

2000

Wardley Better Homes and Gardens v. Leland J.  
Mascaro, Sheri Mascaro, Tracy Cannon and  
Cannon & Associates Inc., a Utah corporation :  
Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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WARDLEY BETTER HOMES and  
GARDENS,

Plaintiff/Appellee,

vs.

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

Defendants/Appellants

APPEAL NO.: 20000128-CA

PRIORITY 15

Civil Case No.: 940907000 CN

**ORAL ARGUMENT REQUESTED**

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**BRIEF OF APPELLEE, WARDLEY BETTER HOMES & GARDENS**

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

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**FILED**  
Utah Court of Appeals

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Paulette Staggs  
Clerk of the Court

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## **JURISDICTIONAL STATEMENT**

This is an appeal from Judge Lewis' Order denying Defendants, Tracy Cannon's and Cannon & Associates' (hereinafter collectively referred to as "Cannons") request for attorney fees. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Article VIII § 5 of the Constitution of Utah; Utah Code Annotated §§ 78-2-2(4) and 78-2a-3(j) (1996); and Rules 3 and 4 of the Utah Rules of Appellate Procedure (2000).

## **STATEMENT OF THE ISSUES PRESENTED**

Did Judge Lewis correctly determine that Wardley's claims in this case were not "without merit" and were not pursued in bad faith as required for an award of attorney fees pursuant to Utah Code Anno. 78-27-56 (1996).

## **STANDARD OF REVIEW**

Cannons incorrectly identify the standard of review as a legal question that should be reviewed for correctness. [Cannons' Brief at p. 1]. (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998) and *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 499 (Utah App. 1992)). While "the without merit determination is a question of law" reviewed for correctness, *Jeschke v. Willis*, 811 P.2d 202 (Utah App. 1991), the trial court's finding regarding "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)). More recently, the Utah Supreme Court noted 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* 961 P.2d at 315-16 (citing *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah

App.1989)). Furthermore, in the more recent case of *Pennington v. Allstate Ins. Co.*, 973 P.2d 932 (Utah 1988), the Utah Supreme Court clarified the appropriate standard of review for an award of attorney fees pursuant to Utah Code. Anno. § 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 Anno. § 78-27-56 governs the award of attorneys fees where a meritless case is pursued 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 CANNONS' STATEMENT OF THE CASE AND THE FACTS**

Wardley objects to the Statement of the Case and Statement of Facts as set forth in Cannons' Brief because those sections of Cannons' Brief twist, misrepresent, confuse and ignore the evidence and the trial court's rulings.

Examples of the objectionable and distorted representations include the following:

(1) “Wardley's lawsuit amounted to an effort to capitalize on fraudulent and deceptive practices.” [Cannons' Brief, p. 2].

There was no such finding or determination by the trial court and no evidence to support such an allegation was ever submitted at trial. In fact, the trial court found that “[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. [R. 1175].

(2) “At trial, the court found that Wardley [] had altered the dates of certain listing agreements and fraudulently induced the Mascaros to enter into the listing agreements.” [*Id.*].

The trial court did conclude that Hansen altered an expiration date on one Listing Agreement and inserted expiration dates to which the Mascaros did not agree on the other three Listing Agreements which they signed. There was not, however, any finding or evidence that Wardley altered dates or otherwise acted improperly. Furthermore, there were numerous other documents, including options, letters, Real Estate Purchase Contracts, disclosures, and other information (95 Exhibits were marked and 65 Exhibits were received) which created numerous factual and legal questions that were only resolved by a four day jury trial and a long period when all the evidence was taken under advisement. [R. 847-50].

(3) “the trial court dismissed Wardley's meritless claims...” [*Id.*].

The trial court found that Wardley had not met its burden of proof for some of the claims it had asserted but specifically determined that Wardley's claims had merit and were not frivolous or of little weight or importance and they had a basis in law and/or fact. [R. 1173-74].

(4) “that Wardley, as opposed to its agent Hansen, did not act in bad faith in bringing this action.” [*Id.*].

In light of all the evidence, exhibits, claims and testimony, the trial court did not find that either Wardley or Hansen pursued their claims or presented their defense in “bad faith.”

(5) “The trial court found that through its agent, Wardley took full advantage of its opportunity to deceive the Mascaros . . . when Wardley knew that the Mascaros' legal counsel would most likely not be present” [Cannons' Brief, p. 4].

As stated above, the trial court found some discrepancies between the dates on the listing contracts and the Mascaro's expectations in signing them, however, only determined that this irregularity made those contracts voidable, not void and never concluded that either Wardley or Hansen took “full advantage to deceive the Mascaros” when their counsel was not present.

