

2001

Wardley Better Homes and Garden v. Leland J. Mascaro, Sheri Mascaro, Tracey Cannon and Cannon Associates, Inc. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WARDLEY BETTER HOMES and
GARDENS,

Plaintiff/Appellee,

vs.

LELAND J. MASCARO, SHERI
MASCARO, TRACY CANNON and
CANNON ASSOCIATES, INC., a Utah
corporation,

Defendants/Appellants.

Supreme Court No. 20010245

Appeal No. 20000128

Civil No. 940907000 CN

ORAL ARGUMENT REQUESTED

**BRIEF OF APPELLEE, WARDLEY BETTER HOMES & GARDENS IN
OPPOSITION TO CANNON APPELLANTS' PETITION FOR WRIT OF
CERTIORARI**

**APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS AFFIRMING
AN ORDER OF THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
UTAH, ISSUED BY THE HONORABLE LESLIE A. LEWIS, DISTRICT COURT
JUDGE, DENYING APPELLANTS' ATTORNEY FEE REQUEST**

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FILED
UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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JURISDICTIONAL STATEMENT

This matter is before the Court pursuant to its grant of Appellants, Tracy Cannon's and Cannon Associates, Inc.'s ("the Cannons"), Petition for Writ of Certiorari of the Utah State Court of Appeals' Decision affirming the Honorable Leslie A. Lewis' Order denying the Cannons' request for attorney fees pursuant to Utah Code Ann. § 78-27-56. *Wardley Better Homes & Gardens v. Cannon*, 2001 UT App. 48, 21 P.3d 235. The Utah Supreme Court has jurisdiction over this Appeal pursuant to UT. Const., art. XIII, § 5 and Utah Code Ann. § 78-2-2(3)(a) (2001 Supp.), and Rules 45 and 51 Utah R. App. P. (2001).

STATEMENT OF THE ISSUE PRESENTED

Whether the Court of Appeals' correctly affirmed the trial Court's finding the Cannons were not entitled to recover attorney fees from Appellee Wardley Better Homes & Garden ("Wardley") because the claims that Wardley litigated in the trial court were not without merit and were not pursued in bad faith.

STANDARD OF REVIEW

The Cannons correctly state that "on Certiorari [this Court] review[s] the Decision of the Court of Appeals not of the trial court." *Rawson v. Conover*, 2001 UT 24, ¶ 25, 20 P.3d 876 (quoting *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540; and *Lysenko v. Sawaya*, 2000 UT 58, ¶ 15, 7 P.3d 783). The Cannons, however, over-simplify the Court's standard of review in this case by asserting that this Court only needs to review the Court of Appeals' Decision for correctness without any deference to its conclusions

of law. The Cannons' Brief at 1 (quoting *Esquivel v. Labor Comm'n*, 2000 UT 66, ¶ 11, 7 P.3d 777; and *Bear River Mut. Ins. Co. v. Wall*, 1999 UT 33, ¶ 4, 978 P.2d 460).

This Court must initially “examine whether the Court of Appeals applied the correct standard of review to the trial court’s decision . . .” *Lysenko* at ¶ 15.

Furthermore, while legal decisions are reviewed for correctness without deference, all factual determinations and any inferences that can be drawn therefrom must be viewed in the light most favorable to Wardley. *Rawson* at ¶ 25 and *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856.

While the question of whether Wardley’s claims were “without merit [] is a question of law” reviewed for correctness, *Jeschke v. Willis*, 811 P.2d 202 (Utah App. 1991), the determination that Wardley did not pursue its claim in “bad faith is a question of fact and is reviewed by [the appellate courts] under the ‘clearly erroneous’ standard.” *Id.* (citing *Topik v. Thurber*, 739 P.2d 1101, 1104 & n. 5 (Utah 1987); and *Canyon Country Store v. Bracey*, 781 P.2d 414, 421 (Utah 1989) (determination of bad faith reviewed for an abuse of discretion)). This Court has recognized that a “finding of bad faith is a mixed question of law and fact that turns on a factual determination of a party’s subjective intent.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-16 (Utah 1998) (citing *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah App.1989)). Additionally, in *Pennington v. Allstate Ins. Co.*, 973 P.2d 932 (Utah 1998), this Court clarified the appropriate standard of review for an award of attorney fees pursuant to Utah Code Ann. § 78-27-56 by stating that “[t]o clarify the matter: As to whether the party lacked good

faith, the trial court **must make a factual finding** of a party's subjective intent. In addition, the trial court **must conclude**, as a matter of law, that the action was without merit." *Id.* (emphasis added).

DETERMINATIVE STATUTES

Utah Code Ann. § 78-27-56 governs the award of attorneys fees where a meritless claim or defense is asserted by a party in bad faith. It states:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1)

STATEMENT OF THE CASE

OBJECTION TO THE CANNONS' STATEMENT OF THE CASE AND THE FACTS

Wardley objects to the Statement of the Case and Statement of Facts as set forth in the Cannons' Brief because those sections of the Cannons' Brief, misrepresent, confuse and ignore the evidence and the basis for the Court of Appeals' Decision .

Paragraphs 2, 3 and 4 of the Utah Court of Appeals Decision in *Wardley v. Cannon*, 2001 UT App. 48, 21 P.3d 235, as well as the trial court's ruling denying the Defendants' request for attorney fees (R. 1171-77 attached hereto as Addendum A),

portray the nature of this case and many of the relevant facts much more accurately than the Cannons' statement and facts.

Examples of objectionable and distorted representations include the following:

The Cannons consistently refer to a fraud perpetrated by Arles Hansen ("Hansen"), an agent of Wardley. The Cannon's Brief at 2. However, the trial court actually ruled and the Court of Appeals recognized that the incorrect dates on the listing agreement were different than anticipated by the Mascaros, but only made them voidable not void. *Wardley v. Cannon*, at ¶ 3. Similarly, the Cannons fail to discuss any of the time, efforts and expenses Hansen utilized while trying to find a buyer for the Mascaros' property during the claimed term of the listing agreement.

The Cannons also fail to point out that an early Motion for Summary Judgment was denied because there were material facts at issue. Furthermore, the trial court rejected Motions for a directed verdict at the close of Wardley's case in chief and did not rule against Wardley until after "[a]fter four days of 'carefully evaluating the trial testimony and carefully scrutinizing the numerous documents entered into evidence.'"

R. 1173-74

Finally, the Cannons gloss over the fact that after sitting through four days of testimony, the trial court took over two months to render a decision. Thereafter, in response to the Cannons and Mascaros' request for attorney fees, the trial courts found that Wardley's suit was not "without merit" and even though the listing agreements entered between Wardley and the Mascaros were voidable because of Hansen's

misconduct, the legality of the listing agreements consisted of mixed factual and legal questions which were not entirely clear. There was no evidence that Wardley knew of Hansen's fraudulent conduct, or that it: (a) did not honestly believe in the propriety of the claims; (b) intended to take unconscionable advantage of others; or (c) acted with knowledge that its activities would hinder, delay, and defraud Cannon or the Mascaros. R. 1173-74 and 1266 (Order Denying Attorney Fees, attached hereto as Addendum B). The trial court also found that Wardley's Complaint was not asserted or pursued in bad faith, R. 1174 and 1266, and stated "the totality of facts and circumstances don't point to [Wardley's Payment of the Cannons' fees] as equitable." [R. 1175]. Because the Cannons have not marshaled any evidence or challenged any factual determinations below, this Court cannot know the facts and circumstances that support the decisions of the trial court and Utah State Court of Appeals.

