

2001

# Wardley Better Homes and Garden v. Tracey Cannon, Cannon Associates, Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark O. Morris; David N. Wolf; Snell and Wilmer; Attorneys for Defendants/Appellants .  
Steven B. Smith; Scalley and Reading; Attorneys for Plaintiffs; John R. Bucher; Attorneys for Third  
Party Defendants; James C. Haskins; Attorneys for Defendant Mascaro.

---

## Recommended Citation

Brief of Appellant, *Wardley Better Homes v. Cannon*, No. 20010245.00 (Utah Supreme Court, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/1808](https://digitalcommons.law.byu.edu/byu_sc2/1808)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE SUPREME COURT OF THE STATE OF UTAH**

---

WARDLEY BETTER HOMES and  
GARDEN,

Plaintiffs/Appellees,

v

TRACEY CANNON and CANNON  
ASSOCIATES, INC , a Utah corporation,

Defendants/Appellants

---

CASE NO · 20010245-SC

PRIORITY NO 15

ORAL ARGUMENT REQUESTED

---

**BRIEF OF APPELLANTS**

---

**ON APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS  
AFFIRMING AN ORDER ENTERED BY THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE LESLIE A. LEWIS, DISTRICT JUDGE**

---

MARK O MORRIS (4636),  
DAVID N WOLF (6688)  
SNELL & WILMER L.L.P  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101  
Attorneys for Defendants-Appellants  
Tracey Cannon & Cannon Assoc , Inc

STEVEN B SMITH (5759)  
SCALLEY & READING  
261 East 300 South, Suite 200  
Salt Lake City, Utah 84111  
Attorneys for Plaintiffs-Appellees

JOHN R BUCHER (0474)  
1343 South 1100 East  
Salt Lake City, Utah 84105  
Attorneys for Third Party Defendants

JAMES C HASKINS (1406)  
357 South 200 East #300  
Salt Lake City, Utah 84111  
Attorneys for Defendant Mascaro

①

FILED  
2004

---

**IN THE SUPREME COURT OF THE STATE OF UTAH**

---

WARDLEY BETTER HOMES and  
GARDEN,

Plaintiffs/Appellees,

v.

TRACEY CANNON and CANNON  
ASSOCIATES, INC., a Utah corporation,

Defendants/Appellants.

CASE NO.: 20010245-SC

PRIORITY NO.: 15

ORAL ARGUMENT REQUESTED

---

**BRIEF OF APPELLANTS**

---

**ON APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS  
AFFIRMING AN ORDER ENTERED BY THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE LESLIE A. LEWIS, DISTRICT JUDGE**

---

MARK O. MORRIS (4636)  
DAVID N. WOLF (6688)  
SNELL & WILMER L.L.P.  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101  
Attorneys for Defendants-Appellants  
Tracey Cannon & Cannon Assoc., Inc.

STEVEN B. SMITH (5759)  
SCALLEY & READING  
261 East 300 South, Suite 200  
Salt Lake City, Utah 84111  
Attorneys for Plaintiffs-Appellees

JOHN R. BUCHER (0474)  
1343 South 1100 East  
Salt Lake City, Utah 84105  
Attorneys for Third Party Defendants

JAMES C. HASKINS (1406)  
357 South 200 East #300  
Salt Lake City, Utah 84111  
Attorneys for Defendant Mascaro

## TABLE OF CONTENTS

	Page
JURISDICTION.....	1
STATEMENT OF ISSUE .....	1
STANDARD OF REVIEW .....	1
CONTROLLING STATUTES AND CASES .....	2
STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Relevant Facts: .....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7
A. THE COURT OF APPEALS ERRED IN FAILING TO SEE NO MEANINGFUL DISTINCTION BETWEEN <u>HODGES</u> AND THIS CASE, AND THUS HANSEN’S ACTUAL KNOWLEDGE OF HIS OWN FRAUD SHOULD HAVE BEEN IMPUTED TO WARDLEY .....	7
B. DECADES OF UTAH JURISPRUDENCE SUPPORT THE APPLICATION OF THE <u>HODGES</u> RULE HERE.....	10
C. BECAUSE WARDLEY IS AND SHOULD BE IMPUTED WITH THE KNOWLEDGE OF THE FRAUDULENT CONDUCT OF ITS AGENT, CANNON IS ENTITLED TO BE COMPENSATED FOR THE ATTORNEY’S FEES SHE EXPENDED IN DEFENDING AGAINST WARDLEY’S MERITLESS CLAIMS, BROUGHT IN BAD FAITH.....	12
1. <u>Wardley’s Claims Were Without Merit</u> .....	12
2. <u>Wardley’s Claims Were Brought in Bad Faith</u> .....	13