(6) “Wardley did not have any viable economic relations with the Mascaros...” [*Id.*].

As stated above, the trial court found that the incorrect dates on the Listing Agreements between Wardley and the Mascaros made those contracts voidable, not void. Therefore, at some level there were viable economic relations between Wardley and the Mascaros.

(7) “the trial court entered its order denying Cannons' Motion for attorney's 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, did not know its agent was engaging in fraudulent conduct, and did not have reason to know that its agent had engaged in fraudulent conduct. [Cannons' Brief, p. 5].

While it is true that Wardley did not participate in or have actual or constructive knowledge of any wrongful conduct, the trial court's decision that Wardley did not pursue meritless claims in bad faith was based upon the totality of the evidence submitted in two dispositive motions and after four days of trial testimony.

#### **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

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]. The Mascaros' claims against Wardley and the Hansens included Negligence, Fraud, Breach of Contract, and a Declaratory Judgment. [Id.]. Thereafter, Wardley filed an Amended Complaint asserting additional claims against Defendant/Appellant Tracey Cannon for Unlawful Interference with Contract, Conspiracy and Declaratory Judgment. [R. 81-90]. Tracey Cannon Answered Wardley's Complaint but did not assert a Counterclaim against Wardley nor a Crossclaim against the Hansens. [R. 104-09].

Tracey Cannon filed a Motion for Summary Judgment alleging there were no material facts which, if proven, would entitle Wardley to a judgment against her. [R. 116-33]. The trial court denied Tracey Cannon's Motion for Summary Judgment because “there [were] material facts at issue, including what defendant, Cannon, knew or should have known and when she obtained any knowledge she had, etc.” [R. 268-70].

Wardley then received permission to and did file a Second Amended Complaint which added Cannon Associates as a Defendant and added claims against Cannons for violation of statutes and for conversion. [R. 277-82]. Cannons answered Wardley's Second Amended Complaint without asserting a Counterclaim against Wardley or a Crossclaim against the Hansens. [R. 302-09].

Wardley and the Hansens then filed a Motion for Summary Judgment seeking to have the Mascaros' Counterclaims and Third-Party Claims dismissed. [R. 526-69]. After oral



argument on Wardley's and Hansens' Motion for Summary Judgment, the trial court dismissed the negligence claims but found there were questions of fact regarding the Mascaros' claims for breach of contract and for fraud. [R. 661-78].

This case was then tried before Judge Leslie Lewis for four days, from June 8-11, 1998. The following witnesses testified during presentation of Wardley's case in chief:

Arles Hansen;  
Leland Mascaro;  
Sheri Mascaro;  
James Fairborn;  
Gerard Dinkelman;  
Michael Ahlin;  
Ruth Mary Hansen;  
Rod Foster Gordon;  
Gage Froerer;  
Michael Brodsky;  
Rodney Butch Dailey;  
Tracey Cannon;  
Mitchel J. Olsen; and  
Dogan Jones.

[R. 845-46, 851-52, 895 and 926-27]. Additionally, 95 Exhibits were marked, 65 of which were received into evidence. [R. 847-50].

At the close of Wardley's case in chief, the Mascaro's and Cannons moved for directed verdicts. The trial court did not grant the Defendants' request, but took them under advisement. [R. 926-27].

After presentation of all the evidence and closing arguments, Judge Lewis found no cause of action against Tracey 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 Cannons for interference with contracts or conversion. Judge Lewis, however, took Wardley's claims against Mascaro's and Cannons related to the listing contracts under advisement. [R. 927 and 937-38].

The trial court kept the pending claims under advisement for 68 days and on August 28, 1998, issued a Memorandum Decision which concluded that the Listing Contracts signed by the Mascaros were voidable and unenforceable because they did not accurately reflect the Mascaros' understanding that they would only be one day listings. [R. 945-51]. Consequently, Wardley's claim against Cannons also failed. The trial court also ruled that the Mascaros were not entitled to recover any amount from Wardley or the Hansens on their Counterclaims and Third-Party Claims for breach of contract and fraud. [R. 951-53].

Thereafter, the Mascaros and Cannons' requested attorney fees pursuant to Utah Code Anno. § 78-27-56. [R. 972-78 and 979-1080]. After the issue was fully briefed [R. 1091-1111, 1121-23 and 1154-61]. Judge Lewis Ruled that the Mascaros and Cannons were not entitled to attorney fees pursuant to § 78-27-56 because the Court could not conclude that "Wardley's suit was without merit" [R. 1173]. and "was not asserted or pursued with the requisite bad faith." [R. 1174-75]. Judge Lewis specifically found that the Defendants "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 supported that conclusion by noting “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.*]. The trial court went on to explain that its 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 “[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” and that it would not be equitable to award the Defendants their attorney fees from Wardley. [R. 1175].