NATURE , PROCEEDINGS, FACTS AND DISPOSITION OF CASE BELOW

This case was originally filed by Wardley against Defendants Leland and Sheri Mascaro ("the Mascaros") to recover a real estate commission Wardley believed it was entitled to recover because of four listing agreements signed by the Mascaros. [R. 12-15 and 287-90]. The Mascaros Answered Wardley's Complaint and asserted a Counterclaim against Wardley and a Third-Party Claim against Third-Party Defendants, Ruth and Arles Hansen ("the Hansens") who were licensed real estate agents affiliated with Wardley. [R. 28-39]. Thereafter, Wardley filed an Amended Complaint asserting claims against Tracy Cannon for Unlawful Interference with Contract, Conspiracy and

seeking a Declaratory Judgment. [R. 81-90]. Later Wardley amended its Complaint and asserted causes of action against Cannon & Associates, including claims for statutory violations and conversion. [R. 277-82]. The Cannons answered Wardley's Complaint but did not assert any counterclaims against Wardley nor any cross-claims against the Hansens.

Tracy Cannon filed a Motion for Summary Judgment claiming there were no disputed material facts. The trial court denied that Motion because "there [were] materials facts at issue." [R. 268-70].

This case was tried over four days utilizing the testimony of 14 witnesses and 95 exhibits (65 of which were received into evidence). [R. 845-46, 851-52, 895, 926-27 (witnesses) and 847-50 (exhibits)]. At the conclusion of the trial, Judge Lewis found no cause of action against Tracy Cannon on the violation of statute or rule claims and determined that Wardley had failed to meet its burdens of proof on its claims against the Cannons for interference with the contracts or conversion. Wardley's other claims, however, against the Mascaros and the Cannons relating to the Listing Contracts were taken under advisement. [R. 927 and 937-54 Memorandum Decision issued by trial court following trial attached hereto as Addendum C]. Those claims were kept under advisement for 68 days at which time Judge Lewis issued a Memorandum Decision concluding that the Listing Contracts were voidable and unenforceable because they did not accurately reflect the Mascaros' understanding that they would be one-day listings. [R. 945-51].

The Mascaros and the Cannons then requested attorney fees pursuant to Utah Code Ann. § 78-27-56. [R. 972-78 and 979-1080]. Because Wardley's suit was not without merit [R. 1173] and because it "was not asserted or pursued with the requisite bad faith." [R. 1174-75] the requests for attorney fees were denied. To support that decision the trial court stated that the Mascaros and the Cannons "failed to show that Wardley's claims under the listing agreements were frivolous or of little weight or importance having no basis in law or fact." [R. 1173-74 (citing *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983))]. The trial court also noted "that the listing agreements entered into between Wardley and the Mascaros were voidable because of Mr. Hansen's misconduct, [but] the legality of the listing agreements, a mixed fact and legal question, was not entirely clear. *Id.* Judge Lewis explained that her decision was reached "only after extensively evaluating the trial testimony and carefully scrutinizing the numerous documents entered into evidence, in light of the law." *Id.*

Judge Lewis' Ruling regarding Wardley's lack of bad faith in pursuing its claims states "[t]he record does not provide any credible support for a finding that Wardley pursued its claims to hinder, delay, defraud, or otherwise take unconscionable advantage of Cannon or the Mascaros" and that it would not be equitable to award the Defendants their attorney fees from Wardley. [R. 1175].

The Cannons appealed the trial court's order denying their request for attorneys fees but did not oppose or dispute any of the trial court's factual findings. *Wardley v. Cannon* at ¶¶ 4 & 7, 21 P.3d.

Because the Cannons did not challenge any of the factual findings or marshal any evidence, the Court of Appeals stated “we must ‘assume [] that the record supports the findings of the trial court,’ including the finding that Wardley’s suit was not pursued in bad faith. *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991). Consequently, because a finding of bad faith is required before a court can award attorney fees under § 78-27-56, our acceptance of this finding as true is fatal to [the Cannons] appeal” *Wardley v. Cannon* at ¶ 7.

The Court of Appeals also rejected the Cannons “novel theories of vicarious liability” to awards of attorney fees. *Id.* at ¶¶ 8-11.

SUMMARY OF ARGUMENT

I. In order to collect attorney fees pursuant to Utah Code Ann. § 78-27-56 three requirements must be met: (1) the parties seeking fees must have prevailed, (2) the claim or defense asserted must have been meritless; and (3) must have been pursued in bad faith. *Chipman v. Miller*, 934 P.2d 1158, 1161 (Utah App. 1997). The claims that Wardley pursued against the Cannons were not meritless and were not pursued in bad faith. There were numerous factual and legal issues presented and resolved at the four-day trial through the testimony of 14 witnesses and 65 exhibits. It took the trial court over two months to reach its final decision and after hearing all the evidence it stated that Wardley’s claims were not frivolous or of little weight or importance having no basis in law or fact. [R. 1173-74] (citing *Cady v. Johnson*, 671 P.2d 149, 151). Furthermore, the

factual determination that Wardley's claims were not pursued in bad faith has not been challenged on appeal and must govern the outcome of this case.

II. The case of *Hodges v. Gibson Products Co.*, 811 P.2d 151 (Utah 1991) is distinguishable from the instant case and does not provide a basis for the Cannons to recover attorney fees from Wardley because of Hansen's conduct. *Hodges* dealt with a tort claim that involved numerous factual determination which were all resolved in the plaintiffs' favor after trial. It also involved the knowledge and conduct of the defendant company's managerial agent. The Cannons' claim for attorney fees from Wardley involves complex factual determinations regarding bad faith that were resolved in favor of Wardley and a statutory claim for attorney fees based solely upon the conduct of an independent contractor. In *Hodges* this Court upheld the jury's determination that the defendant company's managerial agent in charge of determining whether or not to pursue criminal charges **KNOWINGLY** initiated criminal charges against an innocent individual *Id.* at 157-58; lacked probable cause to initiate the prosecution, *Id.*; and pursued the criminal prosecution for an improper purpose *Id.* at 160-61. In the instant case there is no evidence, whatsoever, that Wardley, or any managerial agent had any knowledge of any improper conduct by Hansen.

III. The Cannons' efforts to place themselves in the position of a defrauded innocent third party are misplaced and do not provide them with a legal basis to recover attorney fees from Wardley. In the instant case the Cannons did not rely upon or change their position because of Wardley, Hansen or any improper conduct by Hansen. Section

78-27-56 is punitive in nature and the standards governing an employer's vicarious liability for punitive damages should govern the outcome of this Appeal. Tort principles of vicarious liability and imputation of knowledge should not govern claims for attorney fees under Utah Code Ann. § 78-27-56.

