

1997

# Wardley Corporation, Plaintiff and Appellee, vs. Grant Welsh, Defendant and Appellant : appeal from final judgment

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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WARDLEY CORPORATION,	:	
	:	
Plaintiff and Appellee,	:	
	:	
vs.	:	Appeal No. 970401
	:	
GRANT WELSH,	:	Priority No. 15
	:	
Defendant and Appellant.	:	

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REPLY BRIEF OF APPELLANT

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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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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
INTRODUCTION . . . . .	1
JURISDICTION . . . . .	1
ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL AND STANDARD OF REVIEW . . . . .	1
DETERMINATIVE STATUTES, REGULATIONS, AND CASE LAW ON CROSS APPEAL . . . . .	2
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF FACTS . . . . .	2
SUMMARY OF ARGUMENT ON CROSS-APPEAL . . . . .	3
ARGUMENT . . . . .	4
POINT I - WELSH IS NOT REQUIRED TO MARSHALL EVIDENCE IN SUPPORT OF THE COURT'S FACTUAL FINDINGS . . . . .	5
POINT II - WELSH ADDRESSED ALL ARGUMENTS RAISED ON APPEAL IN ARGUMENTS BEFORE THE TRIAL COURT. . . . .	9
POINT III - WARDLEY ACTED AS AGENT FOR WELSH, LEON PETERSON, OR BOTH, UNDER UTAH STATUTORY LAW . . . . .	11
POINT IV - WELSH DID NOT REFUSE TO ALLOW WARDLEY TO ACT AS HIS AGENT. . . . .	13
POINT V - DUTIES APPLICABLE TO REAL ESTATE AGENTS GENERALLY ARE INCUMBENT UPON WARDLEY. . . . .	14
POINT VI - WARDLEY'S RELATIONSHIP WITH WELSH CONSTITUTED AN UNLAWFUL AND PROHIBITED "NET LISTING". . . . .	14
POINT VII - THE TRIAL COURT IMPROPERLY DENIED WELSH'S MOTION FOR LEAVE TO AMEND HIS ANSWER. . . . .	15
ARGUMENT ON CROSS-APPEAL . . . . .	16
CONCLUSION . . . . .	26

# TABLE OF AUTHORITIES

<i>Allstate Enterprises, Inc. v. Heriford</i> , 772 P. 2d 466 (Utah 1989)	20
<i>B&amp;R Supply Co. v. Bringhurst</i> , 28 Utah 2d 442, 503 P.2d 1216 (1972)	17
<i>Bailey-Allen Co., Inc. v. Kurzet</i> , ____ P.2d ____, 197 Utah App. LEXIS 107 (Utah App. 1997)	6
<i>Baumgart v. Utah Farm Bureau Ins. Co.</i> , 851 P.2d 647 (Utah App. 1993)	6
<i>Blake v. Blake</i> , 17 Utah 2d 369, 412 P.2d 454 (1966)	17
<i>C&amp;Y Corp. v. General Biometrics, Inc.</i> , 896 P.2d 47 (Utah App. 1995)	18
<i>Cheney v. Rucker</i> , 14 Utah 2d 205, 381 P.2d 86 (1963)	16
<i>Christensen v. Farmers Insurance Exchange</i> , 669 P.2d 1236 (Utah 1983)	22
<i>Edwards &amp; Daniels Architects, Inc. v. Farmers Properties, Inc.</i> , 865 P.2d 1382 (Utah App. 1993); Rule 52(a), Utah Rules of Civil Procedure	2
<i>Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone &amp; Telegraph Co.</i> , 844 P.2d 322 (Utah 1992)	18
<i>Golden West Insulation, Inc. v. Stardust Investment Corp.</i> , 47 Ore. App. 493, 615 P.2d 1048 (Ct. App. Ore. 1980)	24
<i>Hansen v. Salt Lake County</i> , 794 P. 2d 838 (Utah 1990)	24
<i>Interwest Construction v. Palmer</i> , 923 P.2d 1350 (Utah 1996)	1
<i>Ledger Construction, Inc. v. Robert, Inc.</i> , 550 P.2d 212 (Utah 1976)	22
<i>National Indemnity Company v. The St. Paul Insurance Company</i> , 150 Ariz. 492, 724 P.2d 578 (Ct. App. Ariz. 1985)	24
<i>Projects Unlimited v. Copper State Thrift</i> , 798 P.2d 738 (Utah 1990)	22
<i>Ranch Homes, Inc. v. The Greater Park Corporation</i> , 592 P.2d 620 (Utah 1979)	17
<i>Rio Algom Corp. v. GIMCO, Ltd.</i> , 618 P.2d 497, 506 (Utah 1980)	21