Cannons appealed the trial court's denial of their request for attorney fees pursuant to Utah Code Anno. § 78-27-56.

### **SUMMARY OF THE ARGUMENT**

The lower court order complained of by Cannons involves both legal and factual questions. In order to overturn a trial court's factual determinations an appellant must marshal all the evidence which supports the determination to demonstrate it cannot stand. In this case, however, Cannons did not include any portion of the four days of trial testimony or any of the 65 exhibits admitted at the trial of this case. Cannons' failure to marshal should lead this Court to affirm the trial court's findings.

The trial court's determinations that Wardley's claims were meritorious and were not pursued in bad faith are supported by the facts, evidence and the record and should not be overturned on appeal.

Wardley should not be punished for the wrongful conduct it did not know about, did not ratify or support in some way. The appropriate party, if any, that should have been responsible for Cannons' attorney fees is Hansen. Nevertheless, Cannons' failure to file claims against him preclude them from recovery in this case.

The trial court found, and set forth in the record, several factors which justify its decision not to award Cannons' attorney fees against Wardley. Those factors include the complexity of the facts and legal issues, Wardley's lack of knowledge of wrongdoing, its lack of participation in any wrongdoing and its honest good faith belief in the claims it was pursuing.

## **ARGUMENT**

### **I. CANNONS' FAILURE TO MARSHALL THE EVIDENCE SUPPORTING THE TRIAL COURT'S DECISION IS FATAL TO THEIR APPEAL**

In order to challenge the finding of a trial court, the appellant must “marshal the evidence, citing the appellate court to all the evidence in the record that would support the determination reached by the trial court and then demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the finding under attack. *Interiors Contracting, Inc. v. Smith Halander & Smith Assoc.*, 881 P.2d 929, 933 (Utah App. 1994) (citing *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah App. 1991); *Saunders v. Sharp*, 793 P.2d 927, 931 (Utah App. 1990); and *Harker v. Condominiums Forest Glen, Inc.*, 740 P.2d 1361, 1362 (Utah

App.1987)). “In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *West Valley*, 818 P.2d at 1315.

In this case Cannons appeal the trial court’s denial of their request for attorney fees which was based upon the determination that Wardley had not pursued a meritless claim in bad faith.<sup>1</sup> Whether a claim is without merit is a question of law which this Court should review for correctness. Whether or not a claim is pursued in bad faith, however, is a “question of fact and is reviewed by [the appellate] court under the clearly erroneous standard. *Jeschke*, 811 P.2d at 204. “The party challenging the trial court's findings of fact ‘must show that the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding.’” *Chipman v. Miller*, 934 P.2d 1158, 1161 (Utah App. 1997) (quoting *Dep't of Soc. Servs. v. Adams*, 806 P.2d 1193, 1197 (Utah App.1991)). In order to prevail in this Appeal, Cannons needed to marshal all the evidence which supports the trial court’s decision that Wardley's claims were meritorious and not pursued in bad faith, then show how that the finding is so lacking in support as to be against the clear weight of the evidence. Cannons, however, have not marshaled any evidence supporting the trial court's decision.

This dispute involved several 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, Cannons have

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<sup>1</sup> The basis for finding a claim meritless and the standard to determine whether an action is pursued in bad faith are dealt with separately below.

relied only upon the trial court's finding that Hansen inserted dates on four listing agreements that were inconsistent with the Mascaro's understanding. Cannons failed to point out the various Real Estate Purchase Contracts that the Hansens presented to the Mascaros. [R. 847-50]. They 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]. They 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, 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].

"If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991). After carefully considering all the evidence presented in this case the trial court determined that the claims pursued by Wardley had merit "they were not frivolous or of little weight or significance" and were not pursued in bad faith. [R. 1171-77 and 1265-67]. "If the party challenging the finding fails to marshal the supporting evidence, the trial court's finding will not be disturbed on appeal. *Breinholt v. Breinholt*, 905 P.2d 877, 882 (Utah App. 1995); (citing *Rudman v. Rudman*, 812 P.2d 73, 79 (Utah App.1991)). Because Cannons have not marshaled the evidence in support of the trial court's ruling, this Court should assume that the record supports the trial court and uphold the decision denying Cannons the attorney fees requested.

