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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WARDLEY BETTER HOMES and
GARDEN,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

APPEAL NO.: 20000128-CA

PRIORITY NO.: 15

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANTS

ON APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
LESLIE A. LEWIS, DISTRICT JUDGE

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JURISDICTION

This case is on appeal from a Final Order of Judgment entered on January 11, 2000, by Judge Leslie A. Lewis of the Third Judicial District Court in and for Salt Lake County, State of Utah. Jurisdiction of this Court is appropriate pursuant to Utah Constitution art. VIII, sec. 5, and Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(j)(1999).

STATEMENT OF ISSUE

Was it error for the trial court to distinguish between an agent whose acknowledged fraud and deceit cost an innocent defendant to expend tens of thousands of dollars in attorneys fees, and that agent's principal, whose suit sought to benefit and ratify the agent's fraudulent conduct? This issue was raised to the trial court by way of motion. (R. at 979)

STANDARD OF REVIEW

"Whether attorney fees are recoverable in an action is a question of law, which [this Court] review(s) for correctness." Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). See also Robertson v. Gem Ins. Co., 828 P.2d 496, 499 (Utah Ct. App. 1992).

STATUTORY PROVISIONS

The following statutory provisions are relied upon in this brief:

Utah Code Ann. § 78-27-56(1) (1988)

Rule 4-501, Utah Code of Judicial Administration

Utah Code Ann. § 61-2-10(1) (1997)

Utah Code Ann. § 61-2-18(2) (1997)

STATEMENT OF THE CASE

Wardley accused Cannon of theft when, in fact, Wardley's lawsuit amounted to an effort to capitalize on fraudulent and deceptive practices. Among other claims below, Wardley claimed that Cannon interfered with Wardley's economic relations with landowners and sellers Leland and Sheri Mascaro ("Mascaros"), converted Wardley's property, and violated sections of the Utah Administrative Code governing the lawful and ethical conduct of real estate agents and brokers. Specifically, Wardley claimed that Cannon interfered with listing agreements between Wardley and the Mascaros and unlawfully refused to remit the commission paid to Cannon upon the sale of the Mascaros' property. These claims were added by amendment, the order granting leave for which instructed Wardley to investigate the claims it was making against Cannon.

At trial, the court found that Wardley, through its agent Arles Hanson ("Hanson"), had altered the dates of certain listing agreements and fraudulently induced the Mascaros to enter into the listing agreements. Accordingly, the trial court dismissed Wardley's meritless claims that Cannon converted its property, acted unethically or improperly, and tortiously interfered with the listing agreements.

Cannon moved the trial court to award its attorneys fees under Utah's bad faith statute. Wardley did not contest the reasonableness of the attorney's fees that Cannon sought to recover. These fees were properly supported by the Affidavit of Cannon's counsel pursuant to Rule 4-501 of the Utah Code of Judicial Administration. The trial court denied the motion, indicating that Wardley, as opposed to its agent Hanson, did not act in bad faith in bringing the action. The only issue before this Court is whether attorney fees should have been awarded to Cannon under Utah's bad faith statute, Utah Code Ann. § 78-27-56 (1988).

STATEMENT OF FACTS

I. BEFORE TRIAL WARDLEY WAS CAUTIONED TO INVESTIGATE ITS CLAIMS:

Wardley first brought suit only against the Mascaros on November 7, 1994, (R. at 1), alleging that Wardley had found a ready, willing and able buyer for the Mascaros' property, and that pursuant to signed listing agreements Wardley was entitled to a commission from the Mascaros. (R. at 4.) After learning that the Mascaro property was sold to someone other than Wardley's buyer, Wardley amended its complaint on August 4, 1995, (R. at 81) to add and bring claims against Cannon alleging only unlawful interference with contract and civil conspiracy. (R. at 87-89.) Over a year later, on August 19, 1996, Wardley moved to amend its complaint for a second time for the purpose of, among other things, adding three more claims against Cannon. (R. at 175-76.) Cannon opposed Wardley's motion to file a second amended complaint. (R. at 248.) Although the trial court allowed Wardley to file a second amended complaint, it expressly cautioned Wardley about bringing claims against Cannon for which no good faith basis existed.