<i>Salmon v. Davis County</i> , 916 P. 2d 890, 893 (Utah 1996) . . . . .	2, 17
<i>Saunders v. Sharp</i> , 806 P.2d 198 (Utah 1991) . . . . .	5
<i>Timm v. Dewsnap</i> , 851 P. 2d 1178 (Utah 1993) . . . . .	16
<i>Tracy Collins Bank &amp; Trust v. Dickamore</i> , 652 P.2d 1314 (Utah 1982) . . . . .	2, 17
<i>Trolley Square Assoc. v. Nielson</i> , 886 P.2d 61 (Utah 1994) . . . . .	19
<i>Wilburn v. Interstate Electric</i> , 748 P.2d 582 (Utah App. 1988) . . . . .	19
<i>Willard Pease Oil &amp; Gas Co. v. Pioneer Oil &amp; Gas Co.</i> , 899 P.2d 766 (Utah 1995) . . . . .	18

## INTRODUCTION

This brief is submitted in reply to plaintiffs/appellee Wardley Corporation's arguments in opposition to Welsh's appeal from the lower court's entry of judgment herein, and in opposition to Wardley's cross-appeal on the lower court's denial of attorney's fees.

## JURISDICTION

Welsh agrees with Wardley's statement of jurisdiction.

## ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL AND STANDARD OF REVIEW

Welsh disagrees with the statement of issues on cross-appeal as presented by Wardley, and offers the following statement of issues and standard of review:

1. Whether the trial court erred in finding that the written contract between Welsh and Leon Peterson, taken as a whole and viewed within its four corners, unambiguously manifested an intent on the part of the contracting parties to confer upon Wardley the right to recover attorney's fees in the event of nonpayment of the commission provided for therein.

Standard of Review: Correctness; however, a finding of ambiguity should be sustained if the language of the contract is capable of more than one reasonable interpretation because of uncertain meaning of terms, missing terms, or other facial deficiencies. *Interwest Construction v. Palmer*, 923 P.2d 1350 (Utah 1996).

2. Whether the lower court properly determined that Wardley failed to sustain its burden of proof in establishing, by extrinsic, that the contracting parties (Welsh and Leon Peterson) intended to confer upon Wardley the right to recover attorney's fees under the written contract.

Standard of Review: Clearly erroneous. *Edwards & Daniels Architects, Inc. v. Farmers Properties, Inc.*, 865 P.2d 1382 (Utah App. 1993); Rule 52(a), Utah Rules of Civil Procedure.

**DETERMINATIVE STATUTES, REGULATIONS,  
AND CASE LAW ON CROSS APPEAL**

*Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314 (Utah 1982);  
*Salmon v. Davis County*, 916 P. 2d 890, 893 (Utah 1996).

**STATEMENT OF THE CASE**

Welsh adopts their reference to statement of the case set out in appellant's brief herein.

**STATEMENT OF FACTS**

Welsh offers the following statement of facts in connection with the issues on cross-appeal herein:

In its Complaint, Wardley asserted the right to attorney's fees as a named third-party beneficiary under the May 31, 1994 contract. Complaint (R. 1-17) at ¶ 21. Wardley sought summary judgment on attorneys' fees; The Court rejected this argument and reserved the right to recover attorney's fees for trial. Order of Partial Summary Judgment of November 15, 1996 (R. 336-338).

The May 31, 1994 contract (Defendant's Exhibit 2, R. 350-352) was entered into between defendant Welsh and Leon Peterson. It was negotiated, finalized and executed by defendant Welsh and



Leon Peterson without participation or input of any kind from Wardley. Trial Testimony of Randy Young (R. 609-611). Paragraph 17 of the May 31, 1994 agreement states in pertinent part as follows:

In any action arising out of this contract, the prevailing party shall be entitled to costs and reasonable attorneys fees.

Defendant's Exhibit 2 (R. 350-352) at p. 2 (emphasis added). Wardley is not a named party to the agreement. Defendant's Exhibit 2 (R. 350-352).

There was no discussion between defendant Welsh and Leon Peterson, the parties negotiating the terms of the contract, concerning Wardley's right to attorney's fees in the event it claimed rights under the agreement. Testimony of Grant Welsh (R. 717-719). Defendant Welsh did not intend, in executing the contract, to confer upon Wardley a right to recover attorney's fees thereunder; Leon Peterson likewise manifested no intent to confer upon Wardley the right to recover attorney's fees under the contract. Testimony of Grant Welsh (R. 717-719).

At trial, Wardley presented no evidence whatsoever establishing any right to recover attorney's fees.

#### **SUMMARY OF ARGUMENT ON CROSS-APPEAL**

1. The trial court correctly found that the written agreement of May 31, 1994 between Welsh and Leon Peterson did not unambiguously establish an intent by the contracting parties to confer upon Wardley the right to recover attorney's fees incident to enforcement of any third-party beneficiary rights which Wardley

may have had under the contract. The contracting parties were Welsh and Leon Peterson; Wardley was at best a non-party beneficiary under law, whose rights under the agreement were function of the intent of the contracting parties. As such, language in a printed form, conferring the right to recovery attorney's fees on "the prevailing party" (when the form was not intended to create any rights in a non-party beneficiary) was clearly ambiguous, and extrinsic evidence was warranted.

