

1997

Wardley Corporation v. Grant Welsh : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

WARDLEY CORPORATION,	:	
	:	
Plaintiff, Appellee and	:	
Cross-Appellant,	:	Appeal No. 970074
	:	
v.	:	Priority No. 15
	:	
GRANT WELSH,	:	
	:	
Defendant and Appellant.	:	

BRIEF OF APPELLEE AND CROSS-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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UTAH RULES OF CIVIL PROCEDURE Rule 52(a) 1

JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78-2a-3(2)(j).

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

1. Whether the trial court erred as a matter of law in holding that the contract was ambiguous as to the right of a prevailing third-party beneficiary, named in the contract but not a signatory to the contract, to an award of attorney's fees in the face of contractual language which states: "In any action arising out of this contract, the prevailing party shall be entitled to costs and reasonable attorney's fees." (Preserved at R. at 4-5, 235-36, and 416-25.)

Standard of Review: Correctness. Interwest Construction v. Palmer, 923 P.2d 1350 (Utah 1996) ("Determining whether a contract is ambiguous presents a threshold question of law, which we review for correctness.")

2. If the contract is found to be ambiguous as a matter of law, whether the trial court correctly and appropriately interpreted the attorney's fee provision of the contract in denying the Plaintiff's claim for attorney's fees. (Preserved at R. at 4-5, 235-36, and 416-25.)

Standard of Review: Clearly erroneous. Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc., 865 P.2d 1382 (Utah App. 1993); Rule 52(a) of the UTAH RULES OF CIVIL PROCEDURE.

there never was a listing arrangement between the Wardley and Welsh because Welsh refused to enter into any such listing with Wardley, and, since there was no listing, there was no net listing. (The Court's oral ruling is included as Attachment 3 and the Court's written Findings of Fact and Conclusions of Law are included as Attachment 4.) (R. at 465 and 764-68.) Accordingly, judgment in the amount of \$15,173.75, plus interest thereon, was entered in Wardley's favor for the full amount of the commissions. (R. at 467-68.) (The Judgment is included as Attachment 5.) At the conclusion of trial, the Court asked the parties to submit additional memoranda on the issue of attorney's fees and costs. After reviewing those memoranda, the trial court held that the Contract was ambiguous as to whether Wardley was entitled to its attorney's fees, and since extrinsic evidence did not clarify the intent of the parties, denied Wardley's attorney's fees. (R. at 477-78.) (The Supplemental Findings of Fact and Conclusions of Law are included as Attachment 6.) The trial court did award Wardley its costs, including the cost of the additional depositions requested by Welsh at the first summary judgment hearing. (R. at 477-78.) (The Order on Attorneys' Fees and Costs is included as Attachment 7.)

Welsh has appealed from the judgment awarding Wardley's commissions. (R. at 471-72.) Wardley has appealed the trial court's decision denying its attorney's fees under the Contract. (R. at 495-96; 502-04.)

STATEMENT OF FACTS

Prior to May 31, 1994, 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"). (R. at 1.) Wardley is a real estate brokerage and Randy Young ("Young") is a real estate agent licensed through Wardley. (R. at 2,94.) Prior to May 31, 1994, Young and Welsh, who is a broker himself and who was interested in selling the Subject Property, discussed Young's possibly finding a buyer for the Subject Property and earning a commission pursuant thereto. (R. at 463, 635.) Welsh repeatedly refused to grant Young and Wardley a listing on the Subject Property. (R. at 618.) Randy Young then introduced Welsh to Leon Peterson ("Peterson") as a potential buyer for the Subject Property and informed Welsh of Peterson's interest in the property. (R. at 98, 463.) Pursuant to negotiations directly between Welsh and Peterson, Welsh and Peterson on or about May 31, 1994, entered into the Contract, which was written by Welsh, for Welsh's sale of the Subject Property. (R. at 99, 647.) At the time of the execution of the Contract, Welsh and Peterson also entered into an "Addendum No. 1," which Welsh also wrote in his own handwriting, which provides, "While Wardley BH&G has no agency relationship with neither the Seller nor the Buyer, the Seller agrees to pay \$500.00 per acre to Wardley BH&G, at settlement." (R. at 277.)

On or about July 19, 1994, Welsh conveyed to Peterson, as a partial release under the contract, approximately 21 acres of the property, and Welsh paid Wardley the full commission of \$10,556.80 for that portion of the property. (R. at 95.) Disputes subsequently arose between Welsh and Peterson, and they eventually entered into a Settlement Agreement, dated April 10, 1995, which specifically incorporated into the Settlement Agreement the terms of the Contract, which included the provisions of Addendum No. 1. (R. at 95.)

On or about April 24, 1995, Welsh conveyed to Peterson an additional 16.70 acres of the property but, unlike the payment at the time of the first release, refused to pay Wardley's commission of \$8,350.70. (R. at 95.) Again, on May 26, 1995, Welsh conveyed to Peterson another 13.6475 acres of property, and Welsh again refused to pay Wardley's \$6,823.80 commission. (R. at 96.) Wardley brought this action to enforce the Contract, which Welsh himself wrote, providing for payment of the commissions owing. (R. at 1-5.) Wardley also asserted a claim for its attorney's fees and costs incurred in bringing this action to enforce the contract, based upon the contract language stating: "In any action arising out of this contract, the prevailing party shall be entitled to costs and reasonable attorney's fee." (R. at 4.)

At trial, Wardley prevailed on the merits and was awarded judgment against Welsh for the commissions. (R. at 467-68.) The trial court, taking the issue of attorney's fees and costs under advisement, subsequently determined that the contract was ambiguous as to

whether the attorney's fee provision applied to other than the signatories to the contract. (R. at 477-78.) Accordingly, the Court denied Plaintiff's claim for attorney's fees, awarding only costs to the Plaintiff. (R. at 499-500.)

SUMMARY OF ARGUMENTS

If an appellant wishes to challenge the factual findings of the trial court, on appeal the appellant must first marshal all of the evidence in support of those findings and demonstrate that, in spite of this evidence, they are clearly erroneous being against the clear weight of the evidence. As Welsh has failed to marshal the evidence in support of the trial court's factual findings, none of those findings may be disturbed in this appeal.

Welsh has also improperly tried to present new arguments and issues in this appeal. Specifically, he attempts for the first time to raise argument relating to alleging fiduciary duties and breaches thereof which Welsh previously failed to present to the trial court when these issues were pending on Wardley's Motion for summary judgment. But, in seeking to overturn the trial court's ruling granting partial summary judgment, Welsh is limited to the arguments, issues, and evidence raised or presented at the trial court level. Wardley's response to these new arguments is made subject to this specific objection.

Welsh claims that Wardley must have acted as buyer's agent, seller's agent, or as a dual agent in the transaction herein. This position, however, is not supported by Utah law, which does not limit the roles a real estate agent can legally assume to that extent. Further,

the very terms of the Contract drafted by Welsh himself entitle Wardley to a commission by virtue of its role as a finder and without assuming any of these agency roles asserted by Welsh. Welsh, who is a broker himself, created the very situation which he claims is precluded by law. He only now argues in favor of the existence of the agency relationship, which he refused to enter into, to avoid the obligation for commission. Since Welsh negotiated and documented the nature of this relationship with Wardley, he cannot legitimately argue that a different relationship existed in an obvious attempt to avoid paying the balance of the commission owing.

Fiduciary relationships arise only by contract or by circumstances where one party has been induced to relax the care and vigilance they would otherwise exercise. In this case, Welsh intentionally precluded a fiduciary relationship by the very wording of the contract, and he failed to allege any circumstance showing that he as a real estate broker had been induced to relax the care and vigilance he would have otherwise exercised in this transaction. Accordingly, the trial court properly held that no fiduciary relationship existed. Even if a fiduciary relationship had existed, Welsh seeks to impose duties on Wardley which are beyond those imposed by Utah law.

The trial court properly determined that the transaction herein did not constitute a net listing. A net listing is defined by Rule R162-1-2.11 of the UTAH ADMINISTRATIVE CODE as, "A listing wherein the amount of real estate commission is the difference between the

selling price of the property and the minimum price set by the seller.” Welsh refused to enter in to any listing agreement with Wardley, and subsequently reiterated in the Contract and by letter to Young that Wardley was not his agent, whether listing or otherwise. The trial court, therefore, properly held that no listing existed between Welsh and Wardley, and thus, no net listing existed. Even if there were a listing, the commission is set by the terms of the Contract at a flat fee of \$500.00 per acre and in no way references either the selling price or the minimum amount required by the seller.