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

(R. at 269.) Court's Ruling dated October 9, 1996, a true and correct copy of which is attached hereto as Exhibit "A" (emphasis added.) Despite the trial court's admonition, Wardley chose to file its Second Amended Complaint against Cannon, wherein Wardley alleged that Cannon violated the Utah Administrative Code, converted Wardley's property, and intentionally interfered with listing agreements executed between Wardley and the Mascaros. (R. at 278-80.)

II. HANSON'S AND THUS WARDLEY'S FRAUD AND DECEIT WERE ESTABLISHED AT TRIAL

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

On August 28, 1998, the trial court issued its Memorandum Decision, a true and correct copy of which is attached hereto as Exhibit "B." (R. at 937.) The trial court found that Wardley's agent changed and altered dates in the listing agreements with the Mascaros. Wardley had accused Cannon of interfering with these agreements. (R. at 943-44.) The trial court also found that Wardley's agent, to induce the Mascaros to sign the listing agreements, fraudulently represented that the listing agreements would be limited to one-party and would expire in one day. (R. at 944.) Specifically, the trial court found that Wardley's agent "altered the November 15, 1993, date which was originally found on the first listing agreement and added expiration dates to the remaining three listing agreements to reflect an unagreed and unintended one-year duration." (R. at 948.) The trial court found that through its agent, Wardley took full advantage of its opportunity to deceive the Mascaros by hastily meeting with the Mascaros to obtain their signatures on the listing agreements on a Sunday, when Wardley knew that the Mascaros' legal counsel would most likely not be present. (R. at 949.) The trial court concluded that the listing agreements were fraudulently induced and, therefore, Wardley did not

have any viable economic relations with the Mascaros with which Cannon could interfere. (R. at 951.) Cannon incurred over \$60,000 in fees and costs in defending against Wardley's claims, as set forth in the Affidavit of Mark Morris. (R. at 996-99.)

III. THE TRIAL COURT DISTINGUISHED BETWEEN PRINCIPAL AND AGENT FOR ATTORNEYS' FEES PURPOSES

On September 25, 1998, Cannon filed a motion to recover the attorney's fees and costs incurred in defending against Wardley's claims. (R. at 979.) On February 9, 2000, the trial court awarded Cannon \$2091.45 in costs. (R. at 1393.) On April 21, 1999, the trial court entered its order denying Cannon's motion for 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. (R. at 1265-66.) The trial court's April 21, 1999 order denying Cannon's motion for attorney's fees was incorporated by reference into the court's Final Order of Judgment dated January 11, 2000. (R. at 1359-60.) Cannon now appeals from this Final Order of Judgment. (R. at 1358-61.)

SUMMARY OF ARGUMENT

If Hanson had been the plaintiff, his liability for fees would be undisputed. But Utah law precluded Hanson from being the plaintiff, and instead required his broker to file suit. That is because under Utah's common law and statutory scheme, the broker is the principal, and it benefits from his agent's activities. For the same policy reason, this Court should hold that the broker should also bear the negative consequences of his agent's activities.

For all legal and equitable purposes in this case, Wardley and its agent Hanson are one and the same. Wardley placed Hanson in the position of dealing with landowners. Wardley's agent acted to further Wardley's purposes by seeking to secure a commission

to Wardley. Wardley's agent fraudulently altered contracts, unlawfully induced the execution of contracts, and in addition to pursuing the landowners chose to prosecute an action against Cannon, alleging interference with contracts which he knew to be fraudulently and unlawfully obtained. Because Hanson was Wardley's agent, Hanson's bad faith in causing Wardley to bring frivolous claims against Cannon must be imputed to Wardley. Such liability includes liability for paying the attorney's fees that Cannon incurred in defending against Wardley's frivolous and bad faith action.