2. Wardley failed outright to establish, by extrinsic evidence, an intent on behalf of the contracting parties to bestow upon it the right to recover attorney's fees. As the party asserting a right to fees, Wardley bore the burden of proof in this regard. Not only has Wardley failed to marshall evidence in support of the lower court's finding on the attorney's fees, but failed outright at trial to present any evidence whatsoever that the contracting parties intended to bestow upon it the right to recover attorney's fees in connection with the recovery of the commission. All evidence presented, in fact, was to the contrary.

3. Wardley has no statutory right to recover attorneys fees. Legislative history of Utah Code Ann. § 78-27-56 manifests no intent to confer rights to the recovery of attorneys fees on non-party beneficiaries.

#### **ARGUMENT**

Wardley's brief, like the trial court's ruling, relies on one fact alone: that Welsh signed writings purporting to disclaim the absence of an agency relationship with Wardley. By writings

after the fact, in other words, Welsh unilaterally absolved Wardley of all obligations of a real estate licensee under law.

Yet the whole purpose of Wardley's actions was to recover a realtor's commission. Either that commission was earned as Welsh's real estate agent, or it was not earned at all - there are no "coordinating agents" under Utah's regulatory system.

Wardley was constituted Welsh's agent by acting as his agent according to statutory definitions. By failing to comply with requirements incumbent on it under the same statutory scheme, though, Wardley forfeits its right to commission.

#### POINT I

##### WELSH IS NOT REQUIRED TO MARSHALL EVIDENCE IN SUPPORT OF THE COURT'S FACTUAL FINDINGS

Wardley begins by making the preliminary argument that Welsh failed to "marshall evidence" challenging the lower court's findings of fact, which must therefore stand undisturbed. Wardley's argument in this regard misconstrues the nature of Welsh's appeal from the lower court's ruling.

The requiring of "marshalling of evidence" is not well-defined in the law. Where addressed, though, it relates only to challenges to the evidentiary sufficiency of a finding of fact made at trial. It contemplates that the appellant "marshall" all evidence adduced at trial in support of the finding, and then establish why it was insufficient. *Saunders v. Sharp*, 806 P.2d 198 (Utah 1991). The doctrine of marshalling of evidence, however, has no application whatever where an appeal is taken from the grant of summary judgment, where the appellate court scrutinizes the lower

court's ruling for correctness, giving no deference to the lower court's ruling and in fact construing all available facts *against* the ruling. See *Baumgart v. Utah Farm Bureau Ins. Co.*, 851 P.2d 647 (Utah App. 1993). Similarly, where the challenge is not to a findings of fact but to a conclusion of law, the standard is correctness of the lower court's ruling, and does not contemplate the marshalling of evidence. *Bailey-Allen Co., Inc. v. Kurzet*, \_\_\_\_ P.2d \_\_\_\_, 197 Utah App. LEXIS 107 (Utah App. 1997).

Welsh set out his statement of issues presented for review *and standard of review* at pages 2-7 of his opening brief. *Wardley's* brief took no exception either to the issues as presented, nor the applicable standard of review presented with respect thereto; accordingly, both must be established as controlling for purposes of this appeal - see Rule 24(b)(1), Utah Rules of Appellate Procedure. As noted therein, all issues in this case with the sole exception of whether Wardley held a "net listing" with Welsh were resolved by the lower court's grant of summary judgment thereon (R. 336-338). By virtue of that order, the court foreclosed all question whether any agency relationship of whatever nature existed between Wardley and Welsh, or whether a resulting fiduciary obligation of any kind existed (R. 180-183, 230-233, 764-769). At the onset of trial, the court denied Welsh's request that the pleadings be amended in order to permit a more reasoned consideration of whether an agency or listing existed, reiterating that the sole issue remaining to be tried was whether

a "net listing" had been created between Wardley and Welsh (R. 574-579) .

Wardley thereupon proceeded to present evidence concerning the nature of the agreement between Wardley and Welsh, and whether it did or did not constitute a "net listing". Again, the court admonished counsel not to reopen the question of agency (R. 594-595, 685) .

The lower court, however, never reached the factual questions surrounding the "net listing" question. Instead, the court reverted to the foreclosed agency question based on testimony of Welsh's expert, Arnold Stringham, who properly pointed out that a net listing contemplates an agency relationship between the owner and the broker/agent (R. 686-687, 703-704) . In handwritten notes made during the course of trial (R. 353-355), and again during the bench ruling (761-773), the lower court articulated its rationale that (1) no "net listing" could exist if there were no listing agreement; (2) a "listing agreement" implied and required an agency relationship; and (3) the court had resolved the agency question on summary judgment.

Under these circumstances, and particularly given Wardley's consent to the standard of review set out in Welsh's opening brief, this court needs to review the lower court's entire ruling for correctness, and reverse its finding denying the existence of an agency relationship.