IV. In Utah, attorney fees can only be recovered when provided for by contract or statute. The evidence and findings in this case preclude an award of attorney fees in this case regardless of Hansen's knowledge. The statutory mandates regarding attorney fees should be strictly applied. Utah Code Ann. § 78-27-56 states that to recover attorney fees in a civil action the claim or defense asserted must be meritless **AND** brought in bad faith. While questions of merit are matters of law, questions of bad faith turn on the "subjective intent" of the party to the action, not the knowledge of a witness or independent contractor. There is no evidence in the instant case that Wardley's subjective intent amounted to bad faith.

ARGUMENT

I. THE CLAIMS WARDLEY PURSUED AGAINST THE CANNONS WERE NOT MERITLESS AND WERE NOT PURSUED WITH BAD FAITH.

A. Wardley's Claims Were Not Meritless

Attorney fees may be awarded pursuant to Utah Code Ann. § 78-27-56 "if the court determines the acts or defense of the action (i) was without merit and (ii) not brought or asserted in good faith." *Valcarce* 961 P.2d at 316 "to prove a claim is

‘without merit’, a party must show that the claim is ‘frivolous’ or ‘of little weight or importance having no basis in law or fact.’” *Chipman* 934 P.2d at 1162.

This dispute involved a number of dispositive motions, sixty five exhibits and four days of trial testimony. Even then, the trial court needed a significant amount of time to sort through all of the evidence before it could make a ruling. Rather than provide this Court with the trial testimony or the exhibits upon which the trial court’s decision was based, the Cannons have relied solely upon the trial court’s finding that Hansen inserted dates on four listing agreements that were inconsistent with the Mascaro’s understanding. The Cannons failed to point out the various Real Estate Purchase Contracts that the Hansens presented to the Mascaros [R. 847-50] and totally ignored the fact that the Mascaros believed they had a contract with Wardley or they would not have filed a counterclaim alleging breach of contract. [R. 28-39]. The Cannons have also disregarded the numerous other efforts and steps which the Hansens took to help the Mascaros sell their property. [R. 661-77]. Finally, but perhaps most importantly, the Cannons did not provide this Court with any of the trial testimony, which formulated the basis for the trial court’s decision. [R. 1409-11; Notice of No Transcript Requested].

In order to prove a claim is without merit, a party must show that the claim is “frivolous” or “of little weight or importance having no basis in law or fact.” *Cady*, 671 P.2d at 151. The instant case involved complex factual and legal issues, including the alleged modification of the listing agreements, the enforceability of the listing

agreements, whether the Cannons interfered with another buyer's purchase of the property, whether the Mascaros refused to sell their property to a ready, willing and able buyer brought into the transaction by Wardley, and whether the Cannons interfered with the Wardley/Mascaro listing agreement. [R. 268-70, 271-92, 636 and 661-77]. After reviewing all of the evidence, the trial court could not conclude that Wardley's claims were "frivolous" or "of little weight or importance having no basis in law or fact." [R. 1173-74 (citing *Cady*, 671 P.2d at 151)]. This Court should not make that conclusion without at least reviewing the same evidence. The trial court and Court of Appeals recognized that the legality of the listing agreements upon which Wardley's claims were based, presented complicated questions of fact and law which were only resolved after the trial court "extensively evaluat[ed] the trial testimony and carefully scrutiniz[ed] the numerous documents entered into evidence, in light of the law." [*Id.* See also Wardley BH&G at ¶¶ 3 and 8 f.n. 4]. Even without the benefit of the trial testimony and the numerous documents upon which the trial court's decision was based, the meritorious nature of Wardley's claims should be recognized by this Court by affirming the Court of Appeals Decision.

B. Wardley's Claims Were Not Pursued in Bad Faith.

Even if Wardley's claims lacked merit, before attorney fees can be awarded pursuant to Utah Code Ann. § 78-27-56, there must be a factual finding that Wardley did not have a good faith belief in its claims. "Finding a lack of good faith turns on subjective intent" of the party and for purposes of § 78-27-56 is synonymous with a

finding of “bad faith.” *Cady*, 671 P.2d at 151-52. See also *Taylor*, 770 P.2d at 171 and

Valcarce, 961 P.2d at 315-16. To find that Wardley acted in “bad faith” by pursuing these claims “the trial court must find that one or more of the following factors existed:

(i) [Wardley] lacked an honest belief in the propriety of the activities in question;
(ii) [Wardley] intended to take unconscionable advantage of others; or (iii) [Wardley] intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others.” *Valcarce*, 961 P.2d at 316 (citing *Cady*, 671 P.2d at 151).

There is no evidence, indication or finding that Wardley: (1) lacked an honest belief in the propriety of its claims; (2) that it intended to take unconscionable advantage of anyone; (3) or that it knew its actions would hinder, delay or defraud others. To the contrary, the trial court found that even though Hansen had improperly modified/inserted dates on the listing agreements, when all the evidence was considered, Wardley had a good faith basis from which to pursue the claims involved in this action. The Court of Appeals properly recognized that Wardley’s claims did not lack merit and were not pursued in bad faith. This Court should do likewise.

In the *Cady* case, like in this case, a realty company sued a prospective seller of real property for a commission. The trial court in that case found that the realtor’s claims were meritless and awarded the defendant its attorney fees. The Utah Supreme Court, however, reversed and held that even though the suit may have been ill conceived and without merit, there was no proof of bad faith which would support an award of attorney fees. The Supreme Court explained:

[i]n the instant case, the trial court found lack of good faith because had plaintiffs researched the issue as instructed at pre-trial conference, they would have discovered they had no valid claim and they could have saved the court valuable time by avoiding trial. We disagree that this conduct constitutes bad faith. Plaintiffs were clearly pursuing a meritless claim and better preparation might well have disclosed that to them. However, that conduct does not rise to a lack of good faith. The evidence must also affirmatively establish a lack of at least one of the three elements of good faith heretofore discussed. There was no evidence that plaintiffs lacked an honest (although ill-formed) belief in their claim; that they had an intent to take an unconscionable advantage of defendants; nor that they had the intent to, or knowledge that their suit would hinder, delay or defraud defendants.

Cady, 671 P.2d at 152; (citing *Tacoma Assoc. of Credit Men v. Lester*, 72 Wash.2d 453, 458, 433 P.2d 901, 904 (1967)). Even if Wardley's claims were poorly researched and/or ill-formed, its honest belief that a commission was due from the Cannons defeats the Cannons' claim for attorney fees in this case.

II. *HODGES V. GIBSON PRODUCTS CO. IS DISTINGUISHABLE FROM THE INSTANT CASE.*

The case of *Hodges v. Gibson Products Co.*, 811 P.2d 151 (Utah 1991) deals with a tort claim for malicious prosecution and wrongful termination. In that case four company employees went to the police and accused Hodges of stealing from the company. The jury, however, determined that Hodges did not steal the employer's funds and that conclusion was supported by the evidence. *Id.* at 157-58. The jury also found that the employer did not even have probable cause to believe that Hodges had taken the money. *Id.* at 159. Finally, the jury found that "[the employer] improperly used the criminal prosecution [] to pressure her to pay [it] the missing money." *Id.* at 161. All of those factual determinations were supported by admissible evidence. Principles of

Agency and Tort Law provided a means by which Hodges could pursue her tort claims against her employer for malicious prosecution and wrongful termination. Those claims prevailed and were upheld by this Court because of the employers' knowledge through its managerial agent who had acted within the course and scope of his employment in initiating the prosecution. *Id.* at 163. This Court, however, pointed out that the manager's knowledge could only be imputed to the employer if his wrongful conduct was within the course and scope of his authority and was motivated to carry out the employer's purposes. There is no evidence whatsoever, that Hansen had authority from Wardley to fraudulently change dates on any listing agreements. The conduct complained of here was outside the course and scope of Hansen's authority and cannot serve as a basis to hold Wardley vicariously liable.