The trial court properly exercised its discretion in denying Welsh’s Motion to Amend his Answer only days before trial. Welsh’s Motion was served on the Wardley effectively one business day before trial, without any justification for the delay. All discovery had been completed by Welsh over a month before he brought his Motion, indicating that he was aware of the facts relating to the Motion long before it was filed. Further, the case had developed, partial summary judgment had been entered, and Wardley had prepared for trial based on the posture of the pleadings prior to the Motion. To allow amendment at this late point in the proceedings would have, therefore, resulted in unfair prejudice to Wardley.

The Contract provides that, “In any action arising out of this contract, the prevailing party should be awarded its attorney’s fees.” Pursuant to the unambiguous language of this provision, Wardley is entitled to an award of its attorney’s fees as it meets the only two requirements, namely (1) this is an action arising out of the Contract, and (2) Wardley is the

prevailing party in this action. The trial court, however, determined that the Contract was not clear on whether Wardley, as a named third-party beneficiary, could recover under this provision. Since the rights of a third-party beneficiary are determined by the intentions of the contracting parties, the trial court properly sought to determine those intentions. When the intent could not be determined by extrinsic evidence, the trial court then denied Wardley's claim. Under the rules of contract interpretation, however, when the intent of the parties cannot be determined by extrinsic evidence, the next step is to interpret the contract against the drafter. Accordingly, any ambiguity in the contract herein should have been construed against Welsh as the drafter, allowing Wardley to recover its attorney's fees and costs and requiring reversal of the trial court's ruling on this issue.

ARGUMENT

I.

WELSH HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE COURT'S FACTUAL FINDINGS AND, THUS, THOSE FINDINGS OF FACT MAY NOT BE DISTURBED.

Following the trial in this action, the trial court entered findings of fact and later issued supplemental findings of fact relating to the issue of attorneys' fees. (R. at 462-66, 477-78 and 764-69.) Among the more significant of the Court's findings, are the following:

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

the letter from Defendant to Randy Young dated March 19, 1995, reaffirming their representation.

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.

(Findings of Fact and Conclusions of Law, R. at 465.) All of the trial court's factual findings must remain undisturbed in this appeal since Welsh has failed to marshal the evidence in favor of the Court's findings prior to setting forth his arguments claiming that those findings are erroneous. That is a necessary initial step in challenging the trial court's factual determinations:

To successfully challenge a trial court's factual findings, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Jacobs v. Hafen, 875 P.2d 559, 561 (Utah App. 1994), *quoting* In re Estate of Bartel, 776 P.2d 885, 886 (Utah 1989); Estate v. Walker, 743 P.2d 191, 193 (Utah 1987). If the appellant fails to marshal the evidence as required above, the appellate court assumes that the record supports the findings of the trial court and the trial court's findings are not disturbed. Jacobs at 561; Pasker, Gould, Ames & Weber v. Morris, 887 P.2d 872, 877 (Utah App. 1994); Alta Industries, Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993).) The Appellant has made no effort whatsoever to marshal the evidence in favor of the trial court's finding of fact and, accordingly, these findings must stand on appeal. Sanders v. Sharp, 806 P.2d

198, 199 (Utah 1991). Subject to this position that the Court's factual findings have not been properly marshaled by Welsh and, therefore, cannot be reversed by this appeal, Wardley responds to the arguments raised by Welsh as set forth below.

II.

WELSH CANNOT RAISE NEW ISSUES AND ARGUMENTS ON APPEAL

In both Welsh's written and oral arguments in opposition to Wardley's Motion for Summary Judgment, Welsh argued that Wardley had breached fiduciary duties owing to him and was thus precluded from receiving a commission. Even assuming, however, for sake of argument that an agency relationship did exist, Welsh's claims of breach under any fiduciary duties owed, as set forth in his Memorandum in Opposition to the Summary Judgment, were limited to the supposed "misrepresenting the nature of [Young's] agency relationship between the parties; miscommunicating or withholding information during the course of delicate negotiations to resolve a dispute over the real estate purchase contract which ultimately led to a substantial loss of profit for the seller on a final phase of the subdivision." (R. at 122.) Further, in oral argument, the trial court specifically asked Welsh's counsel, assuming there was an agency or fiduciary relationship, "Where's the breach?" Welsh's counsel then provided only two bases for breach, namely, (1) an allegation (which notably was not properly supported by affidavit) that Young had improperly taken Peterson's side when disputes arose between Welsh and Peterson, resulting in an alleged breach of a

fiduciary duty of loyalty, and (2) an allegation that Young breached some duty of loyalty by attending the closing with Peterson (which was shown, later in the hearing, to be a factual misstatement of Peterson's deposition testimony). (R. at 547-49.) These issues and arguments contrast sharply with detailed and lengthy arguments presented in Welsh's brief relating to fiduciary duties and the breach thereof.

In this appeal, Welsh attempts to argue additional duties owed and subsequently breached by reference to numerous regulations that were never cited prior to this appeal. This he cannot do. In challenging the trial court's entry of partial summary judgment, Welsh is limited to the issues, arguments and evidence presented when the summary judgment motion was pending in the trial court. Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Baker v. Angus, 910 P.2d 427, 431, n.3 (Utah App. 1996). Welsh had been given additional time to take depositions, and yet his summary judgment response was supported only by his own affidavit which, as the trial court stated, offered "only conclusory statements without any evidentiary support" relating to the breaches alleged. (R. at 556.) Accordingly, Welsh's failure to take full advantage of his opportunity to defend against Wardley's motion when pending does not allow him to now seek reversal of the trial court's ruling by rearguing that motion with arguments never made to the trial court in the first instance. Wardley responds to the arguments raised in Welsh's brief subject to this objection. In short, while Welsh

claims some fiduciary breach, he has never satisfied the trial court as to what the breach was or how he was supposedly damaged.

III.

THE CONTRACT, HANDWRITTEN BY WELSH, EXPRESSLY PROVIDED THAT WARDLEY WAS ENTITLED TO A COMMISSION WITHOUT BEING AN AGENT OF EITHER THE BUYER OR THE SELLER.

The Defendant claims that Wardley must have acted as agent for either the buyer or the seller, or both, in the transaction herein. Yet, paragraph 12 of Addendum No. 1 to the Real Estate Purchase Contract, which was drafted by Welsh in his own handwriting, clearly provides: “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.” (R. at 647; R. at 277.) Welsh claims that Utah law permits real estate agents to act only as a buyer’s agent, a seller’s agent, or as a dual agent representing both parties, precluding any other status. Welsh’s position, however, is inaccurate and is not supported by case law, statute, rule or regulation. While the rules and regulations promulgated by the Division of Real Estate do contain provisions which apply specifically when a real estate agent is acting as a buyer’s or seller’s agent, these specific provisions do not preclude or prohibit a real estate agent from acting in any other capacity in a transaction. In fact, Rule R162-6-1.9 of the UTAH ADMINISTRATIVE CODE specifically contemplates that a real estate agent may be involved in a transaction in a role other than as the buyer’s agent or the seller’s agent by

referring to a finder's fee situation: "A licensee may not pay a finder's fee or give any valuable consideration to an unlicensed person or entity for referring a prospect in a real estate transaction, except as provided in this rule." Accordingly, Utah law, while limiting finder's fees only to licensed agents, obviously does not preclude or limit the capacities in which a licensed real estate agent can legally act in a transaction to only those of buyer's agent, seller's agent, or dual agent.

Further, Welsh, who is a licensed real estate broker himself and who is expected to be well aware of the laws and regulations relating to real estate agents, created the very situation which he claims is prohibited by Utah law. (R. at 647.) In fact, Randy Young was not even present at the time the contract referenced above was drafted and signed by Welsh and by the buyer, Leon Peterson, another broker. (R. at 611.) Now, in a transparent and ineffectual attempt to circumvent his obligation to pay the commission which he himself inserted into the contract, Welsh claims that Wardley violated Rule R162-6-2.7 of the Utah Administrative Code which states: "In every real estate transaction involving a licensee, **as agent or principal**, the licensee shall fully 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." (Emphasis supplied.) Notably, this rule only requires such a disclosure when a real estate agent is involved as an agent or principal; Welsh himself evidenced that Wardley was not an agent of either party in this transaction. Even if

this rule were applicable in the present situation, Welsh himself satisfied the agency disclosure requirements when he wrote into the contract that Wardley had no agency relationship with either the buyer or the seller. Since this statement was part of the Contract negotiated and signed by both parties, each was aware of the non-agency status between themselves and Wardley. Rule R162-6-2.7 does not specify the format of such a disclosure; and any “disclosure” from Wardley back to Welsh and Peterson would have been redundant and meaningless.

