

2001

Wardley Better Homes and Garden v. Tracey Cannon and Cannon Associates, Inc. : Reply Brief

Utah Supreme Court

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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

REPLY 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**

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ARGUMENT

I. CANNON IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER UTAH'S BAD FAITH STATUTE BECAUSE WARDLEY IS IMPUTED WITH KNOWLEDGE OF AND IS RESPONSIBLE FOR HANSEN'S FRAUDULENT ACTIVITIES.

Corporations do not have states of mind. Corporations do not have knowledge. People do. The fundamental error of the lower courts that Wardley seeks to perpetuate here is to view "Wardley" as something, or someone, separate and apart from the people that work there . . . in particular its agents who interact with the outside world. To adopt this position would require this Court to conclude that Wardley is not imputed with the knowledge that its agent unquestionably had . . . that the claims against Cannon were completely unfounded, and based on a premise known to be false. This Court rejected that notion in Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991), and it should do so here.

This Court should require Wardley to pay Cannon's attorney's fees because Wardley is imputed with knowledge that its claims against Cannon were brought in bad faith, and were without merit. Below, the trial court found that Arles Hansen ("Hansen"), fraudulently altered the dates of certain listing agreements and fraudulently induced his clients, the Mascaros, to enter into the listing agreements. (R. at 947-50.) The trial court also found that Hansen was acting as Wardley's agent when he engaged in this fraudulent conduct. (R. at 939.) And, it is undisputed that at its agent's behest, Wardley sued Cannon, a stranger to the dealings between Wardley and the Mascaros, to collect a real estate commission and treble damages based on the conduct of its agent, which conduct was undisputedly fraudulent.

Wardley contends that Cannon is not entitled to recover her attorney's fees because the trial court's determination that Hansen knowingly engaged in fraudulent conduct should not be imputed to Wardley. Wardley's attempt to avoid responsibility for the damages caused by its agent's fraud is contrary to law and is contrary to policies espoused by this Court. A basic tenet of Utah agency/principal law, existing since before statehood, holds that the principal is responsible for the damages caused by its agent's fraudulent conduct.

It is a general doctrine of law that . . . the principal . . . 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)).¹

This Court should not permit Wardley to escape responsibility for the fraudulent conduct of its agent, which it will if the trial court's ruling is undisturbed. Principles of agency and accountability, in particular where fiduciaries are concerned, should move this Court to conclude that the trial court's findings as to Hansen's fraudulent conduct

¹ The same doctrine is set forth by Mechem in his work on Agency (section 734).

necessarily, and as a matter of law, apply to Wardley. Accordingly, Cannon respectfully requests that this Court reverse the decision of the Court of Appeals and instruct the trial court to impose fees against Wardley under Utah's bad faith statute, § 78-27-56 Utah Code Ann.

II. THERE IS NO MEANINGFUL DISTINCTION BETWEEN HODGES AND THIS CASE, AND THUS HANSEN'S ACTUAL KNOWLEDGE OF HIS OWN FRAUD SHOULD BE IMPUTED TO WARDLEY

In its opposition brief, Wardley contends that Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991) is distinguishable from the instant case.² In Hodges, this Court held that the knowledge and improper conduct of an agent acting in the scope of his employment, and for the benefit of his principal, should be imputed to that principal. Id. at 157. There, Gibson was found liable for malicious prosecution because its agent knew the criminal charges Gibson was prosecuting were false.

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.

Id.

Wardley does not and cannot dispute that here, Hansen's efforts to secure a commission were performed for the benefit of Wardley. Wardley claims, however, that

² The facts of Hodges are fully set forth in Cannon's initial brief and will not be repeated here.

Hansen was not acting within the scope of his employment with Wardley because “[t]here is no evidence whatsoever, that Hansen had authority from Wardley to fraudulently change dates on any listing agreements.” (Appellee’s brief at 15.) This misinterprets the law, and begs the question: If Hansen weren’t acting on behalf of Wardley, how could Wardley seek a commission arising from Hansen’s conduct?

The distinction that Wardley attempts to draw is meaningless. In the Hodges case, of course “Gibson” never formally authorized or otherwise assented to its employee embezzling money, or falsifying charges against Hodges. Nevertheless, this Court applied the basic tenets of agency/principal law and imputed the knowledge and the conduct of Gibson’s employee to Gibson. Thus, Gibson, as the employer, was charged in a 5-0 decision with knowingly pursuing false claims against an innocent party.