To the extent that marshalling is warranted on the single issue even presented at trial, it is simply accomplished. There is

no question that an express, written listing agreement - "net" or otherwise - was never created between Wardley and Welsh; further, that Welsh disclaimed the existence of an agency relationship with Wardley in writing. These facts were established by direct testimony of Randy Young (R. 588, 596-597); by Welsh's trial testimony (R. 639, 644, 658, 665-667), defendant's Exhibit 2 (R. 350-352), and plaintiff's Exhibit 2 (R.f 349). In fact, Welsh did not believe Wardley to have been his agent in this transaction, in reliance on Randall Young's representations that he had an agency relationship with Leon Peterson as the buyer (R. 192-195, 666-667).

Yet the undeniable facts remain: Wardley, in the capacity of a licensee under the state of Utah, set out to arrange a sale of property between Welsh and Leon Peterson, with the expectation of receiving a commission on the transaction. To go no further than did the trial court, and conclude that, because no express listing agreement was entered into between Welsh and Wardley prior to the transaction, Wardley may constitute itself a "coordinating agent", with no fiduciary obligation to any party to the transaction, would be to foster a proposition foreclosed by Utah law (see Welsh's opening brief at pp. 21-31). What words the parties used to characterize their relationship is irrelevant to the nature of that relationship according to the governing statute.

The lower court found, as a conclusion of law -- not a finding of fact -- that no listing agreement of whatever nature existed between Welsh and Wardley (R. 465). The predicate assumptions underlying that conclusion were likewise determined by

the lower court as a matter of law. This court must overturn those determinations if any state of fact exists which render the lower court's ruling is incorrect, and neither the "clearly erroneous" standard, nor the marshalling of evidence doctrine, have any application.

## POINT II

WELSH ADDRESSED ALL ARGUMENTS RAISED ON APPEAL IN ARGUMENTS BEFORE THE TRIAL COURT.

Wardley next claims that Welsh is raising its breach of statutory obligations incident to its status as a real estate broker and agent for the first time on appeal, having never addressed these matters to the lower court. Wardley's argument here is something of a mystery; it is easily answered by a review of the record before the trial court.

In his initial response to Wardley's motion for summary judgment herein, Welsh expressly argued that summary judgment was improper in that Randy Young, on behalf of Wardley, had misrepresented the nature of Wardley's agency relationships with the parties to the transaction, asserting that the totality of circumstances made out Wardley to be the agent of Welsh, Leon Peterson, or both, holding a fiduciary responsibility accordingly (R.122-125). In his Supplemental Memorandum in Opposition to Wardley's Motion For Summary Judgment, Welsh again addressed the question of fiduciary responsibility, pointing out that Randy Young had characterized Wardley as a "dual agent", and that he held a "net listing" with Welsh (R.196-200); further, that the failure to

obtain written consent to the agency arrangement should deprive Wardley of its right to a commission (R.201-203).

Welsh thereafter attempted to amend his answer to assert, in more complete detail, the nature and extent of Wardley's breaches of its agency obligations to Welsh (R.394-398); this motion was denied by the court's order of January 2, 1997 (R.426-427).

In short, Welsh attempted repeatedly to address to the trial court the existence and scope of Wardley's agency obligations, his breach thereof, and the resulting application of statutory penalties. The fact that the lower court refused to permit Welsh to take these issues to trial does not mean that they were not preserved for appeal - the court's orders on all pending motions, objections, etc. become final and appealable upon the entry of final judgment. See Rule 54(b), Utah Rules of Civil Procedure.

Wardley argues that, incident to this appeal, Welsh has identified more statutory and regulatory violations arising out of Wardley's conduct than were specifically addressed to the trial court. The contention is an error to begin with - all statutory and regulatory provisions relied upon by Welsh in this appeal were cited through the lower court, either incident to Wardley's own summary judgment motion, or as part of Welsh's motion to amend his answer (which Wardley expressly opposed on the ground that, since the court had already determined, *as a matter of law*, that no agency relationship - and therefore no fiduciary obligation - existed between Wardley and Welsh, all such matters were irrelevant (R.401-403)). In his bench ruling, and later written order,



denying Welsh's motion to amend, the court made clear that all such issues had been foreclosed on summary judgment, and that further proceedings would be limited to the question of whether there existed a "net listing" between the parties. Given the lower court's erroneous ruling on the law concerning the agency relationship between the parties, Welsh is entitled to address to this court the full nature and scope of Wardley's breach of its fiduciary obligations.