Welsh’s argument that Wardley represented at least one, and arguably both, of the parties herein is disingenuous since Welsh, ignoring his own specified language, is simply attempting to avoid an agreed obligation although he continually refused to enter into a listing agreement with Randy Young. (R. at 618.) Hence, Welsh himself created the situation wherein Wardley did not assume the fiduciary duties which Welsh now attempts to fabricate to avoid a commission. The Court should reject Welsh’s meritless position through his attempt to avoid the provisions in the contract he drafted. The trial court rejected Welsh’s “agency” argument on summary judgment, and Welsh now has no legitimate basis to overturn that ruling.

IV.

WELSH REFUSED TO ALLOW WARDLEY TO ACT AS HIS AGENT

Young and Wardley were precluded from being agents of either the buyer or the seller by the parties' refusal to agree to that relationship. In his brief, Welsh claims that Young and Wardley participated too actively in the transaction not to have been an agent of the parties. What is certain is that, by Welsh's own admission, he refused to enter into a listing agreement with Randy Young, wrote into the Contract with Leon Peterson that Wardley represented neither the buyer nor the seller, and then reiterated the fact that Young was not his agent and had no authority to represent him in a letter dated nearly one year after Welsh entered into the Contract with Leon Peterson, which stated, "I would like to remind you that you do not represent me in any way whatsoever, nor do you maintain any kind of agency relationship with me, whatsoever." (R. at 272, 618.) Thus, Welsh's own undisputed actions provided sufficient grounds to refute his agency arguments and the Court was well justified in granting partial summary judgment.

Welsh cannot on the one hand refuse to allow Wardley and Young to act as his agent and at the same time claim that they owe him all of the fiduciary duties and obligations of a seller's agent which arise only in an agency relationship. A fiduciary relationship only arises as follows:

A fiduciary or confidential relationship may be created by contract or by circumstances where equity will imply a higher duty in a relationship

because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise. In such a case, the evidence must demonstrate the placement of trust and reliance such that the nature of the relationship is clear.

Hal Taylor Assoc. v. UnionAmerica, Inc., 657 P.2d 743 (Utah 1982). It is abundantly clear, and the trial court so found, that Welsh refused any listing arrangement, did not want Wardley as his agent, drafted the Contract that way, and consistently thereafter (until this lawsuit) recognized no agency relationship. In fact, Welsh even had previously paid part of the commissions under the Contract. (R. at 95.) The trial court properly held that the Contract was unambiguous and fully integrated and that by its terms indicated that no agency relationship existed between Wardley and Welsh. The Court further held that Welsh had failed to present any evidence whatsoever, other than his own affidavit of conclusory statements without any evidentiary support, that a fiduciary relationship was created by Welsh relaxing the care and vigilance he would have otherwise exercised. (R. at 552-556.) Accordingly, the decision of the trial court in granting partial summary judgment should be affirmed.

V.

WELSH SEEKS TO IMPOSE DUTIES ON WARDLEY AND YOUNG WHICH ARE BEYOND THOSE IMPOSED BY UTAH LAW.

Welsh alleges that Wardley and Young violated provisions of Utah real estate law. However, as set forth below, none of the referenced sections were violated or, in fact, are applicable to the situation which existed in the present case.

(a) Rule R162-6-2.7 of the UTAH ADMINISTRATIVE CODE provides:

In every real estate transaction involving a licensee, as agent or principal, the licensee shall fully disclose in writing to 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 a part of the permanent file.

The inapplicability of this rule to the present case is fully argued above. This Rule was not violated and, indeed, does not apply.

(b) Rule R162-6-2.7.1 of the UTAH ADMINISTRATIVE CODE requires,

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 relationships(s) was provided to him/her. () (Buyer’s initials) () (Seller’s initials).”

The language required by this rule, in its very form, applies only to a situation where an agent represents a buyer or a seller. In this situation, Welsh insisted that Wardley represented

neither party, making this form inapplicable to the present case. Even if Wardley had been an agent of either the buyer or the seller, the real estate purchase contract was entered into by Welsh and Peterson in Randy Young's absence, precluding Young from inserting anything into that document. (R. at 99, 611.) Further, Welsh's disclosure in the Contract adequately defined and disclosed the relationship of the parties herein, making further form language meaningless.

(c) R162-6-1.11 of the UTAH ADMINISTRATIVE CODE, provides:

Failure to have a written agency agreement. To avoid representing more than one party without the informed consent of all parties, principals, broker and licensees acting on their behalf shall have written agency agreements **with their principals.**

(Emphasis added.) Since Welsh precluded an agency relationship, as fully set forth above, he in no way was Wardley's principal.

(d) Rule R162-6-2.16(1) and (2) of the UTAH ADMINISTRATIVE CODE list the duties of a seller's agent and a buyer's agent. This rule is also inapplicable since neither Wardley nor Young was an agent or, indeed, allowed to be an agent. It necessarily follows that neither owed Welsh duties as his agent, even assuming there was any damage to Welsh.

(e) Rule R162-6-2.16(3) of the UTAH ADMINISTRATIVE CODE sets forth duties of a dual agent. This section, by its very terms, applies only the situation where a real estate

agent is representing both the buyer and the seller in the same transaction, which, once again, is not the situation in this case, rendering this section inapplicable.

VI.

THE TRIAL COURT PROPERLY HELD THAT NO NET LISTING EXISTED.

In another argument rejected by the trial court, Welsh attempts to avoid his obligations by asserting that Wardley's arrangement with him was a "net listing," which, somehow, allegedly defeats the unambiguous rights to a commission under the Contract. Inherent in his argument, without adequate authority, is the assumption that a violation of that rule transcends a licensure issue and automatically precludes payment of a commission.

Rule R162-1-2.11 of the UTAH ADMINISTRATIVE CODE defines a net listing as: "A **listing** wherein the amount of real estate commission is the difference between the selling price of the Subject Property and the minimum price set by the seller." (Emphasis added.) The commission which is the subject of this action does not fall within the above definition because Wardley did not have a listing on the property in the first place. In fact, Grant Welsh adamantly refused to enter into a listing agreement with Randy Young and Wardley. (R. at 618.)

Even if a listing agreement had been entered into by Welsh and Wardley, the commission was not structured as a net listing. Wardley's right to commission is based upon the real estate purchase contract between the buyer and seller which states, in pertinent part,

“[t]he Seller agrees to pay \$500.00 per acre to Wardley BH&G, at settlement.” (R. at 277.) Significantly, the Contract does not describe Wardley’s commission as the difference between the selling price of the property and a minimum price set by the seller. Instead, Welsh documented the commission as a flat fee of \$500.00 per acre and in no way referenced either the selling price or the minimum amount required by the Seller.

In his brief, Welsh tries to argue that preliminary conversations between Randy Young and Grand Welsh somehow dictate that the \$500.00 per acre commission somehow is actually a prohibited net listing. Wardley’s claim for commissions, however, is based upon the Contract, drafted by Welsh, that by its own terms is a complete and integrated contract. Paragraph 14 of the Contract states, “This Instrument together with its addenda, any attached exhibits, and Seller Disclosures constitute the entire Contract between the parties and supercedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.” (R. at 276.) The parol evidence rule precludes evidence of prior negotiations attempting to vary the express terms of an integrated contract which contains such merger language. Eie v. St. Benedict’s Hospital, 638 P.2d 1190 (Utah 1981). Thus, Welsh may not, by some supposed prior oral discussions, seek to construe the \$500.00 per acre flat commission fee into something else.

Even if the prior conversations between Welsh and Young could properly be considered on the net listing question, Welsh's own expert, Arnold Stringham, admitted at trial that preliminary conversations regarding a net amount to the seller which result in a written agreement of a flat fee do not constitute a net listing, as follows:

Q. What I'm saying is we have talked about the fact that I want to end up with 20,000, and during our discussions we decide how I'm going to end up with the 20,000 by letting you have \$1,000 an acre out of the purchase price, and we write it up that way. Is that a net listing?

A. No.

(R. at 696.) Welsh and Young may have preliminarily discussed the amount Welsh needed to realize from the sale of his property and Welsh's preliminary thinking as to how he wanted to arrive there. The Contract, though, unambiguously sets the commission at \$500.00 per acre, which, as Welsh's own expert agreed, does not constitute a net listing. The trial court agreed. Welsh is simply attempting to re-plow the field of facts from which the trial court gleaned its findings. Moreover, Welsh has not defended the basis for his assumptions that any violation of the Real Estate Division rules automatically precludes a commission.