Just as in the Hodges case, “Wardley” (i.e. no one else at Wardley other than Hansen) did not authorize Hansen to fraudulently change dates on the listing agreements at issue. But this does not relieve Wardley of its responsibility for the damages caused by its agent’s conduct.³ Wardley’s reading of the Hodges case is erroneous, primarily, because it assumes that there is a legal difference between principal and agent in these situations. There is no distinction between agent and principal where the knowledge of the agent is imputed to the principal. And, the knowledge and conduct of the agent is imputed to the principal where the agent is acting within the scope of their authority and is motivated either in whole or in part to carry out the principal’s purposes. Id.

³ If Wardley’s analysis is correct, then the rule announced in Hodges would only apply if the principal expressly authorized its agent to engage in improper conduct, a fact that was not present in Hodges.

In the instant case, the trial court expressly found that “Hansen . . . represented himself to be the agent of . . . Wardley” (R. at 939). And of course, it was a commission claimed by that agent that Wardley was seeking in the trial court below. Despite the trial court’s conclusion that Hansen was acting as Wardley’s agent, Wardley now claims that somehow Hansen’s status as a non-managerial employee precludes a finding that his fraudulent conduct occurred within the scope of his employment. The facts, and Utah statutory and common law do not support this claim. Hansen had the authority to earn a commission and sign agreements on behalf of Wardley, and that is enough here, particularly when Wardley ratified that conduct by seeking the commission it generated.

A. HANSEN’S FRAUDULENT CONDUCT OCCURRED WITHIN THE SCOPE OF HIS EMPLOYMENT WITH WARDLEY

W. Keeton, Prosser and Keeton on the Law of Torts § 70, at 502 (5th ed. 1984) defines the basic function that the term “scope of employment” serves in respondeat superior cases:

It [scope of employment] refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment. . . . [I]n general the servant’s conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.

Id. (emphasis added.) By seeking to obtain a real estate commission for himself and Wardley, albeit through fraudulent means, there cannot be a dispute about Hansen acting well within his scope of employment.

1. **The Wardley/Hansen Relationship Meets Utah's Three Part Test**

Utah cases have tended to focus on three criteria for determining when the conduct of an employee falls within the scope of employment.⁴ First, an employee's conduct must be of the general kind the employee is employed to perform. See Keller v. Gunn Supply Co., 62 Utah 501, 220 P. 1063 (1923) (citing Hardeman v. Williams, 150 Ala. 415, 43 So. 726, 10 L.R.A. 653 (1907)); Restatement (Second) of Agency § 228(1)(a) (1958). That means that an employee's acts or conduct must be generally directed toward the accomplishment of objectives within the scope of the employee's duties and authority, or reasonably incidental thereto. In other words, the employee must be about the employer's business and the duties assigned by the employer, as opposed to being involved in a wholly personal endeavor. See Keller, 62 Utah at 505, 220 P. at 1064. This element is not disputed here, particularly when Wardley was seeking entitlement to a large percentage of the commission.

Second, the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment. See Cannon v. Goodyear

⁴ The Restatement (Second) of Agency § 228 (1958) definition of "scope of employment" corresponds to how Utah courts have consistently defined scope of employment. See Stone v. Hurst Lumber Co., 15 Utah 2d 49, 51, 386 P.2d 910, 911 (1963); Combes v. Montgomery Ward & Co., 119 Utah 407, 411, 228 P.2d 272, 274 (1951); Barney v. Jewel Tea Co., 104 Utah 292, 296, 139 P.2d 878, 879 (1943); Keller v. Gunn Supply Co., 62 Utah 501, 220 P. 1063 (1923); Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519 (1922). Cf. Carter v. Bessey, 97 Utah 427, 431, 93 P.2d 490, 492 (1939). Section 228 provides in part:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) It is of the kind he is employed to perform;
 - (b) it occurs substantially within authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Tire & Rubber Co., 60 Utah 346, 351, 208 P. 519, 521 (1922); Restatement (Second) of Agency § 228(1)(b). Wardley does not and cannot dispute that Hansen’s activities relevant to this case were within these boundaries.