**II. CANNONS ARE NOT ENTITLED TO ATTORNEY FEES FROM WARDLEY BECAUSE ITS CLAIMS WERE MERITORIOUS AND WERE NOT PURSUED IN BAD FAITH**

In order to award attorney fees pursuant to Utah Code Anno. § 78-27-56 three requirements must be 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.” *Chipman*, 934 P.2d at 1161. 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 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 Cannons interfered with the Wardley/Mascaro Listing Agreement. [R. 268-70, 271-92, 636 and 661-77]. Reviewing all of the evidence, the trial court did 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)]. The legality of the Listing Agreements upon which Wardley's claims were based, presented mixed questions of fact and law which were only resolved by the trial court after “extensively evaluating the trial testimony and carefully scrutinizing the numerous documents entered into evidence, in light of the law.” [*Id.*]. Even without the benefit of the trial testimony and numerous documents upon which the trial court's decision was based the meritorious nature of Wardley's claims is obvious and should be recognized by this Court.

Even if Wardley's claims lack merit, before attorney fees can be awarded pursuant to Utah Code Anno. § 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" 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) the party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party 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 was no evidence presented below, and none before this Court, that Wardley lacked an honest belief in the propriety of its claims, that it intended to take unconscionable advantage of anyone 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. This Court, therefore, should affirm the trial court's decision denying Cannons' request for attorney fees.

In the *Cady* case, like in this case, a realty company sued for a commission from a prospective seller of real property. 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 to 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 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, the honest belief that a commission was due from the Mascaros and or Cannons defeats Cannons' claim for attorney fees in this case.

### **III. CANNONS' RELIANCE UPON PRINCIPLES OF VICARIOUS LIABILITY ARE MISPLACED AND WERE NOT A PART OF THE PROCEEDING BELOW**

The doctrine of vicarious liability by which employers and principals are held liable for the harmful conduct of their employees and agents committed within the course and scope of their employment provides a basis for tort liability. It does not automatically apply in all circumstances. For example, an employer will only be held responsible for punitive damages resulting from an employee's conduct 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)). The award of attorney fees pursuant to Utah Code Anno § 78-27-56 is much closer to an award of punitive damages than to an award for tortious conduct. Recovery of attorney fees under § 78-27-56 is punitive rather than remunerative and is only available when a party acts so far outside the bounds of acceptable conduct that a sanction would be appropriate. Even if the single factual finding that Hansen placed incorrect dates upon the Listing Agreement, equates to a meritless action being filed in bad faith, the wrongdoer, in this case, Hansen, should be the one held responsible.

Cannons may complain that they cannot collect from Hansen. Cannons' inability to collect from Hansen, however, is entirely their own fault for not filing a crossclaim against Hansen like the Mascaros did. If Cannons had asserted a claim against Hansen, recovery of awardable fees would be possible. Wardley should not be forced to answer for Cannons' failure to avail themselves of relevant legal remedies.

IV. **EVEN IF WARDLEY IS DETERMINED TO BE RESPONSIBLE FOR HANSEN'S CONDUCT THE TRIAL COURT DETERMINED THAT THE COMPLEXITY OF THE FACTS AND LEGAL ISSUES COUPLED WITH HANSEN'S WRONGFUL CONDUCT PRECLUDED AN AWARD OF ATTORNEY FEES IN THIS CASE**

Utah Code Anno. § 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 Anno. § 78-27-56(2). In the instant case the trial court entered findings which justify not awarding any fees against Wardley in this case. 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 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.*]. and
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].

See also R. 1265-67.

Wardley has already expended a significant amount on attorney fees as a result of Hansen's conduct. In the interests of justice and for the reasons set forth above this Court should determine that even if Wardley is somehow responsible for Hansen's conduct, the trial court did not abuse its discretion by not awarding the attorney fees requested by Cannons.

### **CONCLUSION AND REQUESTED RELIEF**

Cannons' appeal should be denied and the lower court ruling upheld because Cannons failed to marshal all the evidence supporting the trial court's decisions. Additionally,

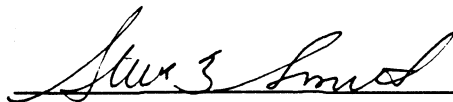
this Court should affirm the trial court's decision that Wardley's claims were meritorious and not pursued in bad faith. Alternatively this Court should hold that Wardley is not responsible pursuant to the doctrine of respondeat superior to pay for Cannons' attorney fees resulting from Hansen's conduct that it did not know about or ratify. Finally, this Court should affirm the trial court's decision and findings that the facts of this case and justice compel the decision that Wardley should not be required to pay Cannons' attorney fees in this case.

### **REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 29, Utah R. App. P. Wardley hereby requests oral argument on this Appeal.

**RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of August, 2000.**

**SCALLEY & READING, P.C.**  
Attorneys for Appellee/Wardley

  
Steven B. Smith

### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of August, 2000, two true and correct copies of the foregoing BRIEF OF APPELLEE were deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

Mark O. Morris  
David N Wolf  
SNELL & WILMER, L.L.P.  
15 West South Temple, #1200  
Salt Lake City, Utah 84101

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

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

Miana L. Ray

Tab A

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

---

WARDLEY BETTER HOMES & GARDENS	:	MINUTE ENTRY
PLAINTIFF	:	CASE NUMBER 940907000 CN
	:	DATE 11/06/97
VS	:	HONORABLE LESLIE A LEWIS
	:	COURT REPORTER TERI CRONENWETT
MASCARO, LELAND J	:	COURT CLERK MGS
DEFENDANT	:	

---

TYPE OF HEARING: MO SUMMARY JUDGMENT  
PRESENT:

P. ATTY. SMITH, CRAIG  
D. ATTY. HASKINS, JAMES C.

---

THIS BEING THE TIME SET FOR A MOTION FOR SUMMARY JUDGMENT  
HEARING. APPEARANCES AS ABOVE AND WILLIAM DARDEN FOR THE  
DEFENDANT'S.

COUNSEL ARGUE TO THE COURT AT THIS TIME.

THE COURT GRANTS THE MOTION ON NEGLIGENCE AND IS DISMISSED.  
THE BREACH OF CONTRACT, FRAUD AND DECLARATORY ISSUES ARE  
TAKEN UNDER ADVISEMENT.

COUNSEL ARE TO SUBMIT BRIEFS ON THE ISSUES UPON RECEIPT THE  
COURT WILL RENDER A DECISION.

THE PRETRIAL DATE OF 11/14/97 IS RESCHEDULED TO 11/26/97  
AT 4:00 PM

Tab B



DEC 12 1997

SALT LAKE COUNTY  
By W. Snell  
Deputy Clerk

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.	:	
_____	:	
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.	:	

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This case came before the Court for hearing on November 5, 1997, on the Plaintiff and Third-Party Defendants' Memorandum in Support of Motion for Summary Judgment Dismissing Counterclaims and Third-Party Complaint. The Court heard argument and ruled from the bench that summary judgment was granted as to the defendants' and counterclaimant's (Mascaros') negligence claim. The remainder of the Motion for Summary Judgment was taken under advisement. The Court, having now reviewed the plaintiff's Motion and the Mascaros' Memorandum in Opposition and having heard and reflected upon the law and argument from counsel, rules as stated herein.

Plaintiffs' Motion for Summary Judgment is denied for reasons more fully articulated in this Ruling.

FACTUAL BACKGROUND

In their Third Party Complaint and Counterclaim, the Mascaros allege that plaintiff Wardley Better Homes and Gardens, through third-party defendants Ruth and Arles Hansen, contacted them concerning the sale of property that they owned ("the Property"). It appears that the Hansens were real estate agents representing either Wetcor Development or Michael Ahlin, the potential buyer of the Property. (Counterclaim and Third Party Complaint at para. 55).

On November 14, 1993, the Mascaros and Wardley Better Homes and Gardens entered into four agreements, each entitled "Listing Agreement & Agency Disclosure". All four agreements are collectively referred to as "the listing agreements".

The first listing agreement covered 40 acres of the Property and was presented to the Mascaros at the same time as Wetcor Development's offer to purchase the Property, which came in the form of a Real Estate Purchase Agreement. (Counterclaim and Third Party Complaint at para. 60). The remaining three agreements were presented to the Mascaros at the same time as an offer to enter into an option agreement. The terms of these listing agreements corresponded in price and acreage with the proposed option agreement. While the described property varied, the remaining terms and conditions in the listing agreements were the same. See Listing Agreements.

The Mascaros claim that the Hansens did not represent or disclose to them that the listing agreements were exclusive or for a term of more than one day or that it covered sales to any buyer of the property other than Wetcor Development or Michael Ahlin. (Counterclaim at para. 62). The Mascaros signed the listing agreements and accepted both the Real Estate Purchase Agreement and

the Option. The buyer of the Property subsequently assigned his purchase and option agreements with the Mascaros. The closing date of May 15, 1994, passed with neither the buyer nor its assignee closing on the first 40 acres of the Property.

On May 19, 1994, Wardley Better Homes and Gardens and the Hansens advised the Mascaros that another buyer had been located and that this buyer's offer on the Property would be presented. Wardley Better Homes and Gardens claims that the Mascaros instead conveyed the Property to a third-party purchaser, defendant Tracey Cannon.