VII.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING WELSH'S MOTION TO AMEND HIS ANSWER ONLY DAYS BEFORE TRIAL.

Rule 15 of the UTAH RULES OF CIVIL PROCEDURE states that, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be

given when justice so requires." The decision of whether amendment should be allowed remains in the sound discretion of the trial court and should not be disturbed on appeal "unless appellant establishes an abuse of discretion resulting in prejudice." Chadwick v. Nielsen, 763 P.2d 817, 820 (Utah App. 1988); *see also*, Westley v. Farmer's Ins. Exchange, 663 P.2d 93 (Utah 1983). "Utah courts should consider the following factors in determining whether to allow amendment: (1) the timeliness of the motion; (2) the justification for delay; and (3) any resulting prejudice to the responding party." Swift Stop, Inc. v. Wight, 845 P.2d 250, 253 (Utah App. 1992); *see also*, Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1359 (Utah App. 1990). The trial court properly exercised its discretion in denying Welsh's Motion to Amend, as the factors which determine whether amendment should be allowed were not met, as set forth below.

A. Welsh's Motion to Amend Was Not Timely and Welsh Did Not Offer Adequate Justification for the Delay.

"Appellate courts uphold a trial court's denial of a motion to amend if the amendment is sought late in the course of litigation, if the movant was aware of the facts underlying the proposed amendment long before its filing, and if there is not adequate explanation for the delay." Swift Stop, 845 P.2d at 253. Wardley was served with Defendant's Motion to Amend Answer literally on the eve of the final dispositive trial in this action. The trial was set for Monday, December 16, 1996, but the Plaintiff was not served with Welsh's Motion to Amend until Thursday, December 12, 1996, after 5:00 p.m., leaving

only one full business day for the Plaintiff to fully respond to the Motion to Amend and to prepare for trial on any new issues raised in the Amended Answer. (R. at 393, 398.) Welsh had delayed these proceedings on a previous occasion when Wardley filed a Motion for Summary Judgment. Welsh sought and received in the initial summary judgment hearing generous leave of the court to continue the hearing to a later date to allow him to take “such depositions as the Defendant deems necessary for purposes of the Court’s consideration of this summary judgment.” (R. at 175-76.) In other words, had the trial court not cut Welch additional slack to find facts in his own favor which he did not have at the hearing, Welsh did not have legitimate basis to preclude entry of summary judgment at that point. Welsh was given until October 31, 1996, to complete these depositions, which constituted the final discovery conducted by Welsh in this action. (R. at 176.)

Following the completion of these depositions, the Court heard further argument on Wardley’s Motion for Summary Judgment and granted partial summary judgment in Wardley’s favor, scheduling trial on the remaining issue for November 21, 1996. (R. at 336-37; R. at 329.) As no new discovery was conducted after October 31, 1996, Welsh would have been aware of the facts upon which he later sought to amend his Answer at that time, yet he took no action to amend. The trial date was then continued to December 16, 1996, at Welsh’s request, when he changed counsel. (R. at 339-40.) In spite of the amount of time that passed after the completion of discovery, and the additional delays which occurred in the

proceedings, and despite the trial court's giving of generous leeway throughout the proceedings, Welsh waited until effectively one business day before trial to seek leave to amend, without offering any adequate reason for the delay. Based upon the untimeliness of Welsh's the Motion to Amend, the Court acted well within its discretion in denying that Motion.

B. Amendment Would Have Resulted Unfair Prejudice to Wardley.

At the time of the filing of Welsh's Motion to amend, the case had developed and partial summary judgment had been entered, based upon the posture of the pleadings. To allow amendment to raise new issues effectively one day before trial would clearly have resulted in an unfair disadvantage to Wardley. The Court in Chadwick recognized the merit of such concerns by stating, "The amendment of pleadings on the eve of trial causes great disruption to the legal process and is unfair to an opponent who has conducted discovery, fully prepared the case, and scheduled trial time based on the moving party's prior pleadings." If amendment had been allowed, at the very least, Wardley would be forced to seek a continuance of the trial date, would have had to again prepare for trial to address the new issues, and possibly would have been compelled to seek additional discovery on these issues. This disruption and delay in the proceedings would have resulted in unfair prejudice to Wardley, confirming that the trial court's denial of the Motion to Amend was proper.

ARGUMENT ON CROSS-APPEAL

I.

THE TRIAL COURT ERRED IN DENYING WARDLEY ITS ATTORNEYS' FEES

A. Any Ambiguity in the Contract Should Have Been Construed Against Welsh as the Drafter When the Intentions of the Contracting Parties Were Not Otherwise Revealed by Extrinsic Evidence.

Attorney's fees are recoverable if allowed by statute, contract, or if equity permits. Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 625-26 (Utah 1979). The Contract herein provides that attorneys' fees should be awarded as follows: "In **any action** arising out of this contract, the **prevailing party** shall be entitled to costs and reasonable attorney's fees." (Real Estate Purchase Contract at ¶ 17, R. at 424.) (Emphasis added). The trial court held, as a matter of law, that Wardley, as a third-party beneficiary to the contract, was not accorded rights under that section. Addendum #1 to Real Estate Purchase Contract specifically identifies and provides for the Plaintiff as a third-party beneficiary of the Contract, as follows:

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.

(R. at 425.)

The rights of third-party beneficiaries are determined by the intentions of the parties to the subject contract, and accordingly, in this case the trial court focused its efforts on

determining the intentions of the contracting parties to establish whether the attorney's fees provision applied to Wardley. Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314, 1315 (Utah 1982). The trial court found:

It is not clear from the contract whether the term "prevailing party" was intended to apply only to the original parties to the contract, or whether it may be extended to a third-party beneficiary such as the plaintiff. Because the contract is ambiguous on this point the Court must look to extrinsic evidence to determine the parties intent. There was no evidence at the trial on the application of the attorney's fee provision to the plaintiff. In the absence of such evidence the Court concludes that the plaintiff is not entitled to an award of attorney's fees.

(Supplemental Findings of Fact and Conclusions of Law; R. at 477-78.) The Court properly first referred to the contract to surmise the contracting parties' intentions.

It is a well-accepted principal of contract law that the court first looks to the "four corners of the agreement to determine the intentions of the parties. The use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement." Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). (Citations omitted.) When the Court determined, however, that there was no extrinsic evidence presented at trial regarding the application of the attorney's fee provision to Wardley, the contract should then have been construed against the drafter. In essence, the court provided Wardley the benefit of some, but not all, contract interpretation provisions. "If a contract is ambiguous, it will be construed against the drafter if extrinsic evidence fails to clarify the intent of the parties."

Trolley Square Associates v. Nielson, 886 P.2d 61, 64-64 (Utah App. 1994); *see also*, Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah App. 1988).

Instead of proceeding to the next step and construing the contract against the drafter when the contracting parties' intentions were not revealed by extrinsic evidence, the trial court improperly denied attorneys' fees without following this rule of contract interpretation. Construing the attorney's fee provision of the Contract against Welsh, as the drafter, would have resolved any ambiguity in that provision in Wardley's favor, entitling it to an award of its attorney's fees and requiring reversal of the trial court's decision on this issue.

B. The Unambiguous Wording of the Contract Entitles Wardley to Its Attorneys' Fees and Costs.

The attorneys' fee provision of the Contract contains no language restricting an award of attorneys fees to parties **to the Contract**. Instead, this provision is drafted in much broader terms, directing that a "party" who is entitled to its attorneys fees is the prevailing party in an action arising out of this contract--making no reference whatsoever to the parties to the Contract itself. The clear and unambiguous wording of the Contract requires that Wardley be awarded its attorneys' fees in this action, as both of the requirements of the attorney's fee provision are met: (1) This is an action arising out of the contract, and (2) Wardley is the prevailing party in this action. Even if the Contract were not clear on this point, which Wardley argues that it is, any ambiguities in the Contract as to whether Wardley,

as a named beneficiary, is appropriately entitled to attorney's fees should be construed against Welsh as the drafter of the contract for the reasons set forth above.

C. Other Jurisdictions Have Awarded Attorneys' Fees to a Third-Party Beneficiary As the Prevailing Party in an Action Based on the Contract.