### POINT III

WARDLEY ACTED AS AGENT FOR WELSH, LEON PETERSON, OR BOTH, UNDER UTAH STATUTORY LAW

At 3. of its opposing brief, Wardley attempts to sidestep the clear import of Utah's statutory and regulatory scheme concerning licensed real estate brokers and agents by claiming that it was entitled to function as a "coordinating agent" (i.e., having no fiduciary obligation to buyer or seller), based on nothing but a *post-transaction* writing, to which Wardley was not even a party, purporting to disclaim any agency relationship as an accommodation to the buyer. In other words, in the wake of the very confusion created by its own failure to abide by Utah laws and regulations governing the disclosure of, and consent to, real estate agency relationships, Wardley attempts to seize upon a writing created after the fact, as a vehicle for excusing its own non-compliance with governing law, while still collecting its commission.

Wardley claims that Welsh's fundamental position - that a licensed broker or agent in Utah may not be a "coordinating agent" having no fiduciary obligations to the parties - "is inaccurate and

is not supported by case law, statute, rule or regulation" (Opposing Brief at p.14). Yet not one statute or case is cited in support of its position. Wardley's only citation is an inexplicable reference to R.162-6-1.6.1.9, which forbids a licensed agent to pay a finder's fee or other consideration to an unlicensed person or entity for referring a prospect. How this prohibition permits a licensee to avoid all fiduciary obligations to either principal in a real estate transaction by simply declaring itself a "coordinating broker" is not explained. Wardley's complete failure to address its noncompliance with Utah's regulatory scheme governing real estate licensees only punctuates the fact of its violations, and mandates the reversal of the lower court's ruling on summary judgment.

At pp. 15-16 of its brief, Wardley apparently argues that Welsh somehow satisfied Wardley's pre-contract disclosure requirements imposed by law through a post-transaction writing. In support of the argument, Wardley cites to Rule R.162-6-2.7, which requires full disclosure "prior to the buyer and seller. . .entering into a binding agreement with each other". The evidence before the lower court on Wardley's motion for summary judgment was undisputed that Welsh went to the final execution of the real estate contract with Leon Peterson understanding that Wardley was acting as Peterson's agent; only upon formulating the final written contract did the parties discover that, in fact, each of them believed that Wardley was representing the other. Wardley should not be permitted to shelter behind the parties' subsequent

efforts to resolve the problem created by its violation of law as a means to circumvent the application of that law.

#### POINT IV

WELSH DID NOT REFUSE TO ALLOW WARDLEY TO ACT AS HIS AGENT.

At pp. 17-18 of its brief, Wardley claims that it is exempt from responsibility to comply with law applicable to real estate agents by reason of Welsh's "refusal" to allow Wardley to "act as his agent". Wardley's argument ignores the fact that, at the time it granted summary judgment herein, the lower court was faced with declarations of Welsh, Randy Young, and others establishing that, whatever the labels placed on the relationship may have been, Wardley was, in fact, acting as Welsh's agent, actively seeking buyers for property owned by Welsh, with the understanding that he would receive a commission in the amount of whatever sales price he (Young) set, less \$18,500.00 per acre to Welsh. To characterize this as other than an agency relationship is to ignore completely the clear, plain and unambiguous language of the statutory and regulatory framework discussed at pp. 21-32 of Welsh's opening brief.

It is certainly true, as set out in his own affidavit, that Welsh *believed* that Wardley was Leon Peterson's agent throughout the transaction. Wardley's agency status, however, is established herein under the totality of circumstances, and not by the mutually-inconsistent understandings of the principals in the transaction (which understanding was generated by Wardley's failure to act in accordance with state law).

## POINT V

DUTIES APPLICABLE TO REAL ESTATE AGENTS GENERALLY  
ARE INCUMBENT UPON WARDLEY.

At Point V of its opposing brief, Wardley attempts to avoid the application of Utah law to its conduct by arguing that the cited provisions of the Utah Code and the Utah Administrative Code relate strictly to relations between agents and principals. Since Wardley was functioning as a "coordinating agent", it argues, these provisions have no application.

This argument was adequately addressed in Welsh's opening brief. Here, it only need be observed that Wardley's position simply begs the question whether (1) it was acting as an agent in this transaction or not, or (2) whether, agency relationship or no, it is required as a licensee under the laws of the state of Utah to abide by the provisions applicable to such licensees generally. The answer to both these questions is clearly in the affirmative -- see opening brief at pages 21-32.

## POINT VI

WARDLEY'S RELATIONSHIP WITH WELSH CONSTITUTED AN  
UNLAWFUL AND PROHIBITED "NET LISTING".

At pages 21-23 of its opposing brief, Wardley argues that no "net listing" existed between the parties, since the real estate agency contract specified a sum certain as commission to Wardley.

Wardley attempted to argue this position at trial, and the fallacy thereof were quickly pointed out by witness Arnold Stringham -- the contract between Welsh and Leon Peterson was not a listing agreement at all, but a contract of purchase and sale (R.

692-693). In any transaction involving a net listing, where the agent has produced a buyer willing to purchase, the final contract will set out a sum certain as purchase price (and therefore a sum certain commission). The fact that the final agreement sets the amount which will be paid to the listing agent does not vitiate the nature of the prior listing agreement as a "net listing", provided the other elements thereof are met.