Pursuant to Utah Code Ann. § 78-27-56(1), Cannon, as the prevailing party, is entitled to an award of reasonable attorneys' fees to compensate for defending against Wardley's meritless and bad faith claims. See Utah Code Ann. § 78-27-56(1) (1988). The Utah Legislature has expressly determined that the broker is ultimately responsible for its agent's actions. Wardley, as the principal broker, chose to file suit against Cannon and was seeking to benefit from its agent's activities in securing a commission on the sale of the Mascaros' property. Given that Wardley stood to benefit from its agent's efforts to secure a commission, it follows that the trial court erred in concluding that Wardley would suffer no consequences from its agent's bad faith.

As between Cannon and Wardley, Wardley should answer for its agent's conduct and pay fees to Cannon. It was Wardley who put Hanson in the position and empowered him with the authority to deceive the Mascaros and fraudulently create the contracts upon which Wardley's claims against Cannon were based. Even if this Court agrees with the trial court's conclusion that Wardley, as a brokerage, was a victim of the dishonesty of its own agent, it cannot ignore the fact that Wardley was in a superior position to prevent the fraud of its own agent. Utah courts have consistently held that as between two innocent persons, one of whom must suffer through the fraud of third, that the one who puts it in the power of the other to practice the fraud must suffer the loss. In addition, it was Wardley that prosecuted the action against Cannon. Wardley was seeking to benefit from the fraudulent and unlawful activities of its agent. In such circumstances, Utah courts

have uniformly concluded that the burden should fall upon Wardley. Unless Cannon is reimbursed for the attorney's fees it paid in defending against Wardley's claims, Cannon alone will suffer the consequences of Hanson's dishonesty. Therefore, this Court should reverse the trial court's denial of Cannon's Motion for Attorney's Fees and Costs, and order Wardley to pay to Cannon the sum of \$63,857.50 in attorneys' fees, plus Cannon's reasonable costs and attorneys fees incurred in this appeal.

ARGUMENT

I. CANNON IS ENTITLED TO FEES BECAUSE WARDLEY'S AGENT ACTED WITHIN THE SCOPE OF HIS EMPLOYMENT, AND WARDLEY RATIFIED HIS CONDUCT BY PURSUING A COMMISSION.

Below, Wardley claimed that it should not be liable for Cannon's attorneys' fees because Hanson's fraudulent conduct was beyond the scope of his employment with Wardley. Utah law and common law do not support this claim.

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

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

Id. (emphasis added.) By seeking to obtain a real estate commission for himself and Wardley, albeit through fraudulent means, Hanson was acting well within his scope of employment.

A. The Wardley/Hanson Relationship Meets Utah's Three Part Test

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

Second, the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment. See Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 351, 208 P. 519, 521 (1922); Restatement (Second) of

¹ The Restatement (Second) of Agency § 228 (1958) definition of "scope of employment" corresponds to how Utah courts have consistently defined scope of employment. See Stone v. Hurst Lumber Co., 15 Utah 2d 49, 51, 386 P.2d 910, 911 (1963); Combes v. Montgomery Ward & Co., 119 Utah 407, 411, 228 P.2d 272, 274 (1951); Barney v. Jewel Tea Co., 104 Utah 292, 296, 139 P.2d 878, 879 (1943); Keller v. Gunn Supply Co., 62 Utah 501, 220 P. 1063 (1923); Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519 (1922). Cf. Carter v. Bessey, 97 Utah 427, 431, 93 P.2d 490, 492 (1939). Section 228 provides in part:

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

Agency § 228(1)(b). Wardley must concede Hanson's efforts with the Mascaros were within these boundaries.

Third, the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest. See Stone v. Hurst Lumber Co., 15 Utah 2d 49, 51, 386 P.2d 910, 911 (1963); Combes v. Montgomery Ward & Co., 119 Utah 407, 411, 228 P.2d 272, 274 (1951) ("within the scope of furthering [employer's] purpose"); Barney v. Jewel Tea Co., 104 Utah 292, 296, 139 P.2d 878, 879 (1943). Cf. Carter v. Bessey, 97 Utah 427, 431, 93 P.2d 490, 492 (1939) (finding employer not liable when employee's conduct intended "for purposes other than the master's business"). The courts in Combes and Carter make clear that an employer is liable for the tortious conduct of its employee if the employee's purpose or intent, however misguided in its means, is to further the employer's business interests. See also Prosser and Keeton § 70, at 503-05. Finally, the fact that Wardley brought this suit to enforce contractual rights Hanson procured for it, ratifies Hanson's conduct, and establishes this element.