While Utah has not specifically addressed the issue of whether a litigant who was not a signatory party to a contract can recover attorney's fees in an action based upon the contract, several neighboring jurisdictions have awarded attorney's fees to the prevailing party in a contract action, even when the successful party was not a party to the contract which formed the basis of the dispute. National Indemnity Co. v. St. Paul Insurance Companies, 724 P.2d 578, 581 (Ariz. App. 1985); Golden West Insulation v. Stardust Investment Corp., 615 P.2d 1048 (Or. App. 1980).

The Oregon Court of Appeals also addressed this issue in Golden West Insulation as the Court considered Oregon Revised Statutes 20.096(1), which states:

In any action or suit on a contract, where such contract specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the prevailing party, whether that party is the party specified in the contract or not, at trial or on appeal, shall be entitled to reasonable attorney fees in addition to costs and necessary disbursements.

The disputed contract in Golden West also provided that in the event of litigation, the prevailing party would be entitled to court costs and reasonable attorney fees. Id. at 1057. Accordingly, the Court held that the prevailing party, although not a party to the contract,

was entitled to attorneys fees. Id. at 1058. Wardley is equally entitled to its attorneys fees since both the disputed contract and the relevant statute similarly provide for such an award to the prevailing party as set forth below.

In jurisdictions where attorney's fees have been denied to third-party beneficiaries of a contract, the denial has been based upon other grounds which are clearly distinguishable from the present case. For example, the Washington Court of Appeals refused to grant attorney's fees to a third-party beneficiary under a contract because the terms of the contract were not central to the dispute and because the third-party beneficiary himself would not have been bound under the contract to pay attorney's fees. Watkins v. Restorative Care Center, Inc., 831 P.2d 1085, 1094 (Wash. App. Div. 1 1992). In the present case, the contract was central to the dispute and by statute the Plaintiff also arguably would have been bound by the attorney's fee provision of the contract as Utah law provides that the court may award attorney's fees to either party in a civil action if the contract allows at least one party to recover attorney's fees. UTAH CODE ANN. § 78-27-56.5.

UTAH CODE ANN. § 78-27-56.5 allows that when a contract provides for attorney's fees to at least one of the parties in an action based upon a written contract, the court may properly award attorney's fees to either party that prevails, by stating:

A court may award costs and attorney's fees to **either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986**, when the provisions of the

promissory note, written contract, or other writing **allow at least one party to recover attorney's fees.** (Emphasis Supplied).

The contract which is the basis of the action herein clearly provides for an award of attorney's fees to **at least** one party. Accordingly, in addition to the Plaintiff being entitled to its attorney's fees pursuant to the wording of the contract alone, the Plaintiff is, alternatively, entitled to such an award by operation of the above provision, which provides for attorney's fees to the prevailing party.

Welsh claims that since this statutory provision was not set forth by Wardley in its Complaint, Wardley cannot now claim its attorneys' fees based upon that statute. The sole basis, however, for Wardley's claim of attorneys' fees is the contract, which is then extended by statute. Without the contractual provisions, Wardley would have no basis for its claim, evidencing the fact that Wardley properly set forth its claim **based on the contract** in its pleadings.

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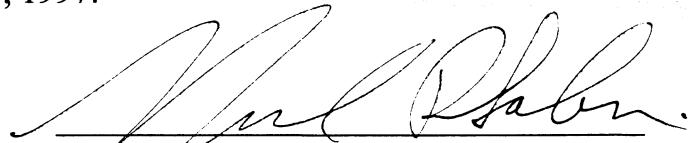
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CONCLUSION

For the reason set forth herein, Wardley respectfully requests that the decision of the trial court in granting partial summary judgment and in subsequently granting Wardley judgment for the full amount of its commissions under the Contract be affirmed, and, further, that the trial court's denial of Wardley's attorney's fees be reversed.

DATED this 22nd day of September, 1997.

A handwritten signature in cursive script, appearing to read "Neil R. Sabin", written over a horizontal line.

Neil R. Sabin

Annette F. Sorensen

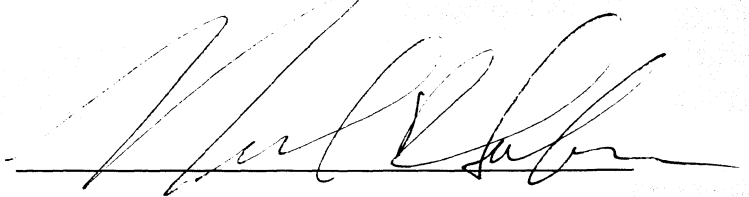
NIELSEN & SENIOR, P.C.

Attorneys for Plaintiff/Appellee
Cross-Appellant

CERTIFICATE OF SERVICE

I certify that on the 22nd day of September, 1997, I served a true and correct copy of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT**, by causing the same to be hand delivered to the following:

Vincent C. Rampton, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant/Appellant
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444

A handwritten signature in black ink, appearing to read "Vincent C. Rampton", is written over a horizontal line.

ADDENDUM

Tab 1



REAL ESTATE PURCHASE CONTRACT



This is a legally binding Contract. Utah State Law requires that licensed real estate agents use this form, but the Buyer and the Seller may legally agree in writing to alter or delete provisions of this form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

The Buyer, LEON FERNANDEZ, offers to purchase the Property described below and delivers to Brokerage, as Earnest Money Deposit \$ 20,000 In the form of CHECK to be deposited within three business days after Acceptance of this offer to purchase by all parties.

FEDERAL TRUSTMENT Co. Received by Common Title on May 31/94 (Date)
Brokerage Phone Number

OFFER TO PURCHASE

1. PROPERTY: 4800 WEST - FLOORS SOUTH TOWN PARKWAY R-17 F
City SLC County Salt Lake Utah DORIS ACRES

1.1 Included Items. Unless excluded herein, this sale shall include all fixtures presently attached to the Property: plumbing, heating, air-conditioning and venting fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, satellite dishes and system, wall-to-wall carpets, automatic garage door opener and transmitter(s), fencing, trees and shrubs. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: AA

1.2 Excluded Items. The following items are excluded from this sale AA

2. PURCHASE PRICE AND FINANCING. Buyer agrees to pay for the Property as follows:

\$ 20,000 Earnest Money Deposit

\$ Existing Loan: Buyer agrees to assume and pay an existing loan in this approximate amount presently payable at \$ _____ per month including principal, interest (presently at _____ % per annum), ☐ real estate taxes, ☐ property insurance premium and ☐ mortgage insurance premium. Buyer agrees to pay any transfer and assumption fees. Seller ☐ shall ☐ shall not be released from liability on said loan. Any net differences between the approximate balance of the loan shown above and the actual balance at Closing shall be adjusted in ☐ Cash ☐ Other _____.

\$ Proceeds from New Loan: Buyer reserves the right to apply for any of the following loans under the terms described below.

☐ Conventional ☐ FHA ☐ VA ☐ Other _____ Seller agrees to pay \$ _____ toward Discount Points and Buyer's other loan and closing costs, to be allocated at Buyer's discretion.

☐ For a fixed rate loan: Amortized and payable over _____ years, interest shall not exceed _____ % per annum; monthly principal and interest payment shall not exceed \$ _____, or

☐ For an Adjustable Rate Mortgage (ARM): Amortized and payable over _____ years; Initial interest rate shall not exceed _____ % per annum; Initial monthly principal and interest payments shall not exceed \$ _____. Maximum Life Time interest rate shall not exceed _____ % per annum.

\$ Seller Financing: (See attached Seller Financing Addendum)

\$ Other: 19,000 - 1st 10% AT DETERMINED RPT. SELLER AT CLOSING

\$ 360,000 Balance of Purchase Price in Cash at Closing 20.5 (A(14.4) ACRES X 19,000/000 = PROPOSED PRICE

\$ 389,000 Total Purchase Price APPROXIMATELY 11 LOTS (NOTE 1 & 2)

2.1 Existing/New Loan Application. Buyer agrees to make application for a loan specified above within _____ calendar days (Application Date) after Acceptance. Buyer will have made Loan Application only when Buyer has: (a) completed, signed, and delivered to the Lender the initial loan application and documentation required by the Lender; and (b) paid all loan application fees as required by the Lender. Buyer will continue to provide the Lender with any additional documentation as required by the Lender. If, within seven calendar days after receipt of written request from Seller, Buyer fails to provide to Seller written evidence that Buyer has made Loan Application by the Application Date, then Seller may, prior to the Qualification Date below, cancel this Contract by providing written notice to Buyer. The Brokerage, upon receipt of a copy of such written notice, shall release to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit without the requirement of any further written authorization from Buyer.