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
<b>D. BECAUSE THERE WERE NO FACTUAL DISPUTES, IT WAS UNNECESSARY FOR CANNON TO MARSHAL EVIDENCE .....</b>	<b>15</b>
<b>E. THE POLICIES BEHIND THE BAD FAITH STATUTE ARE REMUNERATIVE. ....</b>	<b>16</b>
<b>CONCLUSION.....</b>	<b>18</b>

## TABLE OF AUTHORITIES

Page(s)

### STATE CASES

<u>Bear River Mut. Ins. Co. v. Wall</u> , 1999 UT 33, 978 P.2d 460 .....	2
<u>Birkner v. Salt Lake County</u> , 771 P.2d 1053 (Utah 1989).....	14
<u>Brown v. Glover</u> , 2000 UT 89, 16 P.3d 540 .....	1
<u>Cady v. Johnson</u> , 671 P.2d 149 (Utah 1983).....	12, 13, 14
<u>Esquivel v. Labor Comm’n</u> , 2000 UT 66, 7 P.3d 777 .....	1
<u>Everett v. Oregon Shortline &amp; Utah Northern RY. Co.</u> , 9 Utah 340, 34 P. 289 (1893) .....	10
<u>G. Eugene England Found. v. Smith's Food King</u> , 542 P.2d 753 (Utah 1975).....	11
<u>Heavy v. The Commercial National Bank</u> , 27 Utah 222, 75 P. 727 (1904) .....	11
<u>Heber City Corp. v. Simpson</u> , 942 P.2d 307 (Utah 1997) .....	16
<u>Hodges v. Gibson Products Co.</u> , 811 P.2d 15 (Utah 1991).....	1, 2, 7, 8, 9, 10, 13
<u>Jensen v. IHC Hospitals, Inc.</u> , 944 P.2d 327 (Utah 1997) .....	13
<u>Lysenko v. Sawaya</u> , 2000 UT 58, 7 P.3d 783 .....	1
<u>Rawson v. Conover</u> , 2001 UT 24, 20 P.3d 876.....	1
<u>State v. Larsen</u> , 2000 UT App. 106, 999 P.2d 1252 .....	15
<u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991) .....	16
<u>Sullivan v. Evans-Morris Whitney Co.</u> , 54 Utah 293, 180 P. 435 (1919).....	11
<u>Swartz v. White</u> , 80 Utah 150, 13 P.2d 643 (1932).....	11
<u>Valcarce v. Fitzgerald</u> , 961 P.2d 305 (Utah 1998) .....	14

# **TABLE OF AUTHORITIES** (continued)

	Page(s)
<u>Valley Bank and Trust Co. v. Gerber</u> , 526 P.2d 1121 (Utah 1974) .....	11
<u>Wardley Better Homes and Garden v. Cannon et al.</u> , 2001 UT App 48, 21 P.3d 235 .....	8, 15
<u>Watkiss &amp; Campbell v. Foa &amp; Sons</u> , 808 P.2d 1061 (Utah 1991) .....	12

## **STATUTES**

Utah Code Ann. § 61-2-10(1) (1997) .....	2, 9
Utah Code Ann. § 61-2-18(2) (1997) .....	2, 9
Utah Code Ann. § 78-2-3(a) (1999) .....	1
Utah Code Ann. § 78-27-56 (1988) .....	2, 3, 12, 16, 17
Utah Constitution art. VIII, sec. 5 .....	1

## **OTHER**

Rep. Maxfield, Third Reading of H.B. 100, 44th Utah Leg., Gen. Sess. (Feb 5, 1981) .....	17
Restatement (Second) of Agency § 272 (1958) .....	8
<u>Story</u> , Doctrine of Agency, section 452 .....	10

## **JURISDICTION**

This case is here on this Court's August 9, 2001 grant of Tracey Cannon's and Cannon Associates, Inc.'s ("Appellants") Petition for Writ of Certiorari, a copy of which is included in the Addendum as Exhibit 1. Appellants seek this Court's review of the decision of the Utah Court of Appeals affirming the Final Order of Judgment entered on January 11, 2000, by the Honorable Judge Leslie A. Lewis of the Third Judicial District Court in and for Salt Lake County, State of Utah. This Court has jurisdiction pursuant to Utah Constitution art. VIII, sec. 5, and Utah Code Ann. § 78-2-3(a).