For the same reason, Wardley may not rely upon the terms of the purchase and sale agreement between Welsh and Leon Peterson as precluding consideration of the true nature of the agency relationships between Welsh and Wardley under the parol evidence rule. As pointed out elsewhere, Wardley was not even a party to the agreement between Welsh and Leon Peterson; as such, that agreement was clearly not intended as an integration of any agency, listing or net listing arrangement between Wardley and Welsh, and the parol evidence rule does not preclude establishing the existence of such an arrangement -- see *Union Bank v. Swenson*, 707 P. 2d 663 (Utah 1985); *Lee v. Kimura*, 634 P. 2d 1043 (Haw. App. 1981).

With respect to Wardley's reliance on the non-existence of a listing agreement of any kind between the parties, see Points III-V, above.

#### POINT VII

THE TRIAL COURT IMPROPERLY DENIED WELSH'S MOTION FOR  
LEAVE TO AMEND HIS ANSWER.

Contrary to Wardley's assertion, at page 23-26 of the proposing brief, Welsh's motion to amend his answer prior to trial

was not an attempt to transform or expand the issues pending before the court. It was, rather, an attempt to frame the pleadings to reflect the issues that had been developed in discovery and motion practice prior to that time. It is acknowledged that many of the issues raised by the proposed amended answer had already been addressed and ruled upon by the court incident to Wardley's summary judgment motion. Nevertheless, Welsh was entitled to an order of the court amending the pleadings to reflect properly the full scope of the parties' dispute herein. Such amendment is clearly contemplated by Rule 15(b), Utah Rules of Civil Procedure, and would have served to clarify and define the issues both for the remaining disposition before the trial court, and incident to this appeal. The whole thrust of the law surrounding the amendment of pleadings, both prior to and even during or following trial, is to afford the parties to plead and argue whatever legitimate contentions they have pertaining to their dispute. *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86 (1963); *Timm v. Dewsnup*, 851 P. 2d 1178 (Utah 1993). Indeed, the proposed amendment would have clarified the issues both for the trial court and for this appeal, avoiding the very dispute raised at Point 2 of Wardley's brief.

#### ARGUMENT ON CROSS-APPEAL

THE TRIAL COURT PROPERLY DENIED WARDLEY AN AWARD OF ATTORNEYS FEES.

Wardley's sole issue on cross appeal is that the lower court should have awarded it attorneys fees. Reliance in this regard is placed exclusively on the May 31, 1994 real estate purchase contract between Welsh and Leon Peterson.

Attorney's fees are not recoverable as a matter of course in litigation. Rather, a prevailing party litigant may recover attorney's fees only where such recovery is contracted for by the parties to an agreement, or where permitted by statute or mandated by equity. See *Ranch Homes, Inc. v. The Greater Park Corporation*, 592 P.2d 620 (Utah 1979); *B&R Supply Co. v. Bringham*, 28 Utah 2d 442, 503 P.2d 1216 (1972); *Blake v. Blake*, 17 Utah 2d 369, 412 P.2d 454 (1966). *The burden of proof in establishing contractual right of attorney's fees rests with the claimant:*

[A] party requesting an award of attorney's fees has the burden of presenting evidence sufficient to support the award.

*Salmon v. Davis County*, 916 P. 2d 890, 893 (Utah 1996).

The rights of a beneficiary to a contract to which it is not a party, like all other rights and obligations arising under private agreement, are a function of the intent of the contracting parties. As stated in *Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314 (Utah 1982):

Generally, the rights of a third-party beneficiary are determined by the intentions of the parties to the subject contract. [Citation omitted] Where it appears from the promise or the contracting situation that the parties *intended* that a third party receive a benefit, then the third party may enforce his rights in the courts and is deemed a donee beneficiary. . . . But where any benefits to a person are incidental to the performance of the promise and such person is neither a donee nor a creditor beneficiary, he is a stranger for the promise and they assert no rights thereunder.

652 P.2d at p. 1315 (emphasis added). The intent of the parties to a written contract is to be determined, if possible, first by examination of the four corners of the contract itself; if the

language of the writing is ambiguous, the intent of the contracting parties may be shown by extrinsic evidence. *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766 (Utah 1995); *Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co.*, 844 P.2d 322 (Utah 1992); *C&Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47 (Utah App. 1995).

Before trial, Wardley argued its right, as a non-party beneficiary under the contract, to attorney's fees as a matter of law; the court rejected this argument and set the matter for trial. At trial, Wardley presented no evidence whatever of its right to attorney's fees under the contract. At the conclusion of evidence, though, Wardley again attempted to argue that the May 31, 1994 agreement plainly and unambiguously manifests, on its face, an intent of the contracting parties to bestow a right of attorney's fees on Wardley.

The trial court rejected Wardley's argument in this regard, holding that the language of the agreement did not unambiguously manifest an intent that Wardley be permitted to recover attorneys fees incident to enforcing any rights which it may have under the contract, observing that Wardley had presented no evidence whatever on the issue at trial.