Third, the employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interest. See Stone v. Hurst Lumber Co., 15 Utah 2d 49, 51, 386 P.2d 910, 911 (1963); Combes v. Montgomery Ward & Co., 119 Utah 407, 411, 228 P.2d 272, 274 (1951) (“within the scope of furthering [employer’s] purpose”); Barney v. Jewel Tea Co., 104 Utah 292, 296, 139 P.2d 878, 879 (1943). Cf. Carter v. Bessey, 97 Utah 427, 431, 93 P.2d 490, 492 (1939) (finding employer not liable when employee’s conduct intended “for purposes other than the master’s business”). Again, this element is satisfied in this case as Wardley stood to benefit financially through the procurement and receipt of a substantial commission. Here, Wardley expended significant efforts to obtain that benefit.

III. CANNON IS ENTITLED TO ATTORNEY’S FEES BECAUSE THE TRIAL COURT’S FACTUAL FINDINGS OF FRAUD COMMITTED BY HANSEN ARE IMPUTED TO WARDLEY

Wardley contends that Cannon is not entitled to attorney’s fees in this case “even if Wardley is charged with Hansen’s conduct.” (Appellees’ brief at 18.) In support of its position, Wardley cites to the following findings of the trial court, all of which findings are premised on the same legal error perpetuated by the Court of Appeals, i.e. that “Wardley” should be viewed differently from its agent, Hansen. The teaching of Hodges is that Wardley and Hansen are one and the same. Erroneously treating Wardley as separate and distinct from Hansen, the trial court found:

1. Wardley’s suit was not without merit; [R. 1173].

2. The evidence did not support the contention that Wardley's claims were frivolous or of little weight; [R. 1173-74].
3. Wardley did not have knowledge of Hansen's fraudulent conduct; [R. 1174].
4. Wardley strongly believed it had a claim for unpaid commissions; *Id.*
5. Wardley's decision to bring a lawsuit under the listing agreements, which on their face appeared to be legitimate, cannot be viewed with 20/20 hindsight and the benefit of approximately four days of trial testimony; *Id.*
6. Wardley's Complaint was not asserted or pursued in bad faith; *Id.*
7. The record does not provide any credible support for a finding that Wardley pursued its claim to hinder, delay, defraud or otherwise take unconscionable advantage of Cannon. [R.1175]; and
8. "The totality of facts and circumstances don't point to [an award of attorney fees to Defendants from Wardley] as equitable. [R.1175 and 1266].

One method of avoiding this error is to apply Hodges, and assume that it was Hansen who had been the plaintiff suing Cannon. If he had, his liability for fees in seeking to enforce a contract he knowingly altered to extend its term would be undisputed. The trial court could not have found that Hansen's suit had merit. Likewise, the evidence would clearly support the conclusion that Hansen's claims were frivolous or of little weight.

The finding, cited by Wardley that most glaringly highlights the trial court's error, is its finding that "Wardley" did not have knowledge of Hansen's fraudulent conduct. The trial court erroneously thought it important that apparently, no one at Wardley, other

than Hansen knew of his fraud. As set forth above, knowledge of Hansen's fraudulent conduct is imputed to Wardley as a matter of law. Accordingly, Wardley is deemed to have knowledge of Hansen's fraudulent conduct. Furthermore, it cannot be said that Hansen believed he had a valid claim for an unpaid commission. Nor does the evidence suggest that Hansen could have asserted claims in good faith or for any other purpose other than "defrauding or otherwise taking unconscionable advantage of Cannon."

The fact that Wardley was the named plaintiff, rather than Hansen, is simply a function of Utah law. Utah law precluded Hansen from being the plaintiff, and instead required his broker, Wardley, to file suit.⁵ 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 to these real property dealings, Hansen's knowledge of his fraud should be imputed to his principal, Wardley. Imputed with the knowledge, and charged with the conduct of Hansen, the trial court's findings applicable to Hansen become equally applicable to Wardley. Accordingly, Cannon is entitled as a matter of law to recover its attorney's fees from Wardley in this case.