## **STATEMENT OF ISSUE**

When a real estate agent fraudulently induced a listing agreement, and that agent's broker brought suit against an innocent defendant to collect a commission based on the fraudulently obtained contract, did the Utah Court of Appeals err when it failed to follow the rules of law affirmed in this Court's decision in Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991), which require that the agent's knowledge of the fraud be imputed to the principal for purposes of showing lack of merit and bad faith? This issue was raised to the trial court by way of motion. (R. at 979).

## **STANDARD OF REVIEW**

““On certiorari, we review the decision of the court of appeals, not of the trial court.”” Rawson v. Conover, 2001 UT 24, 416 Utah Adv. Rep. 39 (Utah 2001) (quoting Brown v. Glover, 2000 UT 89, 408 Utah Adv. Rep. 12 (quoting Lysenko v. Sawaya, 2000 UT 58, P15, 7 P.3d 783)). “The court of appeals’ decision is reviewed for correctness, and its conclusions of law are afforded no deference.” Esquivel v. Labor



Comm'n, 2000 UT 66, 7 P.3d 777 (Utah 2000) (citing Bear River Mut. Ins. Co. v. Wall, 1999 UT 33, P4, 978 P.2d 460).

## **CONTROLLING STATUTES AND CASES**

The following cases and statutory provisions are deemed controlling and are relied upon in this brief:

Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991)

Utah Code Ann. § 78-27-56(1) (1988)

Utah Code Ann. § 61-2-10(1) (1997)

Utah Code Ann. § 61-2-18(2) (1997)

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE.**

This case arises out of a fraud perpetrated by Arles Hansen (“Hansen”), an agent of Wardley Better Homes & Garden (“Wardley”), a real estate brokerage and the plaintiff in the underlying action. Wardley’s agent falsified dates in certain real estate listing agreements signed by landowners named Mascaro, fraudulently extending the agreements’ intended term from one (1) day, to a year and a day (366 days). Months after the intended one-day listing lapsed, Tracey Cannon, (“Cannon”) a real estate broker, listed the property and eventually facilitated a sale, earning a commission. Seeking to enforce its agent’s fraudulent listing agreement, Wardley brought suit against the Mascaros and, eventually, Cannon, seeking the commission on Cannon’s sale. At the conclusion of the litigation, Cannon had been forced to spend over \$60,000 in attorneys fees defending herself against, and ultimately proving that Wardley’s claims were based

on the fraudulent conduct of its own agent (R. at 996-99). When Cannon sought her attorneys' fees under Utah Code Ann. § 78-27-56 ("Utah Bad Faith Statute"), the trial court denied the motion, ruling that "Wardley" did not act in bad faith in pursuing the commission and other claims. This appeal ensued, and the judgment of the trial court denying attorneys' fees was affirmed in the panel opinion below.

**B. RELEVANT FACTS:**

1. Because Utah law specifies only a broker may pursue a commission earned by an agent, Wardley first brought suit against the Mascaros on November 7, 1994, (R. at 1), many months after the listing agreements were signed, alleging that Wardley had found a ready, willing and able buyer for the Mascaros' property, and that pursuant to the listing agreements signed by Hansen, Wardley was entitled to a commission from the Mascaros. (R. at 4).

2. After learning that the Mascaro property had been sold with Cannon's assistance, Wardley amended its complaint on August 4, 1995 (R. at 81) to add and bring claims against Cannon alleging unlawful interference with contract and civil conspiracy. (R. at 87-89). Over a year later, on August 19, 1996, Wardley moved to amend its complaint for a second time for the purpose of, among other things, adding three more claims against Cannon. (R. at 175-76). Wardley's actions continued to mount against Cannon in spite of the fact that Wardley's agent had actual knowledge he had fraudulently induced the listing agreements.

3. Cannon opposed Wardley's motion to file a second amended complaint. (R. at 248). Although the trial court eventually allowed Wardley to file a second

amended complaint, it expressly cautioned Wardley against bringing claims for which no good faith basis existed:

The Motion to Amend Complaint is granted. It should be noted that this Court is not ruling on the viability of any of plaintiff's new claims. Plaintiff is urged to very carefully assess the facts and law and only file those claims that can be brought in good faith after diligent exploration of the facts.