On appeal, Wardley argues that (1) the contract should have been strictly construed against Welsh as its drafter, (2) the wording of the contract unambiguously conferred upon Wardley the right to recover attorneys fees, and (3) other jurisdictions that



have awarded attorneys fees to third-party beneficiaries. None of these positions has merit.

A. The Lower Court is Not Obligated to Construe the Contract Against the Drafter.

Wardley first argues that, given the uncertainty of the contract language regarding the rights of a non-party beneficiary to recover attorneys fees, the contract should have been construed against Welsh as the drafter of the language in question, reliance is placed on *Trolley Square Assoc. v. Nielson*, 886 P.2d 61 (Utah 1994), and *Wilburn v. Interstate Electric*, 748 P.2d 582 (Utah App. 1988). Wardley's theory in this regard fails on two fundamental points.

First, the ambiguous language concerning the right of a party to recover attorneys fees was not drafted by Welsh at all. It was part of the printed form used by both Welsh and Leon Peterson in framing the transaction.

A far more fundamental flaw, however, is the fact that the rule of contract interpretation in Wardley's cited cases assumes that *no extrinsic evidence* has been adduced to determine the contracting parties' intent. In this regard, Wardley flatly states--without any support whatever--that there *was* no extrinsic evidence presented to a lower court on this issue. In this regard, Wardley has not only failed to marshal evidence actually presented to the lower court in compliance with the argument addressed at Point I of its brief, but has flatly mischaracterized the evidence presented:

Q: Grant, when you signed Defendant's Exhibit 2, the contract (unintelligible) with Leon Peterson, before you signed that, the very next meeting that you had with him, did you and he have any conversation about whether or not either one of you had intended that Wardley get attorneys fees if they had to sue for their commission?

A: No discussion whatsoever.

. . . . .

Q: . . . [D]id you have any conversation with Mr. Peterson at any time other than the time you signed the agreement concerning whether or not Wardley would have an entitlement to attorneys fees if they didn't get that commission?

A: No.

Q: Was it ever your intent in signing that agreement that if Wardley didn't get their attorneys fees they would be able to collect--or didn't get their commission, they would be able to collect--

. . . . .

A: No."

(R. 1717-719.)

According to the undisputed evidence at trial, therefore, the contracting parties--Welsh and Leon Peterson--had no discussions establishing an intent to confer upon Wardley the right to recover attorneys fees incident to commission collections under the contract, and Welsh had no intention that such be the case. Only if the evidence is completely lacking, or in conflict, is the court to construe ambiguous terms against the drafter *Allstate Enterprises, Inc. v. Heriford*, 772 P. 2d 466 (Utah 1989). Here, the uncontested evidence established no intent to confer contractual rights of attorneys fees recovery upon Wardley. As

such, the lower court properly ruled that no such rights were intended and did not exist.

B. Language of the Contract is at Best Ambiguous with Respect to Wardley's Rights to Attorneys Fees.

Wardley next argues that the contract, plainly and ambiguously on its face, confers rights upon Wardley, as a non-party beneficiary, to recover attorneys fees.

It is undisputed, in this regard, that plaintiff is not a "party" to the contract according to the customary usage of that term. Contracting parties, by definition, are those persons or entities agreeing with each other - *see Restatement 2d, Contracts, § 9*. Plaintiff was not an agreeing party to the contract of May 31, 1994—it had no role whatever in negotiating or finalizing any of the terms thereof, and learned of the contract only after the fact. Any rights which plaintiff may have under the contract, as admitted in its own pleadings, arise as a *non-party beneficiary*:

Third-party beneficiaries are 'persons who are recognized as having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration' [citation omitted]. For a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct benefit upon the third party must be clear. [Citation omitted].

*Rio Algom Corp. v. GIMCO, Ltd.*, 618 P.2d 497, 506 (Utah 1980). The printed form's reference to "parties", therefore, establishes if anything that Wardley had no rights thereunder.

C. Wardley Has No Cause of Action for Attorneys Fees Under Utah Code Ann. § 78-27-56.5.

Wardley next claims that under Utah Code Ann. § 78-27-56.5, even though it was not a party to the contract under which it is pursuing, and even though it was undisputed that the contracting parties evidenced no intent (within the four corners of the written contract or by extrinsic evidence) to confer a right to recover attorney's fees upon it, plaintiff is entitled to attorney's fees as a matter of law because the contracting parties conferred the right of recovery of attorney's fees upon each other.

To begin with, Wardley's claim in this respect is untimely raised. The complaint in this action makes no mention of any statutory right to recover attorney's fees, including the provision on which it now seeks to rely. The complaint refers exclusively to the language of the contract which, as shown above, fails to confer upon it any right to recover attorney's fees. It is well-established that any statutory claim for an award of attorney's fees which is not raised in the pleadings is deemed waived. See *Ledger Construction, Inc. v. Robert, Inc.*, 550 P.2d 212 (Utah 1976); *Christensen v. Farmers Insurance Exchange*, 669 P.2d 1236 (Utah 1983); *Projects Unlimited v. Copper State Thrift*, 798 P.2d 738 (Utah 1990).