⁵ Utah Code Ann. § 61-2-10(1) prohibits a real estate agent from accepting a commission on the sale of property directly, and requires that any consideration paid to the agent must be paid through a principal broker with whom the agent is affiliated and licensed. See Utah Code Ann. § 61-2-10(1) (1997). In addition, Utah Code Ann. § 61-2-18(2) prohibits a real estate agent from filing suit in his or her own name to recover a commission on the sale of a property. See Utah Code Ann. § 61-2-18(2) (1997). This statutory policy highlights and affirms the significant responsibility brokers bear for their agent's conduct.

IV. ATTORNEY'S FEES ARE PROPERLY IMPOSED ON WARDLEY BASED ON THE "BAD ACTS" OF HANSEN

Wardley contends that "attorney's fees should only be imposed upon bad actors, not their principals." As set forth above, the courts in Hodges, Combes and Carter make clear that an employer is liable for the tortious conduct of its employee that occurs within the scope of their employment if the employee's purpose or intent, however misguided in its means, is to further the employer's business interests. See also Prosser and Keeton § 70, at 503-05.

An employer is vicariously liable for an employee's intentional tort if the employee's purpose in performing the acts was either wholly or only in part to further the employer's business, even if the employee was misguided in that respect. Birkner, 771 P.2d 1057. See also W. Keeton, Prosser and Keeton on the Law of Torts, at 505 (5th ed. 1984). See Hodges, 811 P.2d at 156-57. Applying this principle here, Wardley is vicariously liable for Hansen's fraud, including the liability for attorneys fees that attached once the spurious claims were asserted in bad faith and pursued through trial.

V. REQUIRING WARDLEY TO PAY CANNON'S ATTORNEY'S FEES IS CONSISTENT WITH THE INTENT OF UTAH CODE ANN. § 78-27-56.

Without citing any authority to support its position, Wardley asserts that it should not be responsible for its agent's fraudulent and tortious conduct because the recovery of attorney fees under § 78-27-56 is punitive rather than remunerative. See Brief of Appellee at 16. Wardley then argues that because it would not be held vicariously liable for an award of punitive damages against Hansen, it should not have to compensate Cannon for the damages caused by Hansen's fraudulent conduct. Wardley's argument is factually inaccurate and legally unsupported.

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 attorney's 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. *Id.*; see also *Gordon v. Heimann*, 715 F.2d 531, 539 (11th Cir. 1983); *Nemeroff v. Abelson*, 704 F.2d 652, 654 (2d Cir. 1983). This is not punishment. It is compensation.

Unless Cannon is reimbursed for the attorney's fees she incurred in defending against Wardley's frivolous claims, she will have paid tens of thousands of dollars to defend herself against Wardley's meritless and factually fraudulent claims, and Wardley will have pursued fraudulent claims with impunity. Such a result is both unjust and contrary to the purpose of Utah Code Ann. § 78-27-56. Accordingly, this Court should require that Wardley pay Cannon the attorney's fees she has incurred in defending against this action.

VI. CANNON IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER UTAH'S BAD FAITH STATUTE BECAUSE WARDLEY PUT ITS AGENT IN THE POSITION TO COMMIT FRAUD

Finally, Utah law also encourages an examination of the relative innocence of parties in Wardley's and Cannon's positions. As between Cannon and Wardley, Wardley should answer for its agent's conduct and pay fees to Cannon. It was Wardley who put Hansen in the position and empowered him with the authority to deceive the Mascaros. Wardley put Hansen in the position to fraudulently create the contracts upon which Wardley's claims against Cannon were based. And, it is undisputed that Wardley was in a superior, and perhaps the only position to prevent the fraud of its own agent. Utah courts have consistently held 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). See also 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).

Erroneously assuming there is a legal distinction between Wardley and its fraudulent agent, the trial court concluded that Wardley was a victim of the dishonesty of its own agent. But Wardley suffered no loss here. Wardley stood only to benefit from its agent's fraudulent conduct. Unless Cannon is reimbursed for the attorney's fees she paid in defending against Wardley's claims, then Cannon alone will suffer the consequences of Hansen's dishonesty. In such circumstances, Utah courts have uniformly concluded that the burden should fall upon Wardley, because it was "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). Because Hansen was not an honest man, this Court should require Wardley to be responsible for its agent's bad conduct.

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 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 18th day of January, 2002.

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CERTIFICATE OF SERVICE

This will certify that on the 18th day of January, 2002, I caused to be mailed two
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