#### LEGAL ANALYSIS

##### *Standard of Review*

In considering a motion for summary judgment, the Court evaluates the evidence and all reasonable inferences drawn therefrom in the light most favorable to the party opposing the motion. B.R. Woodward Marketing v. Collins Food, 754 P.2d 99, 101 (Utah App. 1988). Additionally, the Court recognizes that "summary judgment is appropriate only where there are no issues of genuine fact and the moving party is entitled to a judgment as a matter of law." Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1063 (Utah 1996). Furthermore, the Court acknowledges that the law is

well-settled that in a motion for summary judgment, a trial court's analysis does not involve weighing any disputed evidence. A trial court's only inquiry should be whether material issues of fact exist. Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995) citing W.M. Barnes Co. V. Sohio Nat'l Resources Co., 627 P.2d 56, 59 (Utah 1981)).

1. Plaintiff and Third-Party Defendant's Motion for Summary Judgment concerning the breach of contract claim is denied.

In their Motion for Summary Judgment, Wardley Better Homes and Gardens and the Hansens argue that the Mascaro's claim of breach of contract must fail as a matter of law because the listing agreements did not require them to ascertain whether a potential buyer would be able to perform its obligations in closing on the sale transaction. The Mascaros respond in their Memorandum in Opposition that Wardley Better Homes and Gardens and the Hansens breached the listing agreements by not presenting a ready, willing and able buyer.

The Court finds that the Mascaros' analysis confuses Wardley Better Homes and Gardens' and the Hansens' contractual obligations to not only procure a buyer who was ready, willing and able, but also to evaluate the financial stability of the buyer, advise the

Mascaros on the technicalities of a 1031 exchange, and coordinate the potential buyer's actions in satisfying the closing contingencies. The Court finds that absent a contractual provision to the contrary, Wardley Better Homes and Gardens and the Hansens were not insurers of the potential buyer's subsequent performance of the Real Estate Purchase Agreement. See e.g. F.M.A. Financial Corp. v. Building, Inc., 404 P.2d 670, 672 (Utah 1965) (broker cannot be held as insurer against the possibility that the buyer may become dissatisfied with his bargain and bring a lawsuit claiming the right of rescission). Once Wardley Better Homes and Gardens and the Hansens met their obligations under the listing agreements in procuring a potential buyer who, at that time, was apparently ready, willing and able, it is irrelevant to the breach of contract claim that the potential buyer or its assignee refused or were unable to close on the Property. Accordingly, the Court determines that the Mascaros could not prevail as a matter of law on their breach of contract claim if their position was solely that Wardley Better Homes and Gardens and the Hansens failed to procure a ready, willing and able buyer because the buyer that they did procure was not financially able to close on the Property.

However, the Mascaros appear to have an alternative argument that Wardley Better Homes and Gardens and the Hansens breached paragraph 10 of the listing agreements by neglecting to list the Property through the Multiple Listing Service. The Court and opposing counsel first learned of this position during the course of oral argument, at which time the Mascaros' counsel indicated to the Court that deposition testimony had recently been adduced that Wardley Better Homes and Gardens and the Hansens never listed the Property through the Multiple Listing Service. The testimony alluded to by the Mascaros' counsel would clearly constitute a genuine issue of material fact with respect to the breach of contract claim. However, counsel never presented a transcript of the deposition testimony or excerpts of the same to the Court. Thus, the Court is left in the difficult position of having to rule solely on the representations of counsel, as an officer of the court, that such testimony was indeed adduced. While it is not desirable to raise issues in this manner, it appears nonetheless that the issue does exist and the facts relating to it are in dispute. In its discretion, the Court concludes that the Mascaros are not foreclosed, as a matter of law, from asserting a breach of contract claim.

2. Plaintiff and Third-Party Defendants' Motion for Summary Judgment concerning the fraud and declaratory judgment claims are denied.

Wardley Better Homes and Gardens and the Hansens claim that the Mascaros failed to plead fraud with sufficient particularity to withstand a motion for summary judgment. Rule 9(b) of the Utah Rules of Civil Procedure does specify that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fraud requires that a false representation of an existing material fact must be made knowingly or recklessly for the purpose of inducing reliance thereon, and there must be reasonable reliance resulting in the plaintiff's injury. Horton v. Horton, 695 P.2d 102, 105 (Utah 1984); Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980). The Utah Supreme Court has historically held, and continues to stress, that mere conclusory allegations in a pleading unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment. See Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983); Ellefsen v. Roberts, 526 P.2d 912, 915 (Utah 1974).

