussed Randy Young's proposal to locate a buyer for the Defendant's properties and, in connection therewith, to earn a commission.

5. The Defendant specifically declined to grant to Mr. Young a listing for the Subject Property. While the testimony of Defendant and of Randy Young differs as to the nature of understanding or arrangements they arrived at, both parties understood that Mr. Young would be attempting to locate a buyer for the Subject Property for which he would seek a commission.

6. Randy Young advised Leon Peterson of the availability of the Subject Property and informed the Defendant of Mr. Peterson's interest in considering purchase of the Subject Property.

7. The Defendant then contacted Leon Peterson regarding the possible sale of the Subject Property. The Defendant prepared a typewritten document setting forth the details of his proposal to be presented to Mr. Peterson.

8. The Defendant and Leon Peterson met to negotiate Mr. Peterson's purchase of the Subject Property. The Defendant and Mr. Peterson then prepared a Real Estate Purchase Contract (the "Contract"). Those persons also agreed to an Addendum A to the contract setting forth their agreement, which was the typewritten document the Defendant had prepared, with handwritten changes resulting from Defendant's and Mr. Peterson's discussion. During the negotiations, Mr. Welsh, in addition to other handwritten changes, inserted on the Addendum A the following language:

While Wardley BH&G has no agency relationship with neither [sic] the Seller nor the Buyer, the Seller agrees to pay \$500.00 per acre to Wardley BH&G, at settlement.

9. The typewritten portion of Addendum A was prepared by Defendant, and Defendant inserted all handwriting on the Addendum A.

10. Mr. Peterson and Defendant then executed the Real Estate Purchase Contract, which included the Addendum A with the handwritten additions which Defendant had written.

11. Pursuant to the Agreement, Phase I of the Subject Property was sold and closed, and Plaintiff received a \$500.00 per acre commission (for a total of \$10,556.80) in connection therewith.

12. Disputes subsequently arose between Defendant and Leon Peterson involving the interpretation of paragraph 5 to the Addendum A. Those persons subsequently settled the disputes. Subsequently, Defendant, on April 24, 1995, closed the sale to Mr. Peterson of 16.70

acres, for which a \$500.00 per acre commission is \$8,350.00; and, on May 26, 1995, Defendant closed the sale to Mr. Peterson of 13.6475 acres, for which a \$500.00 per acre commission is \$6,823.75.

13. Throughout this transaction, neither Plaintiff nor Randy Young were agents for the Defendant, which is evidenced by the testimony of Mr. Welsh, the testimony of Mr. Young, the language of the Addendum itself, and a letter from Defendant to Randy Young dated March 19, 1995, reaffirming no representation.

~~14. Defendant never considered Wardley Better Homes & Gardens to be its agent.~~

14. There never was a listing arrangement between the Plaintiff and the Defendant because the Defendant refused to enter into any such listing with the Plaintiff.

15. The issues regarding attorneys' fees should be deferred pending the opportunity of the parties to submit memoranda of law no later than December 31, 1996.

CONCLUSIONS OF LAW

1. In order for a net listing agreement to exist, a precondition must happen that a listing agreement be in effect.

2. No listing arrangement of any nature existed between the Plaintiff and the Defendant. Accordingly, no net listing arrangement of any nature existed between the Plaintiff and the Defendant.

3. The Plaintiff, therefore, is entitled to judgment against the Defendant for the amount of the commissions owing as follows:


a. For \$8,350.00, plus interest thereon at the legal rate since April 24, 1995, until paid; and

b. For \$6,823.75, plus interest thereon at the legal rate since May 26, 1995, until paid.


4. The parties should have until December 31, 1996, to submit to the Court Memoranda of Law for the Court to determine whether attorneys' fees can and should be awarded to the Plaintiff. Upon a determination by the Court that the Plaintiff is entitled to an award of attorneys' fees, the Plaintiff should be entitled to an Order supplementing the judgment herein to add the Court's award of such fees as part of the judgment.

Dated this 8 day of Jan, 1997.

BY THE COURT:



Honorable Robert W. Reese
District Court Judge



CERTIFICATE OF SERVICE

I certify that on the 3rd day of January, 1997, I served a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by causing the same to be mailed by first class mail, postage prepaid, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main #1500
P.O. Box 45444
Salt Lake City, UT 84101



Tab C


FILED
JAN 9 1997
Third District Court
Salt Lake Department
Time of Day 11:52 a.m.