2.2 Qualification. Buyer and the Property must qualify for a loan for which application has been made under section 2.1 within _____ calendar days (Qualification Date) after Acceptance. The Property is deemed qualified if, on or before the Qualification Date, the Property, in its current condition and for the Buyer's intended use, has appraised at a value not less than the Total Purchase Price. Buyer is deemed qualified if, on or before the Qualification Date, the Lender verifies in writing that Buyer has been approved as of the verification date.

2.3 Qualification Contingency. If Seller has not previously voided this Contract as provided in Section 2.1, and either the Property or Buyer has failed to qualify on or before the Qualification Date, either party may cancel this Contract by providing written notice to the other party within three calendar days after the Qualification Date, otherwise Buyer and the Property are deemed qualified. The Brokerage, upon receipt of a copy of such written notice, shall return to Buyer the Earnest Money Deposit without the requirement of any further written authorization of Seller.

3. CLOSING. This transaction shall be closed on or before JULY 18, 1994. Closing shall occur when: (a) Buyer and Seller have signed and delivered to each other (or to the escrow/title company), all documents required by this Contract, by the Lender, by written escrow instructions and by applicable law; and (b) the monies required to be paid under these documents, have been delivered to the escrow/title company in the form of cashier's check, collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the escrow Closing fee, unless otherwise agreed by the parties in writing. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated as set forth in this Section. Unearned deposits on tenancies shall be transferred to Buyer at Closing. Prorations set forth in this Section, shall be made as of ☒ Date of Closing ☐ Date of possession ☐ other _____.

4. POSSESSION. Unless otherwise agreed in writing by the parties, Seller shall deliver possession to Buyer within 17 hours after Closing.

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract the listing agent _____ represents

☐ Seller ☐ Buyer, and the selling agent _____ represents ☐ Seller ☐ Buyer. Buyer and Seller confirm that prior to signing this Contract written disclosure of the agency relationship(s) was provided to him/her. () Buyer's Initials () Seller's Initials.

6. TITLE TO PROPERTY AND TITLE INSURANCE. (a) Seller has, or shall have at Closing, fee title to the Property and agrees to convey such title to Buyer by general warranty deed, free of financial encumbrances as warranted under Section 10.6; (b) Seller agrees to pay for and furnish Buyer at Closing with a current standard form owner's policy of title insurance in the amount of the Total Purchase Price; (c) the title policy shall conform with Seller's obligations under subsections (a) and (b) above. Unless otherwise agreed under subsection 8.4, the commitment shall conform with the title insurance commitment provided under Section 7.

7. SELLER DISCLOSURES. No later than _____ calendar days after Acceptance, Seller will deliver to Buyer the following Seller Disclosures: (a) a Seller property condition disclosure for the Property, signed and dated by Seller; (b) a commitment for the policy of title insurance required under Section 6, to be issued by the title insurance company chosen by Seller, including copies of all documents listed as Exceptions on the Commitment; (c) a copy of all loan documents relating to any loan now existing which will encumber the Property after Closing; and (d) a copy of all leases affecting the Property not expiring prior to Closing. Seller agrees to pay any title commitment cancellation charge under subsection (b).

8. GENERAL CONTINGENCIES. In addition to Qualification under Section 2.2 this offer is: (a) subject to Buyer's approval of the content of each of the items referenced in Section 7 above; and (b) ☐ is ☐ is not subject to Buyer's approval of an inspection of the Property. The inspection shall be paid for by Buyer and shall be conducted by an individual/company of Buyer's choice. Seller agrees to fully cooperate with such inspection and a walk-through inspection under Section 11 and to make the Property available for the same.

8.1 Buyer shall have _____ calendar days after Acceptance in which to review the content of Seller Disclosures, and, if the inspection contingency applies, to complete and evaluate the inspection of the Property, and to determine, in Buyer's sole discretion, the content of all Seller Disclosures (including the Property Inspection) is acceptable.

8.2 If Buyer does not deliver a written objection to Seller regarding a Seller Disclosure or the Property Inspection within the time provided in subsection 8.1 above, that document or inspection will be deemed approved or waived by Buyer.

8.3 If Buyer objects, Buyer and Seller shall have seven calendar days after receipt of the objections to resolve Buyer's objections. Seller shall not be required to resolve Buyer's objections. If Buyer's objections are not resolved within the seven calendar days, Buyer may void this Contract by providing written notice to Seller within the same seven calendar days. The Brokerage, upon receipt of a copy of Buyer's written notice, shall return to Buyer the Earnest Money Deposit without the requirement of any further written authorization from Seller. If this Contract is not voided by Buyer, Buyer's objection is deemed to have been waived. However, this waiver does not affect those items warranted in Section 11.

8.4 Resolution of Buyer's objections under Section 8.3 shall be in writing and shall be specifically enforceable as covenants of this Contract.

9. SPECIAL CONTINGENCIES. This offer is made subject to ADDENDUM #1.
The terms of attached Addendum # 1 are incorporated into this Contract by this reference.

10. SELLER'S LIMITED WARRANTIES. Seller's warranties to Buyer regarding the condition of the Property are limited to the following:

- 10.1 When seller delivers possession of the Property to Buyer, it will be broom-clean and free of debris and personal belongings;
- 10.2 Seller will deliver possession of the Property to Buyer with the plumbing, plumbed fixtures, heating, cooling, ventilating, electrical and sprinkler systems, appliances and fireplaces in working order;
- 10.3 Seller will deliver possession of the Property to Buyer with the roof and foundation free of leaks known to Seller;
- 10.4 Seller will deliver possession of the Property to Buyer with any private well or septic tank serving the Property in working order and in compliance with governmental regulations;
- 10.5 Seller will be responsible for repacking any of Seller's moving-related damage to the Property;
- 10.6 At Closing, Seller will bring current all financial obligations encumbering the Property which are assumed in writing by Buyer and will discharge all such obligations which Buyer has not so assumed; and
- 10.7 As of Closing, Seller has no knowledge of any claim or notice of an environmental, building or zoning code violation regarding the Property which has not been resolved.

11. VERIFICATION OF WARRANTED AND INCLUDED ITEMS. Before Closing, Buyer may conduct a "walk-through" inspection of the Property to determine whether or not items warranted by Seller in Section 10.1, 10.2, 10.3 and 10.4 are in the warranted condition and to verify items included in Section 1.1 are presently on the Property. If any item is not in the warranted condition, Seller will correct, repair or replace it as necessary or, with the consent of Buyer, escrow an amount at Closing to provide for such repair or replacement. The Buyer's failure to conduct a "walk-through" inspection, or to claim during the "walk-through" inspection that the Property does not include all items referenced in Section 1.1, or is not in the condition warranted in Section 10, shall not constitute a waiver by Buyer of Buyer's rights under Section 1.1 or of the warranties contained in Section 10.

12. CHANGES DURING TRANSACTION. Seller agrees that no changes in any existing leases shall be made, no new leases entered into, and no substantial alterations or improvements to the Property shall be made or undertaken without the written consent of the Buyer.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer or Seller.

14. COMPLETE CONTRACT. This instrument together with its addenda, any attached exhibits, and Seller Disclosures constitute the entire Contract between the parties and supercedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit, the breach or termination of this Contract, or the services relating to this transaction, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Disputes shall include representations made by the parties, any Broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the Property to which this Contract pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Each party agrees to bear its own costs of mediation. Any agreement signed by the parties pursuant to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation. By marking this box ☐, and adding their initials, the Buyer (), and the Seller (), agree that mediation under this Section 15 is not mandatory, but is optional upon agreement of all parties.

16. DEFAULT. If Buyer defaults, Seller may elect to either retain the Earnest Money Deposit as liquidated damages or to return the Earnest Money Deposit and sue Buyer to enforce Seller's rights. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect to either accept from Seller as liquidated damages, a sum equal to the Earnest Money Deposit, or to sue Seller for specific performance and/or damages. If Buyer elects to accept the liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. Where a Section of this Contract provides a specific remedy the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law.

17. ATTORNEY'S FEES. In any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees.

18. DISPOSITION OF EARNEST MONEY. The Earnest Money Deposit shall not be released unless it is authorized by: (a) Section 2, Section 8.3 or Section 15; (b) separate written agreement of the parties; or (c) court order.

19. ABROGATION. Except for express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss or damage to the Property shall be borne by Seller until Closing.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this transaction. Extensions must be agreed to in writing by all parties. Performance under each Section of this Contract which references a date shall be required absolutely by 5:00 PM Mountain Time on the stated date.