In this case, however, the fraud claim set forth in the Mascaros' Counterclaim and Third Party Complaint incorporates averments that the Hansens, as agents of Wardley Better Homes and

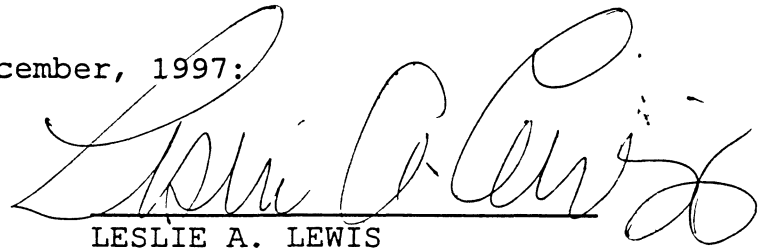


Gardens, made misrepresentations concerning (1) the duration and scope of the listing agreements; (2) their expertise in structuring real estate transactions to qualify under §1031; and (3) the exercise of the option to be contingent on the closing of the first 40 acres of the Property. Furthermore, they allege that the misrepresentations were made with the intent of inducing them to rely on the representations by entering into the listing agreements. The Mascaros claim that they did in fact rely on these misrepresentations to their detriment because of the ultimate delay in the sale of the Property, their inability to collect earnest money deposit of \$4,000 made by the potential buyer, and incurring attorney's fees and costs in dealing with the potential buyer. This is a sufficiently clear and specific description of the facts underlying the Mascaros' claim of fraud to support this Court's conclusion that the requirement of Rule 9(b) has been met. The Court therefore denies summary judgment as to both the fraud and the declaratory judgment claim.

Accordingly, Plaintiff and Third-Party Defendants' Motion for Summary Judgment is denied for the foregoing reasons and counsel

for the Mascaros is to prepare an Order consistent with this Ruling.

Dated this 12<sup>th</sup> day of December, 1997:

A handwritten signature in cursive script, appearing to read "Leslie A. Lewis", written over a horizontal line.

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 15 day of December, 1997:

Neil R. Sabin  
Attorney for Plaintiff  
60 E. South Temple, Suite 1100  
Salt Lake City, Utah 84111

Thomas R. Karrenberg  
Steven W. Dougherty  
Attorney for Defendant Mascaro  
50 W. Broadway, Suite 700  
Salt Lake City, Utah 84101-2006

Mark O. Morris  
Attorney for Defendant Cannon  
111 E. Broadway, Suite 900  
Salt Lake City, Utah 84111

MD Sharp

Tab C

1 IN THE THIRD DISTRICT COURT - SALT LAKE CITY COURT  
2 SALT LAKE COUNTY, STATE OF UTAH

3 -oOo-

4 WARDLEY BETTER HOMES & )  
GARDENS, )

5 Plaintiff, )

6 vs. )

7 LELAND J. MASCARO, SHERI )  
8 MASCARO, TRACEY CANNON and )  
CANNON ASSOCIATES, INC., )

9 Defendants. )

Case No. 940907000

JUDGE'S RULING

(Videotape Proceedings)

10 -oOo-

11  
12 BE IT REMEMBERED that on the 11th day of June,  
13 1998, the above-entitled matter came on for hearing  
14 before the HONORABLE LESLIE LEWIS, sitting as Judge in  
15 the above-named Court for the purpose of this cause, and  
16 that the following videotape proceedings were had.

17 A P P E A R A N C E S

18 For the Plaintiff:

19 J. CRAIG SMITH  
NEIL R. SABIN  
ANNETTE F. SORENSEN  
Attorneys at Law  
Nielsen & Senior  
60 East South Temple, #1100  
Salt Lake City, Utah 84111

22 MARK O. MORRIS  
23 DAVID N. WOLF  
Attorneys at Law  
24 Snell & Wilmer  
111 East Broadway, #900  
25 Salt Lake City, Utah 84111

COPY



A P P E A R A N C E S (Continuing)

For the Defendants:

JAMES C. HASKINS  
Attorney at Law  
Haskins & Associates  
5085 South State  
Salt Lake City, Utah 84107

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1 advisement with reference to Ms. Cannon, finding that the  
2 plaintiffs have not met their burden of proof with  
3 reference to Ms. Cannon on conversion and finding that  
4 they have not met their burden of proof as I've  
5 previously indicated on the alleged statutory violation.

6 I cannot find that there has been any showing  
7 of impropriety in terms of how she's handled this of an  
8 ethical nature.

9 I will make a ruling with reference to the  
10 remaining issues as quickly as I can. I will indicate to  
11 Counsel that I have another trial, a jury trial, set to  
12 begin on Monday and hearings in connection with that  
13 tomorrow and I have a criminal trial the following week,  
14 but my plan would be to get to this as quickly as I can.

15 I would like to say to all of the attorneys  
16 involved, all seven of you, that it has been a distinct  
17 privilege and pleasure to have you all here. I have  
18 found that all of you have shown that you have engaged in  
19 the highest degree of professionalism and preparedness  
20 throughout. There has not been one time during this  
21 trial when counsel has not had available the appropriate  
22 documents, even in a case which, as Mr. Sabin so well  
23 pointed out, has been document intensive.