Even disregarding plaintiff's failure to preserve its statutory claim for attorney's fees in the pleadings, however, the claim fails on its face. Utah Code Ann. § 78-26-56.5 was intended for one purpose only: to make the right to recover attorney's fees reciprocal in any agreement where it has been reserved to one, but not the other, party to the contract. No Utah case law has ever

extended rights under the statute to non-parties suing under an agreement. Debates in both houses of the Utah Legislature concerning House Bill 175 of 1986 (enacted as Utah Code Ann. § 78-26-56.5), moreover, make clear that the policy behind the provision was limited to rights as between contracting parties:

If these salesmen come to the door of our elderly citizens and have them sign a contract for services, if their written contract provides that if they do not conform with the terms of the agreement, that they may take them to court and require - and collect attorney's fees. However, if the party feels they have been defrauded or have some other defense, if they go to fight it, they win, they may have won, but they still have to pay for their own attorneys' fees, but if they'd lost, they would have to pay the other guy's attorneys' fees. All this says, you notice the bill, is that a court may award costs and attorneys' fees to either party that prevails in a civil action based upon any promissory note, contract or other writing executed after April 28th...If one party can recover also it's reciprocal. And this would just make it fair.

House Debate on House Bill No. 175, January 27, 1986.

Currently under the law, you can only have attorneys' fees awarded to you if it's provided by the contract or by statute. For example on lien law, if you file a lien it's by statute - you can add attorney's fees onto it. Many times contracts are written with what we call "boiler plate". In other words, they write paragraphs and paragraphs and paragraphs in the contract to protect whoever may draw up the contract. And what generally these boiler plates say is that one party can get attorneys' fees but not the other party. What this Bill simply says is if the contract is like that, then it becomes mutual. That either party, whoever may be the prevailing party, can then be awarded attorneys' fees.

Senate Debate on House Bill No. 175, February 20, 1986.

If an agreement - if somebody presents you with a contract and in that contract it says that if you decide you have the right to get attorney's fees and it doesn't say, there is no reciprocal agreement in

the contract. This says that if one of them gets it, you both get it. So, if one of them -if the document or contract or note permits one party to prevail, to get attorney's fees if you prevail, the law would now say the winning party, regardless, so it goes both ways, regardless of how it says in the contract.

Senate Debate on House Bill 175, February 25, 1986. The purpose of the statute's framers, in other words, was to avoid the situation where one *contracting party* is entitled to attorney's fees in the event of breach *by the other contracting party*, but not the reverse. It has no application to situations such as that before the court, where a *non-party beneficiary* is seeking an award of attorney's fees pursuant to a contract where *neither* contracting party intended such an award as part of their agreement. It is not the function of the judiciary to expand the application of a statute beyond the intent of its framers, but to give effect to that intent in light of the statute's underlying policy and legislative history. *Hansen v. Salt Lake County*, 794 P. 2d 838 (Utah 1990).

Wardley attempts to argue cases from Arizona and Oregon in support of its claim for attorneys fees under the Utah Statute. Neither case is applicable.

*National Indemnity Company v. The St. Paul Insurance Company*, 150 Ariz. 492, 724 P.2d 578 (Ct. App. Ariz. 1985) dealt with Arizona's statute which is completely dissimilar from the Utah statute, providing that attorney's fees may be recovered in an action "arising out of a contract, express or implied" -- A.R.S. § 12-341.01A. *Golden West Insulation, Inc. v. Stardust Investment*

Corp., 47 Ore. App. 493, 615 P.2d 1048 (Ct. App. Ore. 1980) dealt with an erroneous claim by a contracting party against an individual whom the plaintiff *believed* to be a party to the contract, but who in fact was not. The opinion held that, under these circumstances, the non-party to the contract -- having established that he was not a contracting party -- was entitled to recover of attorney's fees, since the plaintiff would have recovered attorney's fees if the contrary had been proven. The case has no application to the facts before the Court in this appeal.

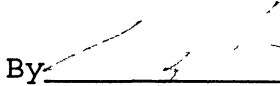
#### CONCLUSION

If Wardley was not acting as Welsh's agent, pursuant to a listing agreement covering the property at issue, it has no right as a licensed agent to recover a commission for the services which it claims earned the commission. If Wardley was Welsh's agent, its violation of numerous statutory and regulatory provisions preclude the recovery of a commission.

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 to the direction to enter judgment in favor of Welsh and against Wardley.

DATED this 22<sup>nd</sup> day of October, 1997.

JONES, WALDO, HOLBROOK & McDONOUGH

By   
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Vincent C. Rampton  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 22<sup>d</sup> day of October, 1997, I caused to be hand delivered, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

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