(R. at 269). See, court's Ruling dated October 9, 1996, a true and correct copy of which is attached to the Addendum as Exhibit 2 (emphasis added).

4. Despite the trial court's admonition, and despite its agent's actual knowledge of the fraudulently induced listing agreements, Wardley chose to file its Second Amended Complaint against Cannon, wherein Wardley alleged that Cannon violated the Utah Administrative Code, converted Wardley's property, and intentionally interfered with listing agreements executed between Wardley and the Mascaros. (R. at 278-80). Those claims were premised upon listing agreements assuming a term of 366 days which, of course, was a false premise known to Wardley's agent. Cannon answered and claimed that Wardley should pay attorneys' fees under the Utah Bad Faith Statute.

5. Trial began on June 8, 1998 and continued through June 11, 1998. At the conclusion of the trial, the court ruled from the bench that Wardley had not established a cause of action against Cannon under the Utah Administrative Code. (R. at 927). Likewise, the court also ruled that Wardley had not met its burden of proof in connection with its claim that Cannon interfered with Wardley's prospective economic relations. (R. at 927). Finally, the court ruled that Wardley had not met its burden of proof as to its claim that Cannon's failure to remit the commissions on the sale of the Mascaros'

property to Cannon constituted conversion. (R. at 927). The trial court took the remaining issues raised in Wardley's Second Amended Complaint under advisement. (R. at 927).

6. On August 28, 1998, the trial court issued its Memorandum Decision, a true and correct copy of which is attached to the Addendum as Exhibit 3 (R. at 937). The trial court found that Wardley's agent changed and altered dates in the listing agreements with the Mascaros. (R. at 943-44). The trial court also found that Wardley's agent, to induce the Mascaros to sign the listing agreements, fraudulently represented that the listing agreements would be limited to one-party, and would expire in one day. (R. at 944). Specifically, the trial court found that Wardley's agent "altered the November 15, 1993, date which was originally found on the first listing agreement and added expiration dates to the remaining three listing agreements to reflect an unagreed and unintended one-year duration." (R. at 948). The trial court found that Wardley's agent took full advantage of his opportunity to deceive the Mascaros by hastily meeting with the Mascaros to obtain their signatures on the listing agreements on a Sunday, when Wardley's agent knew that the Mascaros' legal counsel would most likely not be present. (R. at 949). The trial court concluded that the listing agreements were fraudulently induced and, therefore, Wardley did not have any viable economic relations with the Mascaros with which Cannon could interfere. (R. at 951). Wardley never appealed these factual findings.

7. On September 25, 1998, Cannon filed a motion to recover the attorney's fees and costs she incurred in defending against Wardley's claims. (R. at 979). On

February 9, 2000, the trial court awarded Cannon \$2091.45 in costs. (R. at 1393). On April 21, 1999, the trial court entered its order denying Cannon's motion for attorneys' fees, ruling that "Wardley" was not responsible for the fraudulent conduct of its agent because it did not participate in its agent's fraudulent conduct, it did not know its agent was engaging in fraudulent conduct, and it did not have reason to know that its agent had engaged in fraudulent conduct. (R. at 1265-66) A copy of the trial court's Ruling is included at the Addendum as Exhibit 4.

8. The trial court's April 21, 1999 order denying Cannon's motion for attorney's fees was incorporated by reference into the court's Final Order of Judgment dated January 11, 2000. (R. at 1359-60). A copy of the trial court's Final Order of Judgment is included at the Addendum as Exhibit 5. Cannon appealed to this Court from the Final Order of Judgment (R. at 1358-61), which appeal was poured-over to the Utah Court of Appeals. Cannon did not marshal evidence in its briefing, because the trial court's factual findings of fraud by Wardley's agent were unchallenged and accurate.

9. On February 15, 2001, a panel of the Court of Appeals affirmed the trial court's legal determinations that Wardley should be viewed separately from its fraudulent agent, that the agent's knowledge of the fraud should not be imputed to Wardley, and thus Wardley was not liable for attorneys' fees under Utah's Bad Faith Statute. A copy of the Court of Appeals' opinion is included at the Addendum as Exhibit 6.