24 And each one of you were well prepared to move  
25 forward on these issues and the degree of professionalism



Tab D

AUG 28 1998

By M. Smart  
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.	:	
<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.	:	

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

00937

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



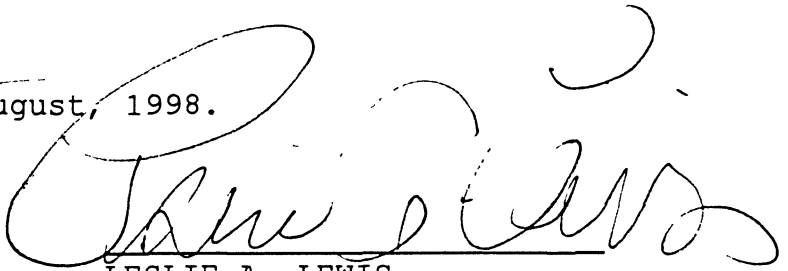
terms of the Listing Agreements, the Mascaros cannot seek to selectively reinstate only certain portions of the Listing Agreements which are favorable to them. The same concept applies to the Mascaros' claim that Wardley breached the terms of the Listing Agreements. As stated previously, since fraudulent 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.

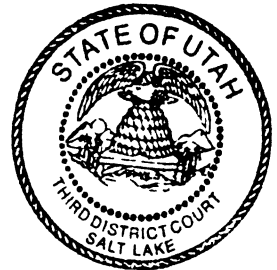
With respect to the Mascaros' claim for damages on fraud, it is this Court's view that the Mascaros have been restored to their former position by this Court's determination that the Listing Agreements are void. Moreover, while the Mascaros may have suffered emotional angst over the Hansens' conduct 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:

Neil R. Sabin  
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Annette F. Sorensen  
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Salt Lake City, Utah 84111

Mark O. Morris  
111 E. Broadway, Suite 900  
Salt Lake City, Utah 84111

M. Snare

Tab E

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*[Signature]*

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.	:	
_____	:	
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.	:	

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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)



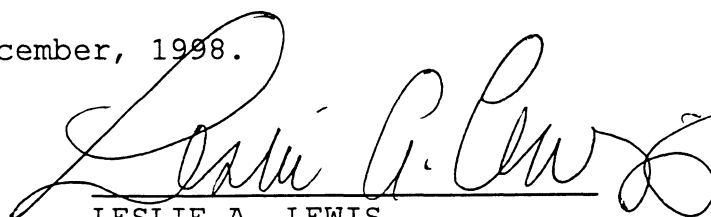
the party lacked an honest belief in the propriety of the activities in question; (2) the party intended to take unconscionable advantage of others; or (3) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others." Chipman v. Miller, 934 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.

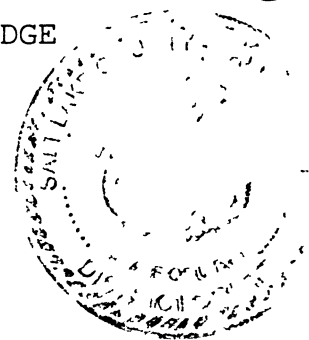
Finally, the Court seeks clarification as to whether Wardley is still being represented by the law firm of Nielsen & Senior. The Court has received a Notice to Submit filed by the law firm of

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 10<sup>th</sup> 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:

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261 East 300 South, Suite 200  
Salt Lake City, Utah 84111

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1343 South 1100 East  
Salt Lake City, Utah 84105

                    m Snake

Tab F

FILED IN DISTRICT COURT  
T. District

APR 21 1999

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Attorneys for Plaintiff Wardley  
261 East 300 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7870

By M. Snare  
Clerk

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

---

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

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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:

01265

### **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.

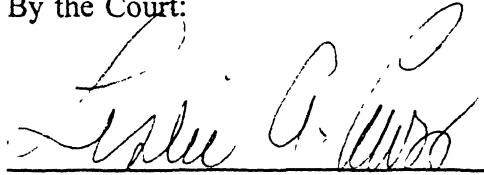
### **CONCLUSIONS OF LAW**

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.

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DATED this 21<sup>st</sup> <sup>April</sup> day of ~~March~~, 1999.

By the Court:

  
\_\_\_\_\_  
Judge Leslie Lewis

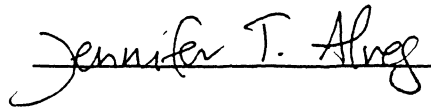
**CERTIFICATE OF MAILING**

I hereby certify that on the 18<sup>th</sup> 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  
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Mark O. Morris, Esq.  
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John Bucher, Esq.  
1343 South 1100 East  
Salt Lake City, Utah 84105

  
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