4. The Court has taken under advisement issues of attorney's fees and costs. The parties shall have until December 31, 1996, to submit to the Court Memoranda of Law for the

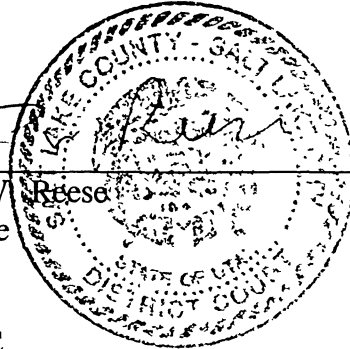
Court to determine whether attorneys' fees can and should be awarded to the Plaintiff. Upon a determination by the Court that the Plaintiff is entitled to an award of attorneys' fees, the Plaintiff is be entitled to an Order supplementing the judgment herein to add the Court's award of such fees as part of this Judgment.

Dated this 8 day of Jan., 1997.

BY THE COURT:



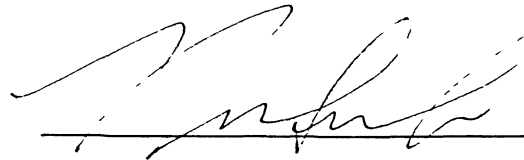
Honorable Robin W. Reese
District Court Judge



CERTIFICATE OF SERVICE

I certify that on the 23rd day of December, 1996, I served a true and correct copy of the foregoing JUDGMENT by causing the same to be mailed by first class mail, postage prepaid, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main #1500
P.O. Box 45444
Salt Lake City, UT 84101



Tab D

FILED

97 FEB 13 PM 3:15

RECEIVED
SALT LAKE COUNTY

Vincent C. Rampton (USB # 2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant
1500 First Interstate Plaza
170 South Main Street
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

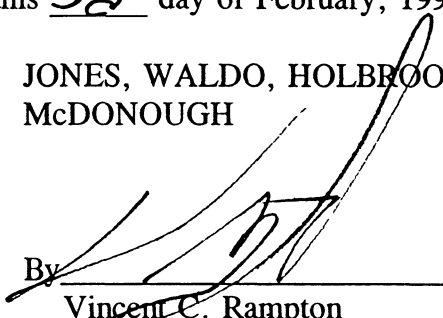
WARDLEY CORPORATION,	:	
	:	
Plaintiff,	:	NOTICE OF APPEAL
	:	
vs.	:	
	:	Case No. 950007889CV
GRANT WELSH,	:	
	:	Judge Robin W. Reese
Defendant.	:	

Notice is given that defendant and appellant, Grant Welsh, appeals to the Utah Supreme Court from the Judgment of the Honorable Robin W. Reese, Third District Judge, entered against Grant Welsh on January 8, 1997 in the above-captioned matter.

RESPECTFULLY SUBMITTED this 3^d day of February, 1997.

JONES, WALDO, HOLBROOK &
McDONOUGH

By

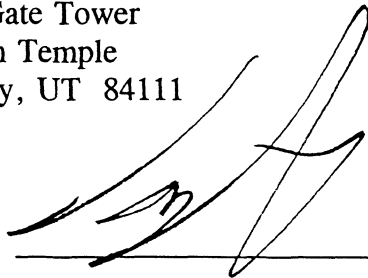


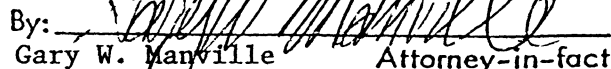
Vincent C. Rampton
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1997, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing NOTICE OF APPEAL, to the following:

Neil R. Sabin
NIELSEN & SENIOR
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111



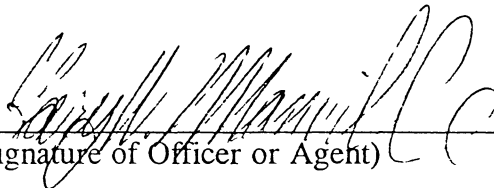


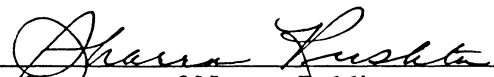
**AFFIDAVIT OF QUALIFICATION
FOR SURETY COMPANIES**

STATE OF UTAH)SS
COUNTY OF SALT LAKE)

GARY W. MANVILLE, BEING FIRST AND DULY SWORN, ON OATH DEPOSES AND SAYS THAT HE IS THE ATTORNEY-IN-FACT (OFFICER OR AGENT) OF SAID COMPANY, AND THAT HE IS DULY AUTHORIZED TO EXECUTE THE SAME AND HAS COMPLIED IN ALL RESPECTS WITH THE LAWS OF THE STATE OF UTAH, IN REFERENCE TO BECOMING SOLE SURETY UPON BONDS, UNDERTAKINGS AND OBLIGATIONS.

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 3rd DAY OF February, A.D.
1997


(Signature of Officer or Agent)


(Signature of Notary Public)

649 East South Temple
Salt Lake City, Utah 84102
(Residence)

(SEAL)
MY COMMISSION EXPIRES:
July 1, 1999

(SURETY SEAL)
(THIS FORM REQUIRED TO BE FILLED
OUT BY SECTION 31-24-3, UCA 1953)

649 East South Temple
Salt Lake City, Utah 84102