### **SUMMARY OF ARGUMENT**

If Wardley's fraudulent agent, Hansen, had been the plaintiff suing Cannon, his liability for fees in seeking to enforce a contract he knowingly altered to extend its term

would be undisputed. But Utah law precluded Hansen from being the plaintiff, and instead required his broker, Wardley, to file suit. That is because under Utah's common law and statutory scheme, the broker is entitled to the commission and, as the principal, it is both responsible for and benefits from its agent's activities. Because Hansen was acting as an agent for Wardley at all relevant times, because Wardley stood to share in the commission it was seeking by trying to enforce a fraudulent contract, and because Utah law does not distinguish between broker and agent in relation to these real property dealings, Hansen's knowledge of his fraud should be imputed to his principal, Wardley. Thus, this Court should find that both the trial court and the Court of Appeals erroneously denied Cannon attorneys fees under Utah's Bad Faith Statute.

## **ARGUMENT**

### **A. THE COURT OF APPEALS ERRED IN FAILING TO SEE NO MEANINGFUL DISTINCTION BETWEEN HODGES AND THIS CASE, AND THUS HANSEN'S ACTUAL KNOWLEDGE OF HIS OWN FRAUD SHOULD HAVE BEEN IMPUTED TO WARDLEY.**

In 1991, this Court considered the question of whether the knowledge of an employee may be imputed to the employer when the employer pursues claims against a person known by the employee to be innocent of the claims. This Court answered that question in the affirmative, so long as the employee was acting within the scope of his employment and, at least in part, to benefit his employer. In Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991), Gibson's store manager, named Cosgrove, had been stealing money from Gibson. There came a point in time when Cosgrove cast blame on Hodges, a part-time bookkeeper, and, on behalf of Gibson, Cosgrove went to the police

and filed criminal charges against Hodges. Before Hodges was put on trial, the theft by Cosgrove came to light, and the charges against Hodges were dropped. In affirming the jury verdict against Gibson in the subsequent civil trial for malicious prosecution, this Court imputed to Gibson as a matter of law Cosgrove's actual knowledge that Hodges was innocent. Thus, *Gibson*, as the employer, was charged with knowingly pursuing false claims against an innocent party.

In holding Gibson responsible for its agent's knowledge, this Court in Hodges relied upon Restatement (Second) of Agency § 272 comment c, and articulated the following rule of law:

Thus, the knowledge which Gibson's servants had in initiating the malicious prosecution action against Hodges and the responsibility for the initiation of the action itself is imputed, as a matter of law, to Gibson, if Gibson's servants acted within the scope of their authority and were motivated either in whole or in part to carry out Gibson's purposes.

Hodges, at 157.

Cannon argued to the Court of Appeals that like Gibson, Wardley was pursuing claims against an innocent third party, which claims were known to Wardley's agent to be false. The panel erred when it attempted to distinguish Hodges from this case by characterizing the prosecuting party in Hodges as Cosgrove, not Gibson. "In Hodges, the court imputed knowledge of a managerial employee, Cosgrove, to his employer and held his employer liable for *Cosgrove's* intentional malicious prosecution of Hodges."

Wardley Better Homes and Garden v. Cannon et al., 2001 UT App 48, ¶ 9, 21 P.3d 235, 239 (emphasis added). Contrary to the panel's statement, Cosgrove did not prosecute

Hodges. Gibson did. The Court of Appeals’ fundamental misunderstanding of the facts and meaning of Hodges was error, since it was Gibson with sole standing to pursue the claims of theft against Hodges, not Cosgrove. This erroneous distinction lies at the heart of, and thus flawed the panel’s decision.

While Cosgrove may have been the live person filing criminal charges against Hodges, he was doing so on behalf of and in the name of Gibson. The Court of Appeal’s confusion between the principal and agent in Hodges mimicked the underlying flaw in the trial court’s analysis below, by suggesting there is a legal difference between principal and agent in these situations. There is not. Cosgrove had no personal claims against Hodges. Hodges was not charged with stealing from Cosgrove. Here too, Hansen had no personal claims against Cannon. Wardley’s fraudulent agent lacked standing to bring claims against Cannon.<sup>1</sup> Only Wardley had standing to pursue the commissions under Utah statute.