B. Once the Relationship is Established, Liability Follows

Once an employee acts within the scope of his employment, the employer is bound, regardless of intent. Utah courts have previously set forth the general principles governing the liability of an employer for an employee's tortious acts, both for negligent and intentional acts. See Hodges v. Gibson Products Co., 811 P.2d 151, 156-57 (Utah 1991); Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989); see also Barney v. Jewel Tea Co., 104 Utah 292, 139 P.2d 878 (1943). In Birkner, the Court held that an employer is liable for the torts of its employees that are committed within the scope of employment, even if the tortious acts were intentional and not done solely to further the interests of the employer.

An employer is vicariously liable for an employee's intentional tort if the employee's purpose in performing the acts was either wholly or only in part to further the

employer's business, even if the employee was misguided in that respect. Birkner, 771 P.2d 1057. See also W. Keeton, Prosser and Keeton on the Law of Torts, at 505 (5th ed. 1984). Thus, an employer is vicariously liable for the fraudulent conduct of its employees, if the employee is acting to further any purpose of the employer. See Hodges, 811 P.2d at 156-57. Applying this principle here, Wardley is vicariously liable for Hanson's fraud, including the liability for attorneys fees that attached once the spurious claims were asserted in bad faith and pursued through trial.

C. Vicarious Liability Applies in Litigation Contexts

Moreover, the rule of vicarious liability for intentional torts stated in Birkner and reaffirmed in Hodges also applies when an employer authorizes a servant or an agent to initiate a legal action. See Hodges, 811 P.2d at 156-57. The Restatement (Second) of Agency § 253 (1958) states:

A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.

Here, where the principal filed legal proceedings at the agent's behest, the principal has no less liability as the main actor than it would have if the agent had instituted such proceedings directly on behalf of the principal.

Furthermore, personal knowledge material to the liability that a servant has when acting in a matter as to which the master has empowered the servant to act is imputed to the master. Section 272 of the Restatement (Second) of Agency capsulizes the rule:

In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

The rule imputing a servant's knowledge to the master is of particular importance in tort cases based on negligence, malicious prosecution, fraud, and deceit. Comment c of § 272 states in part:

In determining tort liability, the knowledge which the actor has or should have is usually of great importance. This is particularly true in cases of negligence and in torts which, like deceit or malicious prosecution, are based upon the fact that the defendant has acted improperly in view of the knowledge which he has.

Thus, even if this Court accepts the trial court's finding that "Wardley," had no knowledge of Hanson's fraudulent conduct when it initiated the meritless action against Cannon, i.e., no one at Wardley other than its agent had knowledge of the fraud and baseless nature of the claims, Hanson's knowledge in causing Wardley to initiate and prosecute the action against Cannon is imputed to Wardley. The responsibility for the initiation of the action itself is imputed, as a matter of law, to Wardley, because Hanson acted within the scope of his authority and was motivated either in whole or in part to carry out Wardley's purposes.

Hanson acted within his delegated authority in obtaining listing agreements and seeking to enforce those agreements for Wardley's benefit and his own. Most importantly, it was Wardley and not Hanson that elected to bring the claims against Cannon after being warned by the trial court to investigate the facts. Hence, it is not solely Hanson's acts giving rise to liability in Wardley, but Wardley's direct and intentional acts, with knowledge of fraudulent intent imputed to it. Accordingly, the bad faith Hanson evidenced when Wardley sought the trial court's enforcement of fraudulently obtained listing agreements is imputed to Wardley, and thus it should pay Cannon's attorneys fees.