Hodges dealt with an employer's vicarious liability for a legal action pursued by its managerial employee. In the instant case Wardley pursued a claim which, on the face of all the documents that existed and the facts that were available to it, appeared to be legitimate. Even though that was not ultimately the case, the information in question came from an independent contractor, not a managerial employee. Additionally, Wardley, unlike the employer in *Hodges*, did not have any reason to question or doubt Hansen. Because Hansen was not a managerial agent, but instead was an independent contractor of Wardley, his knowledge of the altered dates should not be imputed to Wardley nor provide this Court with a basis upon which to find that Wardley pursued a meritless action in bad faith. The Court of Appeals' Decision differentiating *Hodges*

from the instant case should be upheld and the Cannons' request for attorney fees should be denied.

III. THE SANCTIONS OF ATTORNEY FEES SHOULD ONLY BE IMPOSED UPON BAD ACTORS, NOT THEIR PRINCIPALS.

The Cannons' Brief argues that they have been damaged by Hansen's fraud. The elements of fraud, however, include reasonable reliance and a change of position. *See Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980). Hansen's conduct involved a contract with the Mascaros not the Cannons. The Cannons were brought into this lawsuit by allegations that they interfered with the prospective economic relations of Wardley and because, on the face of the documents available to Wardley, it appeared that the commission collected by the Cannons should have been paid to Wardley. The Cannons argue that § 78-27-56 is remunerative rather than punitive. The goal of § 78-27-56, however, is to send a message that certain conduct is not acceptable within our legal system. The award of attorney fees due to the pursuit of a meritless action in bad faith is intended to sanction the wrongdoer, similar to an award of punitive damages for intentional or reckless disregard of the rights of another in the tort context. Principles applicable to vicarious liability for punitive damages, therefore, should also govern this case.

Vicarious liability for punitive damages for an employee's conduct only exists in the following four circumstances:

- (a) if the principal or a managerial agent authorized the doing and the manner of the act;

(b) if the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him;

(c) if the agent was employed in a managerial capacity and was acting in the scope of employment; or

(d) if the principal or a managerial agent of the principal knowingly ratified or approved the act.

Hodges v. Gibson Products Co., 811 P.2d 151, 63 (Utah 1991); (citing Restatement (Second) of Agency § 217C (1958)).

None of those circumstances apply in this case. No one at Wardley authorized Hansen's allegedly wrongful conduct. There is no evidence that Hansen was unfit or that anyone at Wardley was reckless in employing or retaining him. Hansen was not employed in a managerial capacity and finally Wardley never knowingly ratified or approved of Hansen's conduct. The sanction represented by payment of the opposing party's attorney fees should not, therefore, be based upon the simple tort doctrine of respondeat superior liability through imputed knowledge.

The Cannons argued that justice requires they be reimbursed for their attorney fees. Justice, however, does not require that that reimbursement come from Wardley. In fact, as indicated above, the trial court concluded it would not be equitable for Wardley to bear the burden of the Cannons' attorney fees. Justice does dictate that Hansen should be personally responsible for any fees, costs or expenses incurred by the parties to this lawsuit. The Cannons, however, chose not to pursue a crossclaim against Hansen. Had the Cannons pursued that avenue of recovery they may have had a judgment for their

costs and fees. Wardley, however, should not be prejudiced by the Cannons failure to avail themselves of relevant and available legal remedies.

IV. EVEN IF HANSEN'S KNOWLEDGE IS IMPUTED TO WARDLEY AND WARDLEY BECOMES VICARIOUSLY LIABLE FOR HANSEN'S WRONGFUL CONDUCT, THE CANNONS ARE NOT ENTITLED TO RECOVER ATTORNEY FEES FROM WARDLEY IN THIS CASE.

Utah Code Ann. § 78-27-56 provides for the award of attorney fees to the prevailing party when the opposing party has pursued a meritless action which was not brought or asserted in good faith. Subsection 2 of that code section, however, states that the “court, in its discretion, may award no fees or limited fees against a party under subsection (1), but only if the court: ...(b) enters in the record the reason for not awarding fees under provisions of Subsection (1).” Utah Code Ann. § 78-27-56(2). In the instant case the trial court entered several findings which justify not awarding any fees against Wardley in this case, even if Wardley is charged with Hansen’s conduct. Those findings included:

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 claims 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].

The Court of Appeals' Decision at footnote 4 acknowledges that there are reasons attorney fees should not be granted against Wardley in this case. In footnote 4 the Court of Appeals states that "assuming arguendo that we were to [resolve whether Wardley's claims were without merit or pursued in bad faith, the Cannons'] argument still fails. Whether the listing agreements were legal was unclear. On their face the listing agreements seemed legitimate. The trial court was required to hear four-day trial and to weigh a significant amount of evidence to determine otherwise. The record does not support a finding that Wardley "(i) lacked an honest belief in the propriety of the activities in question; (ii) . . . intended to take unconscionable advantage of others; or (iii) intended to act with the knowledge that [its] activities would hinder, delay, or defraud others,' as is required for a finding of bad faith." *Wardley v. Cannon*, f.n. 4 ¶ 8 (citing *Childs v. Calahoun*, 1999 UT App. 359, ¶ 16, 993 P.2d 244 and quoting *Cady v. Johnson*, 671 P.2d at 151). Wardley, therefore, should not be held responsible to pay the Cannons' attorney fees in this case.

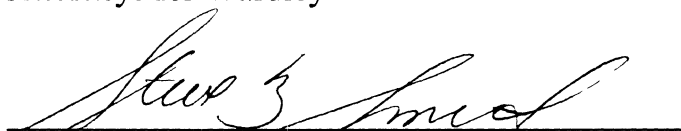
CONCLUSION

The Decision of the Utah State Court of Appeals affirming the trial court's ruling denying the Cannons' request for attorney fees from Wardley should be upheld. The Cannons failure to demonstrate that Wardley's claims were meritless or pursued in bad faith defeats their claim for attorney fees from Wardley. Furthermore, tort principles of vicarious liability are inapplicable to the instant situation. It would be inequitable, unjust and contrary to statute to impute knowledge to Wardley in this case sufficient to justify the sanction of making it pay attorney fees to Cannon in this case. For the reasons set forth above the Cannons request for attorney fees should be denied and the decisions in the trial court and the Utah State Court of Appeals should be upheld.

Respectfully submitted this 16th day of November, 2001.

SCALLEY & READING, P.C.

Attorneys for Wardley

A handwritten signature in cursive script, appearing to read "Steve B. Smith", written over a horizontal line.

Steven B. Smith

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of November, 2001, a true and correct copy of the foregoing **BRIEF OF APPELLEE, WARDLEY BETTER HOMES & GARDENS IN OPPOSITION TO MASCARO APPELLANTS PETITION FOR WRIT OF CERTIORARI** was deposited in the U.S. Mail, postage prepaid, addressed to the following:

Mark O. Morris

David N. Wolf

SNELL & WILMER L.L.P.