The Court of Appeals’ error is repeated in its last paragraph. “There is no legal support for [Cannon’s] claim that vicarious liability should be applied in a manner that imputes the agent’s knowledge to the principal to answer for the principal’s own actions.” Id. at ¶ 11. Thus, the panel’s earlier confusion between agent and principal is continued here. Cannon did not seek to have Wardley answer for its “own actions.” This logic presupposed that Wardley is a live person, with knowledge and actions independent of its agents. Yet when the principal is a corporation, as here and in Hodges, the only means of

---

<sup>1</sup> That Hansen was Wardley’s agent, and that only Wardley had standing to bring the suit against Cannon, is undisputed. Utah’s statutory scheme requires that Wardley, as the broker, pursue the claims of its agents, since it is the broker who is entitled to real estate commissions. See Utah Code Ann. §§ 61-2-10(1) and 61-2-18(2).



taking any action is through agents. Wardley, as a corporation, has no actions of its “own.” Thus, the knowledge of an agent acting in the scope of his employment, and for the benefit of his principal should necessarily be imputed to that principal – here, Wardley.

**B. DECADES OF UTAH JURISPRUDENCE SUPPORT APPLICATION OF THE HODGES RULE HERE.**

Utah’s jurisprudence concerning imputed knowledge and vicarious liability is well developed, and its origins precede Statehood:

It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them. In all cases the rule applies, respondeat superior, and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.

Everett v. Oregon Short Line & Utah Northern RY. Co., 9 Utah 340, 346-47, 34 P. 289, 290 (1893) (quoting Story, Doctrine of Agency, section 452). The Court of Appeals’

decision below implicitly rejects this doctrine by exonerating Wardley from any responsibility for its fraudulent agent's actions and knowledge.

Utah courts have consistently applied the rule of law which holds that "as between two innocent persons, one of whom must suffer through the fraud of third, that the one who puts it in the power of the other to practice the fraud must suffer the loss." Swartz v. White, 80 Utah 150, 152, 13 P.2d 643, 644 (1932). As between Cannon and Wardley, Wardley should answer for its fraudulent agent's conduct and compensate Cannon by reimbursing her for her fees. In seeking to get a commission, Hansen was acting to benefit Wardley as his principal. Wardley was trying hard to obtain that benefit. It was Wardley who put Hansen in the position, and empowered him with the authority, to deceive the Mascaros. Thus, too, Wardley put Hansen in the position to fraudulently create the contracts upon which Wardley's claims against Cannon were based. It is undisputed that Wardley was in a superior, and perhaps the only position to prevent the fraud of its own agent. See G. Eugene England Found. v. Smith's Food King, 542 P.2d 753, 755 (Utah 1975); Valley Bank and Trust Co. v. Gerber, 526 P.2d 1121, 1124 (Utah 1974); Heavy v. The Commercial Nat'l Bank, 27 Utah 222, 229, 75 P. 727, 729 (1904 ). The Court of Appeals ignored these policies in its opinion. Wardley was not a victim here. Unless Cannon is reimbursed for the attorney's fees she paid in defending against Wardley's claims, then Cannon alone will suffer the financial consequences of Hansen's dishonesty. In such circumstances, this Court has uniformly concluded that the burden should fall upon Wardley, as "the party that held [Hansen] out and gave him the character and standing of an honest man." Sullivan v. Evans-Morris Whitney Co., 54 Utah 293,

304, 180 P. 435, 439 (1919). This policy should be reaffirmed again here, and this Court should reverse the Court of Appeals' decision below.

**C. BECAUSE WARDLEY IS AND SHOULD BE IMPUTED WITH THE KNOWLEDGE OF THE FRAUDULENT CONDUCT OF ITS AGENT, CANNON IS ENTITLED TO BE COMPENSATED FOR THE ATTORNEY'S FEES SHE EXPENDED IN DEFENDING AGAINST WARDLEY'S MERITLESS CLAIMS, BROUGHT IN BAD FAITH.**

Section 78-27-56(1) of the Utah Code requires the court to award reasonable attorney's fees to a prevailing party if an action is without merit and brought in bad faith. See Utah Code Ann. § 78-27-56 (1) (1988); Watkiss & Campbell v. Foa & Sons, 808 P.2d 1061, 1067 (Utah 1991). Because Wardley is imputed with knowledge of the fraudulent nature of its claims against Cannon, this Court should remand this case back to the trial court with instructions to determine a reasonable attorneys fee below, and on appeal.