II. CANNON IS ENTITLED TO FEES BECAUSE WARDLEY IS RESPONSIBLE FOR THE FRAUDULENT CONDUCT OF ITS AGENT.

The relationship between a real estate broker and its agents is that of employer and employee, and the universal laws applying to principals and agents, set forth above, control their rights and responsibilities. White v. Fox, 665 P.2d 1297 (Utah 1983); Wardley Corp. v. Welsh, 962 P.2d 86 (Utah Ct. App. 1998). Agency is “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Wardley Corp. v. Welsh, 962 P.2d at 89 (quoting Restatement (Second) of Agency § 1(1) (1958)). In the instant case, it is not disputed that Hanson was authorized to act, and did in fact act, as Wardley’s agent.

Wardley contends that it should not be held liable for the fraudulent conduct of its agent. Specifically, Wardley argued to the trial court that it had an honest belief in the propriety of the conduct of its agent; that it did not intend to take unconscionable advantage of Cannon; and it did not pursue its claims against Cannon with knowledge of its agent’s fraudulent activities. Wardley’s attempts to avoid responsibility is contrary to law, and unavailing here.

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

principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.

Everett v. Oregon Short Line & Utah Northern RY. Co., 9 Utah 340, 346-47, 34 P. 289, 290 (1893) (quoting Story, Doctrine of Agency, section 452)).² Wardley foisted Hanson upon the Mascaros, and now wants to ignore the damage caused to innocent third parties such as Cannon.

Utah courts have consistently applied the rule of law which holds that “as between two innocent persons, one of whom must suffer through the fraud of third, that the one who puts it in the power of the other to practice the fraud must suffer the loss.” Swartz v. White, 80 Utah 150, 152, 13 P.2d 643, 644 (1932). This doctrine was preceded, and has been followed by decades of Utah jurisprudence. See e.g. G. Eugene England Found v. Smith’s Food King, 542 P.2d 753, 755 (Utah 1975); Valley Bank and Trust Co. v. Gerber, 526 P.2d 1121, 1124 (Utah 1974); Heavy v. The Commercial Nat’l Bank, 27 Utah 222, 229, 75 P. 727, 729 (1904); Jungk v. Holbrook, 15 Utah 198, 204, 49 P. 305, 306 (1897).

In the instant case the trial court concluded that Wardley was essentially innocent, that it, too, was a victim of the dishonesty of its own agent. However, unless Cannon is reimbursed for the attorney’s fees it paid in defending against Wardley’s claims, then Cannon alone will suffer the consequences of Hanson's dishonesty. In such circumstances, Utah courts have uniformly concluded that the burden should fall upon Wardley, as “the party that held [Hanson] out and gave him the character and standing of an honest man.” Sullivan v. Evans-Morris Whitney Co., 54 Utah 293, 304, 180 P. 435, 439 (1919).

² The same doctrine is set forth by Mechem in his work on Agency (section 734).

III. THE ELEMENTS OF UTAH'S BAD FAITH ATTORNEYS FEE STATUTE ARE MET HERE.

Because Wardley is imputed with knowledge of the fraudulent nature of its claims against Cannon, this Court should award Cannon's reasonable attorneys' fees incurred in defending this meritless action.³ Section 78-27-56(1) of the Utah Code requires the court to award reasonable attorneys' fees to a prevailing party if an action is without merit and brought in bad faith. See Utah Code Ann. § 78-27-56(1) (1988).

To be entitled to an award of attorneys' fees under this statute, the prevailing party must show that (1) the claim or defense she prevailed upon was without merit, and (2) the claim or defense was not asserted in good faith. See Watkiss & Campbell v. Foa & Sons, 808 P.2d 1061, 1067 (Utah 1991). If the prevailing party establishes both of these elements, the trial court must award attorneys' fees. Id. ("If the court finds both elements of the statute, then it has no discretion and must award reasonable attorney fees to the prevailing party.").