22. FACSIMILE (FAX) DOCUMENTS. Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission shall be the same as delivery of an original. If the transaction involves multiple Buyers or Sellers, facsimile transmissions may be executed in counterparts.

23. ACCEPTANCE. Acceptance occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counter where noted in indentation; and (b) communicates to the other party or the other party's agent that the offer or counteroffer has been signed as required.

24. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by ☐ AM ☐ PM Mountain Time 19, this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

[Signature] (Buyer's Signature) May 31, 1994 (Offer Date) [Signature] (Buyer's Signature) (Offer Date)
above date shall be the Offer Reference Date.

(Notice Address) (Phone) (Notice Address) (Phone)

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE:

☐ Acceptance of Offer to Purchase: Seller Accepts the foregoing offer on the terms and conditions specified above.

[Signature] (Seller's Signature) 5/31/94 (Date) 9:05 (Time) [Signature] (Seller's Signature) (Date) (Time)

(Notice Address) (Notice Address)

☐ Rejection: Seller Rejects the foregoing offer. (Seller's Initials) (Date) (Time)

☐ Counter Offer: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached Counter Offer # .

Addendum #1

1) Buyer herewith shall deposit a non-refundable earnest money deposit in the amount of twenty-thousand and 00/100 (\$20,000.00) with Guardian Title Company which shall be credited towards the total sales price at closing. In the event Buyer does not perform and settle on the date specified herein, said deposit shall be deemed to have been earned by the seller and Guardian Title shall immediately disburse same to seller.

2) The price herein shall include: the costs of all engineering and surveys and fees to the City of West Jordan necessary to obtain final plat approval from the Planning Commission, all fees related to the Southern Pacific Railroad crossing permit, all fees related to the Welby Jacobs Canal crossing permit, all fees and costs related to securing the easement across the Lemietz property.

3) Buyer shall be responsible for payment of all storm drain fees and bonding requirements.

4) Settlement of phase 1 and 2 shall occur on or before July 18, 1994.

5) Buyer shall have first right of refusal to purchase phases 3, 4, 5, 6, 8, 10, & 11.

at a price of \$19,000.00 per acre. Written notice of Buyer's election to

6) Seller shall provide and dedicate any and all acreage required, to the City of West Jordan, for the purpose of the proposed storm water management pond / park. However, Buyer shall be responsible for any and all improvements of said pond / park as well as the construction of same as shall be determined and required by the City of West Jordan. Buyer shall thereby be entitled to any and all reimbursements and compensation that shall be approved and granted by the City of West Jordan. (This does not apply to construction of sanitary sewer lines.)

or land cost

7) Buyer shall be responsible for all on-site and off-site improvements as required by the City of West Jordan.

8) Buyer agrees to allow access to the balance of the subdivision as set forth on the preliminary plat, as well as all subsequent final plats, including all rights of way and access to utility connections at no cost to the Seller. Buyer further agrees not to establish or create any protective strips or other legal impediments to the Seller's full access to the balance of the subdivision for streets, curb, guttering, sidewalk and all utilities, including water, sewer, natural gas, storm drain, etc.

9) All conditions herein shall survive closing and settlement.

10) Settlement shall be held by Guardian Title Company.

11) Buyer shall be credited in the amount of \$40,000.00 at the first settlement specified herein as an off-set for off-site sewer line installation.

5 cont.) exercise said right shall be delivered to Seller prior to February 1, 1995 with settlement to occur on or before ~~March~~ April 31, 1995.

12) While Wardley BH+G has no agency relationship with neither the Seller nor the Buyer, the Seller agrees to pay \$500.00 per acre to Wardley BH+G, at settlement.

Tab 2

Neil R. Sabin, USB No. 2840
Annette F. Sorensen, USB No. 6989
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913

FILED
NOV 15 1996
Third District Court
Salt Lake Department
Time of Day 2:52

Attorneys for Plaintiff

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT, DIVISION II

WARDLEY CORPORATION,	)	ORDER OF PARTIAL SUMMARY JUDGMENT
)	
Plaintiff,)	
)	
vs.)	
	)	Civil No. 950007889CV
GRANT WELSH,)	
	)	Judge Robin W. Reese
)	
Defendant.)	

The Plaintiff's Motion for Summary Judgment came on originally for hearing before the above-entitled Court, the Honorable Robin W. Reese, Judge, presiding, on September 27, 1996 and was continued for hearing to November 4, 1996. The Plaintiff appeared on both occasions by its counsel, Neil R. Sabin, Esq., and the Defendant was personally present at both hearings and was represented at both hearings by Michael A. Katz, Esq.

The Court, having reviewed Affidavits, memoranda and other documents, and having heard oral arguments, and having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff's Motion for Summary Judgment is denied as it relates solely to questions as to: (a) whether the commission arrangements constitute a "net listing," and the effect thereof as it relates to the Defendant's defenses to payment of a commission; and (b) issues of attorney's fees and costs.

2. The Plaintiff is granted summary judgment as to all other issues in this case against the Defendant.

3. Trial of this matter shall be scheduled with the trial to be limited to the following:

a. Whether the arrangements by which the Plaintiff claims an interest in commissions constitute a "net listing" in violation of state laws and regulations.

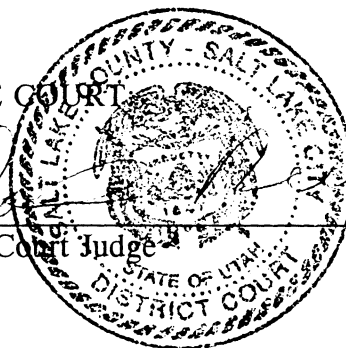
b. Whether the Defendant has a defense to the payment of commissions by virtue of a determination that these arrangements constitute a "net listing."

c. Determination as to any award, if any, of attorney's fees and costs.

Dated this 14 day of November, 1996.

BY THE COURT

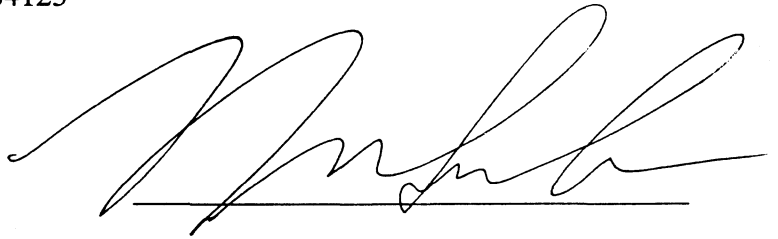
District Court Judge



CERTIFICATE OF SERVICE

I certify that on the 4th day of November, 1996, I served a true and correct copy of the foregoing proposed **ORDER OF PARTIAL SUMMARY JUDGMENT**, by causing the same to be mailed, postage prepaid, to the following:

Michael A. Katz
SIEGFRIED & JENSEN
5684 South Green Street
Murray, UT 84123

A handwritten signature in black ink, appearing to read 'Michael A. Katz', is written over a horizontal line.

Tab 3

December 16, 1996

P R O C E E D I N G S

(Beginning of tape 2763.)

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

THE COURT: Given the lateness of the hour, I'll be quick and to the point. The first and sole issue, as we discussed at the beginning, left to be tried was whether or not this was a net listing.

If it is, it's a violation of the rules and, therefore, in my judgment at least, the plaintiff is not entitled to sue for a commission under Utah law.

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

The question, therefore, as to whether this is a listing I would respond to as follows: Mr. Stringham said in his testimony that listing and agency are more or less synonymous. In fact, he kept 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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1 STATE OF UTAH)

2 : ss.

3 COUNTY OF SALT LAKE)

4 I, LYNN M. ROBINS, Certified Shorthand
5 Reporter and Notary Public for the State of Utah,
6 residing in Salt Lake County, certify:

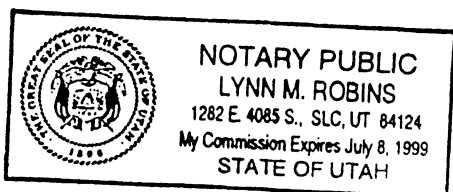
7 That the foregoing reporter's transcript
8 of audio-taped proceedings was stenographically
9 prepared by me upon listening to tape # 2763 provided
10 to me by the office of Vince Rampton of the Third
11 District Court trial from 12-16-96 in the case of
12 Wardley Corporation versus Grant Welsh;

13 That the foregoing reporter's transcript
14 of audio-taped proceedings represents a complete
15 transcription of my stenographic notes so taken to the
16 best of my ability to hear and understand the cassette
17 tape of the proceedings;

18 I further certify that I am neither
19 counsel for nor related to any party to said action nor
20 in anywise interested in the outcome thereof.