**1. Wardley's Claims Were Without Merit**

A claim is without merit if it is "frivolous" or "of little weight or importance having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). In accusing Cannon of converting its property, of violating the ethical standards which govern real estate agents, and of interfering with contracts that Wardley's agent unlawfully and fraudulently obtained, Wardley asserted defamatory and frivolous claims which had no basis in fact or law. Wardley, imputed with the knowledge of its agent,

knew the contracts at issue were fraudulently obtained. Thus, each of Wardley's claims was meritless as a matter of law.<sup>2</sup>

## **2. Wardley's Claims Were Brought in Bad Faith**

The Second Amended Complaint was brought in bad faith. A claim is asserted in bad faith if, among other things, it is asserted "to take unconscionable advantage of others." Cady, 671 P.2d at 151. Wardley's case against Cannon was not about collecting a debt based on a lawful and binding contract, or even upon a colorable claim of such. Rather, this case involved a real estate brokerage that, through its authorized agent, altered the material terms of several contracts with Mascaros, and then elected to expand the scope of its attack to Cannon, a stranger to the dealings between Mascaros and Wardley. This Court should not countenance Wardley's improper attempt to take advantage of Cannon in this lawsuit. Instead, this Court should require that Wardley pay Cannon the attorneys' fees and costs she has incurred in defending against this action.

Wardley correctly asserted below that, as a general rule, fraud committed by a third party cannot be imputed to another defendant. However, in Jensen v. IHC Hosps., Inc., 944 P.2d 327, 338 (Utah 1997), this Court expressly held that "[w]here . . . there is an agency or privity relationship between the third party committing the fraud and the defendant, our cases indicate that liability for the agent's negligent or intentional tort can be imputed to the principal if the agent acts in whole or in part to carry out the purposes of the principal. Id. (citing Hodges v. Gibson Prods. Co., 811 P.2d 151, 156 (Utah

---

<sup>2</sup> Attorney's fees are particularly warranted here when, prior to trial, the court expressly cautioned Wardley about proceeding with claims against Cannon which, after a diligent exploration of the facts, would prove untenable. See Court's Ruling dated October 9, 1996. (R. at 269.)

1991); Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989)). This factual standard is met here.

It is not disputed that Wardley's agent acted in bad faith by fraudulently altering listing agreements. Moreover, Wardley does not dispute that its agent (1) lacked an honest belief in the propriety of the activities in question; (2) intended to take unconscionable advantage of others; or (3) intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998; see Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983)). Instead, Wardley contends that it should not be required to pay Cannon's attorney's fees because "it" was unaware of its own agent's duplicity. This Court should reject such an attempt by a principal to insulate itself from the bad acts of its agent, particularly when Wardley stood to, and vigorously fought to profit by those bad acts if they were not found out and proven at trial. Wardley was imbued with Hansen's knowledge, and thus its actions are tainted by that knowledge.

This Court should not permit Wardley to claim Hansen was its agent for purposes of suing on an unpaid commission, and for purposes of collecting that commission and other statutory damages if it succeeded in completing its agent's fraud, but suddenly was not Wardley's agent when Wardley's commission claim was ultimately found to be based on its own agent's fraud. Yet this is the effect of the Court of Appeals' ruling. If such a rule were to stand, it would allow all brokerages to reap the benefits of their agents' fraudulent and illegal conduct, without any risk or liability for those acts. Such a rule would change the landscape of Utah's law of agency.

Accordingly, because of the agency relationship between Hansen and Wardley, Utah law dictates that by reason of Hansen's knowledge in Wardley's bringing frivolous claims against Cannon, those claims were necessarily brought in bad faith as a matter of law. Wardley's liability, in this case, includes payment of Cannon's attorneys' fees and costs incurred in defending against the meritless action Wardley brought in bad faith, and incurred on appeal.

**D. BECAUSE THERE WERE NO FACTUAL DISPUTES, IT WAS UNNECESSARY FOR CANNON TO MARSHAL EVIDENCE.**

The panel of the Court of Appeals erroneously determined that Cannon failed to marshal the evidence and challenge the factual findings supporting the trial court's decision. Such failure, reasoned the panel, "is fatal to this appeal." Wardley Better Homes and Garden v. Cannon et al., 2001 UT App 48, ¶ 7, 21 P.3d 235, 239. This was error.

Specifically, the Court of Appeals erred in determining that the trial court made a factual finding that "Wardley's suit was not pursued in bad faith." The fraudulent conduct of Wardley's agent, as determined by the trial court, and the knowledge that arose from that conduct constitute factual findings from which no one appealed. Whether the now undisputed fraudulent conduct and knowledge of its agent should be imputed to Wardley presents a legal question. Cannon need not marshal evidence on factual findings not in dispute. State v. Larsen, 2000 UT App. 106, 999 P.2d 1252 (holding that marshaling the evidence "is unnecessary because [defendant] is challenging the trial court's legal conclusions rather than its factual findings."). Further, Cannon's decision

not to marshal the evidence supporting the uncontested facts of this case does not relieve this Court of its obligation to “review . . . the accuracy of the lower court's conclusions of law and the application of that law in the case.” Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997) (quoting Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991)). Here, Cannon asks this Court to review conclusions of law and the application of law to the uncontested facts and circumstances of this case.