A. Wardley's Claims Were Without Merit.

There is no dispute that Wardley's claims in this lawsuit were without merit. A claim is without merit if it is "frivolous" or "of little weight or importance having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Here, Wardley brought suit against Cannon seeking to recover over \$110,000.00 (not including the threat of treble damages made by Wardley against Cannon) for Cannon's alleged interference with real estate listing agreements that Wardley had procured through fraudulent means. Wardley fraudulently induced the Mascaros to enter into the Listing Agreements. Then, Wardley had the audacity not only to sue the Mascaros for allegedly breaching these

³ Wardley has not contested the reasonableness of the attorney's fees that Cannon seeks to recover, which fees have been properly supported by the Affidavit of Cannon's counsel pursuant to Rule 4-501 of the Utah Code of Judicial Administration. Whether attorneys' fees should have been awarded, as opposed to the reasonableness of the fees, is the only issue before this Court.

contracts, but also to sue Cannon for allegedly interfering with these contracts. In accusing Cannon of converting its property, violating the ethical standards which govern real estate agents, and interfering with contracts which Wardley unlawfully and fraudulently obtained, Wardley asserted frivolous claims which had no basis in fact or law. Wardley, imputed with the knowledge of its agent, knew the contracts at issue were fraudulently obtained. Thus, each of Wardley's claims was meritless.

Attorneys' fees and costs are particularly warranted here when, prior to trial, the court expressly cautioned Wardley about proceeding with claims against Cannon, which after a diligent exploration of the facts would prove untenable. Nevertheless, Wardley chose to amend its complaint for a second time to plead three more legally baseless claims against Cannon than it originally pled. As set forth above, there is and was no basis in Utah law to assert any of the claims in the Second Amended Complaint. Therefore, the claims asserted in Wardley's Second Amended Complaint were "without merit."

B. Wardley's Claims Were Brought in Bad Faith.

It is not disputed that Wardley's agent acted in bad faith by fraudulently altering listing agreements. Moreover, Wardley does not dispute that its agent (1) lacked an honest belief in the propriety of the activities in question; (2) intended to take unconscionable advantage of others; or (3) intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998); see Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Instead, Wardley contends that it should not be required to pay Cannon's attorneys' fees because its agent's bad faith should not be imputed to Wardley. This Court should reject that defense as a matter of law. Wardley cannot and should not be permitted to claim Hanson was its agent for purposes of suing on an unpaid commission, and collecting that

commission if it prevailed, but was not its agent when the commission claim is ultimately found to be based on fraud.

The Utah Legislature has expressly determined that the broker is ultimately responsible for its agent's actions. Utah Code Ann. § 61-2-10(1) prohibits a real estate agent from accepting a commission on the sale of property directly and requires that any consideration paid to the agent must be paid through a principal broker with whom the agent is affiliated and licensed. See Utah Code Ann. § 61-2-10(1) (1997). In addition, Utah Code Ann. § 61-2-18(2) prohibits a real estate agent from filing suit in his or her own name to recover a commission on the sale of a property. See Utah Code Ann § 61-2-18(2) (1997). Accordingly, Wardley, as the principal broker, chose to file suit against Cannon and was seeking to benefit from its agent's activities in securing a commission on the sale of the Mascaros' property. Given that Wardley stood to benefit from its agent's efforts to secure a commission, it follows that the trial court erred in concluding that Wardley would suffer no consequences from its agent's bad faith.

Moreover, Wardley is a corporation, which can only act through its employees, officers and other agents. It is not disputed that Hanson was acting as Wardley's agent in securing the listing agreements from the Mascaros. It is also undisputed that Wardley considered Hanson to be its agent all through the litigation and the trial on the merits. If Wardley had prevailed in the suit against Cannon, Wardley, not Hanson, would have been entitled to the damages award. Wardley was clearly willing and intended to receive any benefits that resulted from the lawsuit based on Hanson's fraud. Consequently, Wardley should also be responsible for the risks associated with losing the lawsuit, which risks include paying the opposing parties' attorneys' fees when a meritless claim based on fraudulent inducement is brought in bad faith.