21 IN WITNESS WHEREOF, I have subscribed my name
22 and affixed my seal this--^{20th}---day of
23 -----^{July}-----1997.

24 *Lynn M. Robins*
25 Lynn M. Robins, C.S.R.,
Notary Public



Tab 4

Neil R. Sabin, USB No. 2840
Annette F. Sorensen, USB No. 6989
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913

Attorneys for Plaintiff

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

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.

~~15.~~ 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.

~~16.~~ 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 Robin 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 5

Neil R. Sabin, USB No. 2840
Annette F. Sorensen, USB No. 6989
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913

Attorneys for Plaintiff

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

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT, DIVISION II

WARDLEY CORPORATION,)	
)	
Plaintiff,	)	JUDGMENT
)	
vs.	)	Civil No. 950007889CV
)	
GRANT WELSH,	)	Judge Robin W. Reese
)	
Defendant.)	

IT IS HEREBY ORDERED, ADJUDGED AND DECREED (add language).

1. The Plaintiff is awarded judgment against the Defendant for the following amounts:

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.

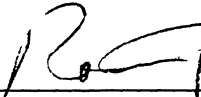
4. The Court has taken under advisement issues of attorney's fees and costs. The parties shall have until December 31, 1996, to submit to the Court Memoranda of Law for the

815,173.75
173.75
173.75

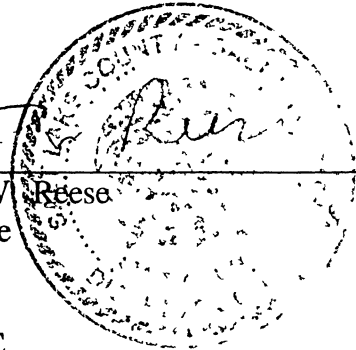
Court to determine whether attorneys' fees can and should be awarded to the Plaintiff. Upon a determination by the Court that the Plaintiff is entitled to an award of attorneys' fees, the Plaintiff is be entitled to an Order supplementing the judgment herein to add the Court's award of such fees as part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

Dated this 8 day of Jan, 1997.

BY THE COURT:



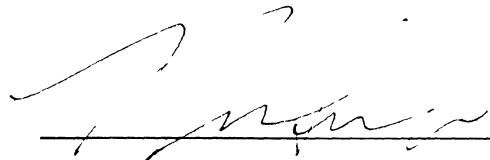
Honorable Robin W. Reese
District Court Judge



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 6

THIRD DISTRICT COURT DIVISION II
STATE OF UTAH, SALT LAKE DEPARTMENT

FILED

FEB 12 1997

Third District Court
Salt Lake Department
Time of Day

WARDLEY CORPORATION,

Plaintiff,

vs.

GRANT WELSH,

Defendant.

SUPPLEMENTAL FINDINGS OF
FACT AND CONCLUSIONS
OF LAW

CASE NO. 950007889 CV

JUDGE ROBIN W. REESE

FINDINGS OF FACT

1. The original contract between Leon Peterson, as the buyer of certain property, and the defendant, Grant Welsh, as the seller includes a provision in paragraph 17 awarding the prevailing party in any action arising out of that contract a reasonable attorney's fee.

2. In paragraph 12 of the addendum to the contract it is stated that the seller, Grant Welsh, would pay \$500.00 per acre to Wardley Better Homes and Gardens at the time of settlement.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and based upon the revised Findings of Fact and Conclusion of Law signed by the Court on January 8, 1997, this court now enters the following supplementary conclusions of law:

1. Paragraph 12 of the addendum to the contract specifically makes the plaintiff in this case a third-party beneficiary of the said contract and gives the plaintiff enforceable rights in the same.

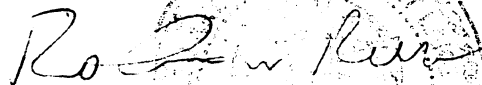
2. Paragraph 17 of the original contract however permits the prevailing party in

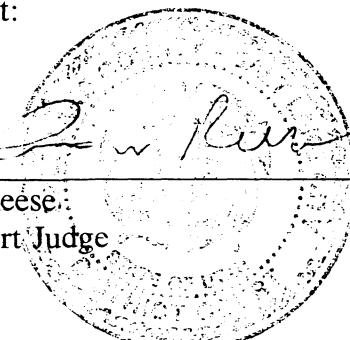
any action arising out of the contract to recover a reasonable attorney's fee. This paragraph, unlike paragraph 12 of the addendum, does not clearly cover the interests of the plaintiff. It is not clear from the contract whether the term "prevailing party" was intended to apply only to the original parties to the contract, or whether it may be extended to a third-party beneficiary such as the plaintiff. Because the contract is ambiguous on this point the Court must look to extrinsic evidence to determine the parties intent. There was no evidence at the trial on the application of the attorney's fee provision to the plaintiff. In the absence of such evidence the Court concludes that the plaintiff is not entitled to an award of attorney's fees.

3. The plaintiff is entitled to be awarded all reasonable costs including those costs incurred in the defendant's depositions mentioned in part II of the plaintiff's memorandum.

Dated this 12 day of February, 1997.


By the Court:


Robin W. Reese
District Court Judge



CERTIFICATE OF MAILING

I hereby certify that I mailed/delivered a true and correct copy of the foregoing Supplemental Findings of Fact and Conclusions of Law to Neil R. Sabin at 1100 Eagle Gate Plaza, 60 East South Temple, Salt Lake City, Utah 84111 and Vincent C. Rampton at 170 South Main #1500, P.O. Box 45444. Salt Lake City, Utah this 12 day of February, 1977.



Tab 7

Neil R. Sabin, USB No. 2840
Annette F. Sorensen, USB No. 6989
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FILED
MAR 25 1997
Third District Court
Salt Lake Department
Time of Day _____

Attorneys for Plaintiff

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT, DIVISION II

WARDLEY CORPORATION,)	
)	
Plaintiff,	)	AMENDED ORDER ON
	)	ATTORNEY'S FEES AND COSTS
vs.)	
	)	Case No. 970074
GRANT WELSH,)	
	)	Civil No. 950007889CV
)	
Defendant.	)	Judge Robin W. Reese

This matter came on 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 that were 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.

At the conclusion of the trial, the Court ruled on the first issue relating to whether the arrangements constituted a "net listing," but requested the parties file additional memoranda on the issue of attorney's fees, and took the issue of attorneys fees under advisement. Upon

consideration of the testimony at trial, the pleadings on file herein, as well as the memoranda on the issue of attorney's fees filed by both Plaintiff and Defendant, and being fully advised in the premises:

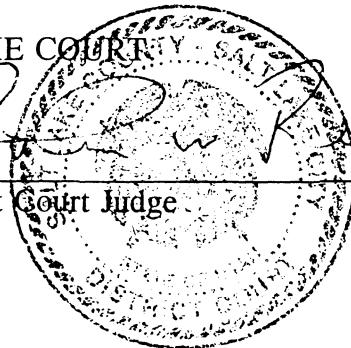
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff is not entitled to an award of attorney's fees in this action.
2. The Plaintiff is awarded all reasonable costs incurred in this action, in the amount of \$496.56, which includes those costs incurred due to the Defendant taking the depositions of Randy Young, Leon Peterson, Lee Stern and Lynn Wardley.

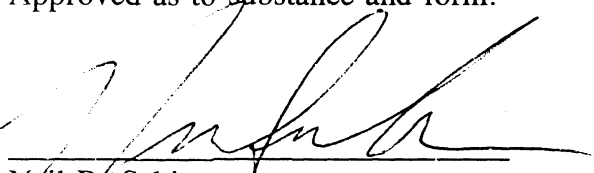
DATED this 25 day of March, 1997.

BY THE COURT

District Court Judge



Approved as to substance and form:


Neil R. Sabin
of NIELSEN & SENIOR, P.C.
Attorney for Wardley Corporation

Vincent C. Rampton
of JONES, WALDO, HOLBROOK & McDONOUGH
Attorney for Grant Welsh

CERTIFICATE OF SERVICE

I certify that on the 14th day of March, 1997, I served a true and correct copy of the foregoing **AMENDED ORDER ON ATTORNEY'S FEES AND COSTS** by causing the same to 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