It is undisputed that the trial court found that Wardley’s agent, Hansen, fraudulently altered the dates of certain listing agreements and fraudulently induced his clients, the Mascaros, to enter into the listing agreements. It is also undisputed that Hansen was acting as Wardley’s agent when he engaged in this fraudulent conduct. And, it is undisputed that in an effort to profit from its agent’s conduct, Wardley sued Cannon, a stranger to the dealings between Wardley and the Mascaros, to collect a real estate commission and obtain treble damages. Accordingly, the only issue before this Court is a question of law, i.e., whether Wardley should be deemed to have the same knowledge as its agent. Principles of agency and accountability, in particular where fiduciaries are concerned, should move this Court to reverse the decision of the Court of Appeals and instruct the trial court to impose fees against Wardley under the Bad Faith Statute.

**E. THE POLICIES BEHIND THE BAD FAITH STATUTE ARE REMUNERATIVE.**

The policies behind the Bad Faith Statute support reversing the Court of Appeals. The purpose of Utah Code Ann. § 78-27-56 is primarily remunerative, as it is designed to compensate an innocent party for the costs associated with defending meritless claims

brought in bad faith. Utah Code Ann. § 78-27-56 was promulgated as House Bill 100 and discussed on February 5, 1991 by the House of Representatives at the 44th Utah Legislative General Session. The sponsor of the Bill, Representative Richard L. Maxfield, stated that:

The purpose of this bill is to eliminate vexatious and nuisance lawsuits. . . . If [a lawsuit is filed], there is no provision even though the suit is later dismissed because it is frivolous, without foundation or without merit, there is no basis to require that person who brought the suit without foundation to pay the cost, the attorney's fees that the party had to pay to defend it. That many times people come in, a suit has been brought against them without foundation or basis and they say, well there's no basis for this. I agree, but you still have to file an answer, you have to answer and maybe even file a motion to dismiss . . . . But you still will have to get an attorney to file that action or unless you can do it yourself. Most of them cannot, they have to hire an attorney. Can I counterclaim for my attorney's fees? The answer is "No." When it is an action such as this, you are just out your own attorney's fees. If you can get the action dismissed, that's the best you can do.

Statement of Rep. Maxfield, Third Reading of H.B. 100, 44th Utah Leg., Gen. Sess. (Feb. 5, 1981) (H.R. Recording Tape No. 6, side 1). Thus, the primary purpose of awarding attorneys' fees where the losing party has filed a meritless claim in bad faith is to make the innocent party whole by compensating the prevailing party for the legal expenses incurred in defending against a groundless suit. If the Court of Appeals' decision is allowed to stand, the purpose of the Bad Faith Statute will be frustrated here, and perhaps in many future cases.

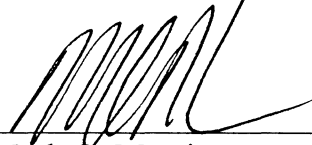


## CONCLUSION

For the reasons stated above, this Court should reverse the Court of Appeals' opinion affirming the trial court's denial of Cannon's Motion for Attorney's Fees and Costs, and remand this case to the trial court with instructions to determine Cannon's reasonable attorneys' fees below, and attorney's fees incurred in appealing the trial and appellate court's rulings, pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

DATED this 24<sup>th</sup> day of September, 2001.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to be 'M. Morris', written over a horizontal line.

Mark O. Morris

David N. Wolf

Attorneys for Defendants/Appellants  
Tracey Cannon and Cannon Associates,  
Inc.

**CERTIFICATE OF SERVICE**

This will certify that on the 24<sup>th</sup> day of September, 2001, I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLANTS to each of the following:

Steven B. Smith, Esq.  
Scalley & Reading, P.C.  
261 East 300 South, Suite 200  
Salt Lake City, Utah 84111

John R. Bucher, Esq.  
1343 South 1100 East  
Salt Lake City, Utah 84105

James C. Haskins, Esq.  
Haskins & Assoc.  
357 South 200 East #300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_