The Second Amended Complaint was brought in bad faith. A claim is asserted in bad faith if, among other things, it is asserted "to take unconscionable advantage of others." Cady, 671 P.2d at 151. Wardley's case against Cannon was not about collecting

a debt based on a lawful and binding contract, or even upon a colorable claim of such. Rather, this case was about a real estate brokerage that, through its authorized agent, altered the material terms of several contracts, and then elected to expand the scope of its attack to Cannon, a stranger to the dealings between Mascaros and Wardley. This Court should not countenance Wardley's improper attempt to take advantage of Cannon in this lawsuit. Instead, this Court should require that Wardley pay Cannon the attorneys' fees and costs it has incurred in defending against this action.

Wardley correctly asserted below that, as a general rule, fraud committed by a third party cannot be imputed to another defendant. However, in Jensen v. IHC Hosps., Inc., 944 P.2d 327, 338 (Utah 1997), the Utah Supreme Court expressly held that "[w]here . . . there is an agency or privity relationship between the third party committing the fraud and the defendant, our cases indicate that liability for the agent's negligent or intentional tort can be imputed to the principal if the agent acts in whole or in part to carry out the purposes of the principal. Id. (citing Hodges v. Gibson Prods. Co., 811 P.2d 151, 156 (Utah 1991); Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989)).

Accordingly, because of the agency relationship between Hanson and Wardley, Utah law dictates that liability for Hanson's bad faith in bringing frivolous claims against Cannon should be imputed to Wardley. Wardley's liability, in this case, includes payment of Cannon's attorneys' fees and costs and attorney's fees incurred in defending against this meritless action which Wardley brought in bad faith.

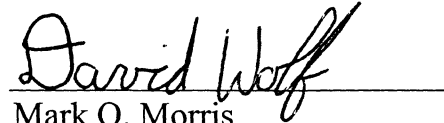
CONCLUSION

For the reasons stated above, this Court should reverse the trial court's denial of Cannon's Motion for Attorney's Fees and Costs, and order Wardley to pay to Cannon the sum of \$63,857.50 in attorneys' fees. Cannon also seeks an award of costs and attorney's

fees incurred in bringing this appeal, pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

DATED this 12th day of June, 2000.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to read "David Wolf", is written over a horizontal line.

Mark O. Morris

David N. Wolf

Attorneys for Defendants/Appellees

Tracy Cannon and Cannon Associates, Inc.

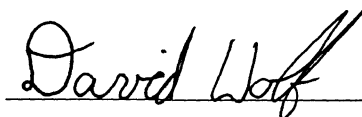
CERTIFICATE OF SERVICE

This will certify that on the 13th day of June, 2000, I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEES to each of the following:

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

John R. Bucher, Esq.
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Salt Lake City, Utah 84105

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



Tab A

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,	:	
Counterclaimaints,	:	
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.	:	

A Notice to Submit having been filed, pursuant to Rule 4-501,
Code of Judicial Administration, in connection with defendant
Tracey Cannon's Motion for Summary Judgment and plaintiff's Motion

for Leave to File Amended Complaint, the Court having reviewed the Motions, Memoranda in Support and Reply Memorandum and the Memoranda in Opposition, and the Court being fully advised and finding good cause, rules as stated herein.

The Motion For Summary Judgment was filed first and is therefore considered first by this Court. The Motion for Summary Judgment is denied because there are material facts at issue, including what defendant, Cannon, knew or should have known and when she obtained any knowledge she had, etc.

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

Plaintiff has ten days from the date of this Ruling to file the Amended Complaint and an Order consistent with this Ruling.

Dated this 9th day of October, 1996.

15
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, to the following, this 9th day of October, 1996:

J. Craig Smith
NIELSEN & SENIOR
Attorney for Plaintiff
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111

Mark O. Morris
SNELL & WILMER
Attorney for Defendant Cannon
111 East Broadway, Suite 900
Salt Lake City, Utah 84111

Steven W. Dougherty
ANDERSON & KARRENBURG
Attorney for Defendant Mascaro
50 West Broadway, Suite 700
Salt Lake City, Utah 84101

E. Matheson

Tab B

AUG 28 1998

By 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

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 28 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 21 day of August, 1998:

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