15 West South Temple, Suite 1200 Salt Lake City, Utah 84101

Diana L. Ray

ADDENDUM

- A. Trial Court's Ruling Denying the Defendants' Request for Attorney Fees.
- B. Order Denying Attorney Fees.
- C. Memorandum Decision issued by Trial Court.

Tab A

DEC 10 1993

Snail

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WARDLEY BETTER HOMES & GARDENS,	:	COURT'S RULING
Plaintiff,	:	CASE NO. 940907000
vs.	:	
LELAND J. MASCARO, SHERI	:	
MASCARO and TRACEY CANNON,	:	
Defendants.	:	
<hr/>		
LELAND J. MASCARO and SHERI	:	
MASCARO,	:	
Counterclaimants,	:	
vs.	:	
WARDLEY BETTER HOMES & GARDENS,	:	
Counterdefendant.	:	
<hr/>		
LELAND J. MASCARO and SHERI	:	
MASCARO,	:	
Third Party Plaintiffs,	:	
vs.	:	
RUTH MARY HANSEN and ARLES	:	
HANSEN,	:	
Third Party Defendants.	:	

01171

The Court has before it a Notice to Submit, filed pursuant to Rule 4-501, Code of Judicial Administration, in connection with defendants' Tracey Cannon and Cannon Associates, Inc. (Cannon) Motion for Award of Attorney's Fees and Costs and Request for Oral Argument and defendants/counterclaimants/third-party plaintiffs' Leland J. Mascaro and Sheri Mascaro's (Mascaros) Request for Attorney Fees and Request for Oral Argument. The Court having now reviewed Cannons' and the Mascaros' Motions, Memoranda in support and in opposition thereto, rules as stated herein.

At the outset, the Court notes that both Cannon and the Mascaros have requested oral argument. This request is denied. The Court is not satisfied that there is a need or basis to justify setting this matter for oral argument. Both sides have done a fine job of stating their positions in the pleadings and the Court is very conversant with the facts, law and arguments.

In their respective motions, Cannon and the Mascaros request attorney's fees pursuant to Utah Code Annotated §78-27-56. Section 78-27-56(1) provides that "[i]n civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Under this statute, attorney fees may be awarded only if the court determines

that three requirements have been met: (1) the party seeking fees prevailed; (2) the claim or defense asserted by the opposing party was meritless; and (3) that claim or defense was asserted in bad faith. With regard to each of these elements, the trial court must make specific findings. See Watkiss & Campbell v. FOA & Son, 808 P.2d 1061, 1068 (Utah 1991) ("Specific findings further the ends of justice by allowing appeals courts to better review the trial court's award.").

Both Cannon and the Mascaros assert that the Court should grant them attorney's fees under § 78-27-56(1) because they are the prevailing parties, and because Wardley's claims against them were meritless and asserted in bad faith. In support of this argument, Cannon and the Mascaros rely on this Court's finding that third-party defendant Arles Hansen improperly modified the listing agreements with the Mascaros. Cannon and the Mascaros argue that Mr. Hansen's misconduct should be imputed to Wardley under the theory of agency or respondeat superior and that Wardley is liable to Cannon and the Mascaros for having to defend against Wardley's meritless suit.

First, this Court does not agree that Wardley's suit was "without merit". Specifically, Cannon and the Mascaros have failed

to show that Wardley's claims under the listing agreements were "frivolous" or "of little weight or importance having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). While the Court subsequently determined that the listing agreements entered into between Wardley and the Mascaros were voidable because of Mr. Hansen's misconduct, the legality of the listing agreements, a mixed fact and legal question, was not entirely clear. The Court reached its decision only after extensively evaluating the trial testimony and carefully scrutinizing the numerous documents entered into evidence, in light of the law. Wardley has represented that it did not have knowledge of Mr. Hansen's fraudulent activity and strongly believed that it had a claim for unpaid commissions. Wardley's decision to bring a lawsuit under the listing agreements, which on their face appeared to be legitimate, cannot be viewed with the 20/20 vision of hindsight and the benefit of approximately four days of trial testimony.

Furthermore, the Court determines that Wardley's Complaint was not asserted or pursued with the requisite bad faith. See Cady, 671 P.2d at 151-52. "In order to find that a party "lacked good faith," or in other words, acted in "bad faith," the trial court must find that one or more of the following factors existed: (1)

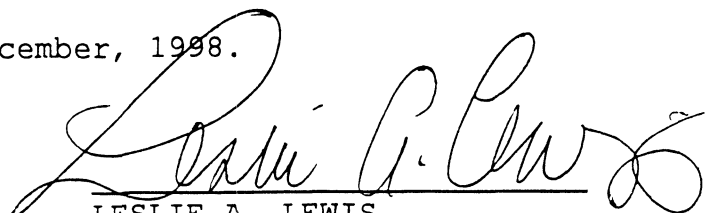
the party lacked an honest belief in the propriety of the activities in question; (2) the party intended to take unconscionable advantage of others; or (3) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others." Chipman v. Miller, 934 P.2d 1158 (Utah Ct. App. 1997); See also Cady, 671 P.2d at 151 (citation omitted). The record does not provide any credible support for a finding that Wardley pursued its claims to hinder, delay, defraud, or otherwise take unconscionable advantage of Cannon or the Mascaros. As a result, this Court cannot find bad faith. Consequently, the Court determines that Cannon and the Mascaros do not appear to be entitled to attorney's fees under §78-27-56. Additionally, the totality of facts and circumstances don't point to this as equitable. Accordingly, Cannon's Motion and the Mascaros' Request is denied.

Counsel for Wardley is to prepare an Order consistent with, but not limited to, this Court's Ruling, and submit the same to the Court for review and signature.

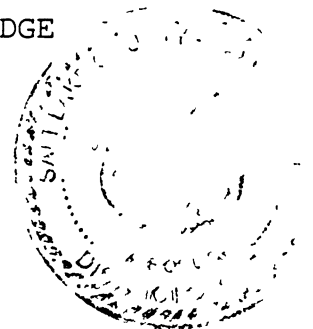
Finally, the Court seeks clarification as to whether Wardley is still being represented by the law firm of Nielsen & Senior. The Court has received a Notice to Submit filed by the law firm of

Nielsen & Senior in connection with their Motion to Withdraw from representing the Hansens. While Nielsen & Senior is apparently seeking to withdraw as counsel only for the Hansens, it now appears that Wardley has retained the law firm of Scalley & Reading to represent it in this matter. The Court has received pleadings from Scalley & Reading on behalf of Wardley. (See Memorandum in Opposition to Mascaro and Cannon's Motions for Attorney's Fees). Until further clarification is received and an Order entered, this Court will continue to consider Nielsen & Senior as counsel for Wardley. They are directed to contact the clients and Scalley & Reading to clarify this issue.

Dated this 10th day of December, 1998.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, postage prepaid, to the following, this 10 day of December, 1998:

Steven B. Smith
Attorney for Plaintiff Wardley
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

Neil R. Sabin
J. Craig Smith
Annette F. Sorensen
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60 E. South Temple, Suite 1100
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James C. Haskins
Attorney for Defendants Mascaro
357 South 200 East, Suite 300
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Mark O. Morris
Attorney for Defendant Cannon
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

John R. Bucher
Attorney for Third Party Defendants Hansen
1343 South 1100 East
Salt Lake City, Utah 84105

 M. Sabin

Tab B

Steven B. Smith, #5797
SCALLEY & READING, P.C.
Attorneys for Plaintiff Wardley
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

APR 21 1999

By M. Snare

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

WARDLEY BETTER HOMES & GARDENS,)	
)	ORDER DENYING
)	ATTORNEY'S FEES
Plaintiff,)	
v.)	
)	
LELAND J. MASCARO, SHERI MASCARO,)	
TRACEY CANNON and ASSOCIATES, INC.,)	Civil No. 940907000 CN
a Utah corporation,)	
)	
Defendant.)	Judge: Leslie A. Lewis
)	

Defendants Tracey Cannon and Cannon and Associates ("Cannon") and Defendants/Counterclaimants/Third Party Plaintiffs, Leland J. Mascaro and Sheri Mascaro ("Mascaros"), after a trial in the above matter, petitioned the Court for an award of attorney's fees from Plaintiff/Third Party Defendant, Wardley Better Homes and Gardens ("Wardley"), pursuant to Utah Code Ann. Section 78-27-56. Memoranda in support and in opposition to those Motions were filed and those Motions were submitted for decision. The Court having reviewed the Motions, Memoranda, and being fully informed, now makes and enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Both Cannons and Mascaros claimed a right to attorney's fees pursuant to Section 78-27-56 (1) contending that Wardley's claims were meritless and asserted in bad faith.

2. Wardley's claims, however, were not "without merit."

3. Even though the listing agreements entered between Wardley and the Mascaros were voidable because of the misconduct of Arlis Hansen, the legality of the listing agreements consisted of mixed factual and legal questions which were not entirely clear. There was no evidence presented that Wardley independently knew of Mr. Hansen's fraudulent conduct, and there was evidence that Wardley strongly believed that it had a valid claim for unpaid commissions. The evidence indicated: (a) Wardley had an honest belief in the propriety of the activities in question; (b) Wardley did not intend to take unconscionable advantage of others; and (c) Wardley did not intend to or act with knowledge that its activities would hinder, delay, and defraud Cannon or the Mascaros.

CONCLUSIONS OF LAW

1. Cannon and Mascaros failed to demonstrate that Wardley's claims were "frivolous," or "of little weight or importance, having no basis in law or fact" as set forth in *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

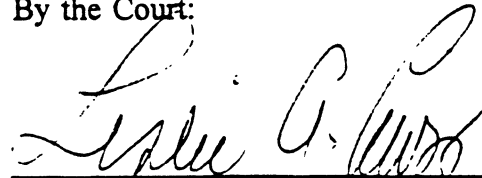
2. Wardley's Complaint was not asserted or pursued in bad faith.

3. The totality of facts and circumstances would make it inequitable to force Wardley to pay Cannons' and Mascaros' attorney's fees.

940907000

DATED this 21st April day of ~~March~~, 1999.

By the Court:



Judge Leslie Lewis

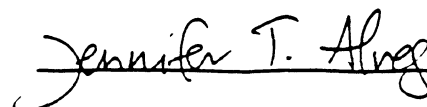
CERTIFICATE OF MAILING

I hereby certify that on the 18th day of March, 1999, a true and correct copy of Wardley's Order Denying Attorney's Fees was deposited in the U.S. Mail, postage prepaid, addressed to the following:

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

Mark O. Morris, Esq.
SNELL & WILMER, L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111

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



Tab C

AUG 28 1998

By M. Snare SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WARDLEY BETTER HOMES & GARDENS, : MEMORANDUM DECISION

Plaintiff, : CASE NO. 940907000

vs. :

LELAND J. MASCARO, et al., :

Defendants. :

----- :
LELAND J. MASCARO and SHERI

MASCARO, :

Counterclaimants, :

vs. :

WARDLEY BETTER HOMES & GARDENS, :

Counterdefendant. :

----- :
LELAND J. MASCARO and SHERI

MASCARO, :

Third Party Plaintiffs, :

vs. :

RUTH MARY HANSEN and ARLES HANSEN,

Third Party Defendants. :

This case came before the Court for trial beginning on June 8,
1998, and continuing through June 11, 1998. The Court having

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received testimony and heard argument from counsel, ruled from the bench that the plaintiffs had not established a cause of action against defendant Tracy Cannon with respect to their claim that defendant Tracy Cannon's conduct violated the Utah Administrative Code. Specifically, the Court found that defendant Tracy Cannon's conduct was not unprofessional or unethical under the totality of the facts and circumstances and based upon the testimony of certain witnesses, including defendant Tracy Cannon and Rodney "Butch" Dailey, whom the Court found to be credible. The Court also ruled that the plaintiffs had not met their burden of proof in connection with their claim that defendant Tracy Cannon intentionally interfered with the plaintiff's prospective economic relations with respect to the Wetcor/Michael Ahlin deal, the Michael Brodsky/Hamlet Development deal and the Boulder deal (see factual discussion below). Further, the Court ruled that the plaintiffs had not met their burden of proof as to their claim that defendant Cannon's failure to remit the commissions on the sale of the defendant Mascaros' property to the plaintiff constituted conversion. The remaining issues raised in the Second Amended Complaint, the Counterclaim, and the Third Party Complaint were

taken under advisement by the Court for further, more in-depth consideration.

FACTUAL BACKGROUND

This Court finds that credible testimony adduced at trial, establishes the following facts. The Mascaros ("Mascaros") defendants and third-party plaintiffs, were first contacted by third-party defendant Arles Hansen ("Mr. Hansen") in the summer of 1993. Mr. Hansen, who represented himself to be the agent of the plaintiff and counterdefendant Wardley Better Homes & Gardens ("Wardley"), inquired whether the Mascaros were interested in selling approximately 128 acres of real property which is the subject of this lawsuit. Mr. Hansen informed the Mascaros that he was looking for property in that area for Michael L. Ahlin ("Mr. Ahlin"), President of Impact Development Corporation d/b/a Wetcor.

After his initial meeting with the Mascaros, Mr. Hansen met with defendant and third-party plaintiff Sheri Mascaro ("Mrs. Mascaro") and requested that she sign an Option agreement. Mrs. Mascaro signed, but did not date, the Option agreement (Plaintiff's Exhibit 1). The terms of this Option agreement included a 20 day duration and gave Mr. Hansen, and his wife, third-party defendant

Ruth Mary Hansen ("Mrs. Hansen"), or their assigns, the right to purchase the Mascaros' property.

When Mr. Hansen discovered that defendant and third-party plaintiff Leland Mascaro ("Mr. Mascaro") was the actual owner of the property, he asked the Mascaros to sign a second Option agreement (Plaintiff's Exhibit 2). The terms of the second Option agreement, dated September 14, 1993, were identical to the first Option agreement and was signed by both the Mascaros. According to the trial testimony, it was also on this date that Mrs. Mascaro informed Mr. Hansen that Century 21 All West Inc. ("Century 21") had an exclusive listing agreement on the property. The Century 21 listing agreement (Plaintiff's Exhibit 30) had been signed by Mr. Mascaro on May 28, 1993, and provided for a six month duration. The Court found Mr. Hansen's testimony that he was not aware of the Century 21 agreement was lacking in credibility. To the contrary, the Court finds that the Century 21 agreement was disclosed to Mr. Hansen and that he requested Mrs. Mascaro to obtain a one-party exemption from Mr. Jerard Dinkelman, the principal broker under the Century 21 Agreement. Mrs. Mascaro obtained the exemption (Plaintiff's Exhibit 29) on September 14, 1993. This exemption was acquired before the second Option agreement was executed.

It further appears from the testimony that when Mr. Ahlin did not make an immediate offer, Mr. Hansen engaged in other actions with the Mascaros, including having them write a letter (Plaintiff's Exhibit 3), dated October 6, 1993, to put pressure on Mr. Ahlin to make the deal. Mrs. Mascaro conceded at trial that this letter, stating that she and her husband had been contacted by another developer offering earnest money on the parcels, was a fabrication.

On October 12, 1993, Mr. Ahlin made an offer on the property through a Real Estate Purchase Contract (Plaintiff's Exhibit 4) of the same date. In addition to the Real Estate Purchase Contract, Mr. Hansen prepared a Dual Agency Agreement (Plaintiff's Exhibit 4) which was signed by Mr. Ahlin and Mrs. Hansen. The Court finds this Agreement is significant because Mr. Hansen had continuously represented to the Mascaros that he was their agent exclusively. In addition, Mr. Rod Gordon testified that he was Mr. Ahlin's agent and that it was inappropriate for the Hansens to present a Dual Agency Agreement for Mr. Ahlin's consideration and signature. Also of significance is the Sales Agency Contract (Plaintiff's Exhibit 4) which the Hansens prepared for the Mascaros' signature. A handwritten notation on the top of this contract expressly states that

it is a single party listing and that the single party is Wetcor. All of these documents were sent to the Mascaros and to their legal counsel, Mr. Mitch Olsen. Mr. Olsen testified that he advised the Mascaros not to sign the documents and offered to draft an original real estate purchase contract which included a provision for commission to be paid to the Hansens in the event that Mr. Ahlin consummated the purchase of the property (Plaintiff's Exhibit 16). Based on Mr. Olsen's advice, the Mascaros did not act on Mr. Ahlin's offer but continued to negotiate with him. In addition, the testimony is clear that no listing agreement was ever executed or contemplated by the Mascaros at that time.

On November 14, 1993, Mr. Hansen came to the Mascaros' home with a number of documents. At this meeting, Mr. Hansen brought an Option Agreement (Defendant's Exhibit 89), a Limited Agency Disclosure Agreement (Plaintiff's Exhibit 26), a blank Real Estate Purchase Contract (Plaintiff's Exhibit 26), and four listing agreements ("Listing Agreements") with Salt Lake Board of Realtors Land Data Input Forms (Plaintiff's Exhibits 17 - 20). In his testimony, Mr. Hansen acknowledged that in preparing these documents the night before, he had predated many of them. The Court finds that Mr. Hansen's preparation of these documents was

unsolicited and that Mr. Hansen purposely met with the Mascaros on a Sunday without the presence of their legal counsel. It appears to the Court that Mr. Hansen's urgency in preparing these documents and having the Mascaros sign them was based on the expiration of the second Option agreement. It further appears from the Mascaros' testimony that Mr. Hansen's scheme was to have the Mascaros present an offer to Mr. Ahlin with the expectation that he would purchase a small portion of the acreage and agree to an option on the remainder of the land. However, because the Mascaros and Mr. Hansen did not yet know how many acres Mr. Ahlin would actually be willing to purchase, the principle terms of the Real Estate Purchase Contract were left blank. In addition, only the first of the four Listing Agreements contained an expiration date.

The Court finds that the first Listing Agreement (Plaintiff's Exhibit 17A), in its unaltered state, reflects the actual agreement between the Mascaros and Mr. Hansen. This Listing Agreement was set to expire on November 15, 1993, one day after Mr. Hansen's Sunday meeting with the Mascaros. The Court finds that Mr. Hansen altered the date on this Listing Agreement from November 15, 1993 to November 15, 1994. This finding is based on the credible testimony of the Mascaros and the Court's comparison of documents

where changes are initialed (See Plaintiff's Exhibit 26), with the Listing Agreement marked as Plaintiff's Exhibit 17A, where the change in the expiration date has no initials. The Court further finds that with respect to the other three Listing Agreements, which were blank with respect to the expiration dates, these were filled in by Mr. Hansen, subsequent to the Mascaros' signature, with "November 14, 1994" dates. The credible testimony established that Mr. Hansen's conduct in changing and/or writing in the expiration dates, was engaged in without the knowledge and the approval of the Mascaros. In addition, the dates alluded to and written by Mr. Hansen were contrary to the parties' agreement and clear understanding that the Listing Agreements would expire in one day.

This Court also finds that Mr. Ahlin did subsequently sign both the Option Agreement and the Real Estate Purchase Contract, and Mrs. Hansen accepted an earnest money check for \$4,000. Further, it is clear that the deal between the Mascaros and Mr. Ahlin subsequently failed. After an attempt to arbitrate the matter of the earnest money, the title company released the \$4,000 earnest money to Mr. Ahlin's assignees.

This Court also finds that around this same time, another potential purchaser of the property, Michael Brodsky, President of Hamlet Development, began to negotiate with the Mascaros. Mr. Brodsky testified that he proposed purchasing the property in stages and thought that he and the Mascaros had reached a verbal agreement on the sale. However, before the agreement was finalized, Mr. Brodsky was informed by the Mascaros that a sale of the property had occurred. In September 1994, the Mascaros signed a one year listing agreement with defendant Cannon Associates. In October 1994, the Mascaros signed a Real Estate Purchase Agreement agreeing to sell the property to defendant Tracey Cannon ("Ms. Cannon"). The Mascaros and Ms. Cannon closed on this property on May 11, 1995. Ms. Cannon received a commission from the sale of \$115,338.16.

LEGAL ANALYSIS

The Court determines that the listing agreements entered into between Wardley and the Mascaros are voidable because they were secured by fraud in the inducement.

In its Second Amended Complaint, Wardley claims that the Mascaros have breached their Listing Agreements with Wardley by refusing to pay Wardley the 7% commission provided for in the Listing Agreements upon the sale of the property to Ms. Cannon.

Wardley argues that the sale to Ms. Cannon was entered into within the one-year term of the Listing Agreements. According to Wardley, when the sale on the property to Ms. Cannon closed, the contractual requirements for Wardley's earned commission had been satisfied.

In their Counterclaim and Third Party Complaint against Wardley and the Hansens, the Mascaros contend they were induced to sign the Listing Agreements in reliance on false representations made to them by Mr. Hansen. The representations which the Mascaros claim were fraudulent are: (1) that Mr. Hansen told them that he would only receive a commission for the sale of the Mascaros' property to Wetcor if they signed the Listing Agreements and (2) that the Listing Agreements would be valid for only one day and would apply only to the Wetcor purchase. The Mascaros also claim that Wardley breached its contract with them by failing to list the property on the MLS, and by failing to appropriately market the property.

Under Utah law, a person may rely upon positive assertions made by another, Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980), and fraud in the inducement may allow the injured party to avoid the contract. Berkely Bank for Cooperatives v. Meibos, 607 P.2d

798, 801-04 (Utah 1980). The nine essential elements of fraudulent inducement (fraud) are:

"(1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act (9) to his injury and damage."

Meibos, 607 P.2d at 800.

The Court determines that the Mascaros have proven fraudulent inducement because they have presented evidence supporting all of its elements. This Court finds most significant the fact that there are inconsistencies between the written terms of the Listing Agreements and the Mascaros' expressed intention to limit Mr. Hansen's representation to the Ahlin/Wetcor deal and to limit the duration of his representation to one day. These inconsistencies can only be reconciled with a finding that Mr. Hansen fraudulently represented that the Listing Agreements would be limited to one-party and would expire in one day to induce the Mascaros to sign the Listing Agreements. As part of his fraudulent scheme, the

Court finds that Mr. Hansen 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. It appears Mr. Hansen unilaterally modified the Listing Agreements to improperly expand the scope of his representation beyond that contemplated by the Mascaros. The Court finds that Mr. Hansen's modifications were made without the Mascaros' knowledge and at a time when they did not have counsel available on the benefit of necessary legal advice. Based on the Mascaros' testimony, which the Court found to be credible, they were induced into signing incomplete drafts of the Listing Agreements during a Sunday meeting, when their legal counsel was apparently unavailable, because of Mr. Hansen's representation that it was the only way for him to receive a commission on the deal and his assurances that the final version of the Listing Agreements would contain the limitations they had discussed. In addition, the Mascaros' testified that they failed to take any additional precautions such as filling out the blank spaces because of their belief that Mr. Hansen had their best interests in mind. On this topic, the Court found Mrs. Mascaro's statement that "blind trust walked in and care

walked out" to be a particularly compelling statement concerning the Mascaros' reliance upon Mr. Hansen's representations and the opportunity for deception by Mr. Hansen. The Court finds that Mr. Hansen took full advantage of this opportunity by arriving for a hastily scheduled meeting with the Mascaros, whom Mr. Hansen knew to be represented by legal counsel, on a Sunday, when counsel would be unlikely to be available.

Overall, the Court found that the Mascaros' belief that they were operating under a one-day, one-party listing agreement was corroborated by documents received into evidence and the totality of credible trial testimony. For instance, the Sale Agency Contract (Plaintiff's Exhibit 4) presented to the Mascaros and signed by Mrs. Hansen imparts the Hansens' acknowledgment of the Mascaros' expressed intention to limit the Hansens' listing to "a single party listing . . . The single party is Wetcor." Further, the Court finds that Mr. Hansen was aware of the Century 21 Listing and was fully cognizant he could represent the Mascaros only if he could obtain a one-party exemption. Mr. Hansen's request that Mrs. Mascaro obtain a one-party exemption from Century 21 is congruent with the Mascaros' express reservations that their listing agreement with the Hansens be limited to the Ahlin/Wetcor deal and

with the Hansens' recognition that their representation had to be limited to one-party so as not run afoul of the Century 21 Listing. Next, it is significant to the Court that the change in the expiration date on the first Listing Agreement was not initialed. When compared to other documents where changes were initialed by the Mascaros, the lack of initials on the altered expiration date strongly suggests to the Court that the date was modified after the Mascaros signed this Listing Agreement and without their knowledge or permission. The Hansens' actions and the trail of documents speak loudly and convincingly that the Mascaros signed the Listing Agreements only because of Mr. Hansen's fraudulent misrepresentations and false assurances concerning the duration and scope of these agreements. In reaching this determination, the Court has given due consideration to all of the evidence, including the Mascaros' confessed lack of expertise in real estate matters and the particular facts surrounding Mr. Hansen's insistence that they sign the Listing Agreements on a Sunday, when they did not have access to their legal counsel. The existence of these proven facts in this case defeats Wardley's recovery upon the Listing Agreements. This Court concludes it would be inequitable, would be

unjust, and unlawful for this Court to enforce agreements, procured through fraudulent inducement.

The Court notes that there are also other possible grounds on which the Mascaros could avoid liability under the Listing Agreements, including the doctrine of mistake. However, since the Court finds that the Listing Agreements are voidable on the grounds of fraudulent inducement, the Court deems it unnecessary to consider alternative theories.

To summarize, the Court rules against Wardley on its claim that the Mascaros breached the Listing Agreements. Specifically, the Court rules that the Listing Agreements are unenforceable. Further, the Court rules against Wardley on its claim that Ms. Cannon interfered with Wardley's economic relations with respect to the Mascaros. Since the Listing Agreements were unenforceable, Wardley did not have viable economic relations with the Mascaros, with which Ms. Cannon could interfere.

With respect to the Mascaros' Counterclaim and Third-Party Complaint, the Court's ruling that the Listing Agreements are unenforceable renders moot the Mascaros' claim that they are entitled to attorney's fees and costs as specified within the terms of the Listing Agreements. In other words, in disaffirming the

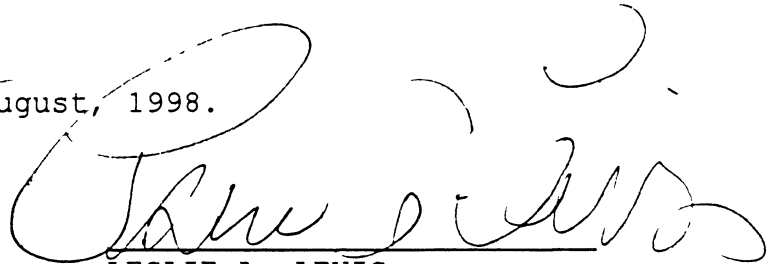
terms of the Listing Agreements, the Mascaros cannot seek to selectively reinstate only certain portions of the Listing Agreements which are favorable to them. The same concept applies to the Mascaros' claim that Wardley breached the terms of the Listing Agreements. As stated previously, since fraudulent inducement has been proven, the terms of the Listing Agreement are not enforceable or binding on either the Mascaros or Wardley. In so ruling, the Court has essentially placed the Mascaros in the same position that they were in before the Listing Agreements were executed.

With respect to the Mascaros' claim for damages on fraud, it is this Court's view that the Mascaros have been restored to their former position by this Court's determination that the Listing Agreements are void. Moreover, while the Mascaros may have suffered emotional angst over the Hansens' conduct and whether their property would be sold, there is no evidence that this distress resulted in any compensatory damages. As a corollary, the Mascaros have not presented any evidence that they have suffered a pecuniary loss, particularly in light of their sale of the property to Ms. Cannon under more beneficial terms than were offered by the

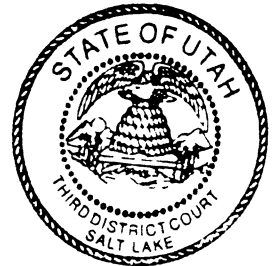
Ahlin/Wetcor deal. Accordingly, the Court denies the Mascaros' claim for damages.

Counsel for the Mascaros is to prepare an Order and Findings consistent with, but not limited to the content of this Ruling within fifteen (15) days.

Dated this 28th day of August, 1998.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 31 day of August, 1998:

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