

2000

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

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Wardley Better Homes v. Mascaro*, No. 20000128 (Utah Court of Appeals, 2000).
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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

REPLY 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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FILED
Utah Court of Appeals

SEP 22 2000

**Paulette Stagg
Clerk of the Court**

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ARGUMENT

I. CANNON NEED NOT MARSHAL THE EVIDENCE BECAUSE SHE DOES NOT CHALLENGE THE FACTUAL FINDINGS OF THE TRIAL COURT

Wardley contends that Cannon's appeal should be summarily dismissed because Cannon did not marshal the evidence supporting the trial court's decision. Cannon need not marshal evidence on factual findings not in dispute. State v. Larsen, 2000 UT App. 106, 999 P.2d 1252 (Utah App. 2000) (holding that marshaling the evidence "is unnecessary because [defendant] is challenging the trial court's legal conclusions rather than its factual findings."). Cannon's decision not to marshal the evidence supporting the uncontested facts of this case does not relieve this Court of its obligation to "review . . . the accuracy of the lower court's conclusions of law and the application of that law in the case." Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997) (quoting Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991)). Cannon accepts the purely factual findings of the trial court as true. Here, Cannon asks this Court to review the trial court's conclusions of law and the application of law to the uncontested facts and circumstances of this case.

It is undisputed that the trial court found that Wardley's agent, Arles Hanson ("Hanson"), fraudulently altered the dates of certain listing agreements and fraudulently induced his clients, the Mascaros, to enter into the listing agreements. It is also undisputed that Hanson was acting as Wardley's agent when he engaged in this fraudulent conduct. And, it is undisputed that at its agent's behest, Wardley sued Cannon, a stranger to the dealings between Wardley and the Mascaros, to collect a real estate commission and treble damages based on the fraudulent conduct of its agent. Accordingly, the only issue before this Court is a question of law, i.e., whether Wardley

should escape responsibility for the fraudulent conduct of its agent. Principles of agency and accountability, in particular where fiduciaries are concerned, should move this Court to reverse the trial court and instruct it to impose fees against Wardley.

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

Wardley contends that it did not bring its claims against Cannon in bad faith because it had an honest belief that Cannon owed Wardley a commission on the sale of the subject property. If Cannon had a statutory or contractual basis to seek attorney's fees from Hanson, she would pursue those. But Utah's statutory scheme requires that Wardley, as the broker, pursue the claims of its agents, since it is the broker who is entitled to real estate commissions. See Utah Code Ann. §§ 61-2-10(1), 61-2-18(2) (1997). Knowingly or not, it was Wardley who forced Cannon to incur tens of thousands of dollars in attorney's fees defending against claims that Wardley's agent knew to be fraudulent and specious. Thus, this Court should rule that a broker who pursued its agent's fraudulent claims should be responsible for the damages and injustices imposed on innocent defendants.

Wardley correctly asserts that the trial court found that "Wardley" did not have actual knowledge of Hansen's fraudulent conduct. While Cannon accepts this factual finding, "Wardley" is still defined as all brokers and agents employed by Wardley, including Hanson. Accordingly, the trial court erred as a matter of law when it implicitly distinguished between Wardley and its agent. For all purposes here, they were one and the same.

Wardley is imputed with the knowledge of its agent and is responsible for Hanson's fraudulent conduct as a matter of law. "Where . . . 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." Jensen v. IHC Hosps., Inc., 944 P.2d 327, 338 (Utah 1997). See also Hodges v. Gibson Prods. Co., 811 P.2d 151, 156 (Utah 1991); Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989). Not only was Hanson acting to benefit Wardley, but Wardley sought to capitalize on and benefit from these efforts at great expense to Cannon.

Wardley does not and cannot dispute that Hanson was acting as its agent to benefit Wardley and was furthering its purposes by attempting to collect a commission. Wardley also concedes, as it must, that its agent attempted to collect Wardley's commission through fraudulent means. Accordingly, Wardley is liable for the intentionally tortious conduct of its agent as a matter of law. And, Wardley's liability should include payment of Cannon's attorney's fees incurred in defending against this meritless action.

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

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. Wardley put Hanson in the position to fraudulently create the contracts upon which Wardley's claims against Cannon were based. And, it is undisputed that Wardley was in a superior, and perhaps the only position to prevent the fraud of its own agent. Utah courts have consistently held that "as between two innocent persons, one of whom must suffer through the fraud of third, that the one who puts it in the power of the other to practice the fraud must suffer the loss." Swartz v. White, 80 Utah 150, 152, 13 P.2d 643, 644 (1932). See also G. Eugene England Found. v. Smith's Food King, 542 P.2d 753, 755 (Utah 1975); Valley Bank and

Trust Co. v. Gerber, 526 P.2d 1121, 1124 (Utah 1974); Heavy v. The Commercial Nat'l Bank, 27 Utah 222, 229, 75 P. 727, 729 (1904).

Erroneously assuming there is a legal distinction between Wardley and its fraudulent agent, the trial court concluded that Wardley was a victim of the dishonesty of its own agent. But, Wardley was not the victim here. Unless Cannon is reimbursed for the attorney's fees she paid in defending against Wardley's claims, then Cannon alone will suffer the 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). Thus, this Court should reverse the trial court's denial of Cannon's Motion for Attorney's Fees and Costs.

IV. CANNON IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES BECAUSE THE PURPOSE OF UTAH CODE ANN. § 78-27-56 IS TO COMPENSATE AN INNOCENT PARTY FOR DEFENDING AGAINST MERITLESS CLAIMS BROUGHT IN BAD FAITH

Without citing any authority to support its position, Wardley asserts that it should not be responsible for its agent's fraudulent and tortious conduct because the "[r]ecovery of attorney fees under § 78-27-56 is punitive rather than remunerative." See Brief of Appellee at 15. Wardley's argument is factually inaccurate and legally unsupported.

The purpose of Utah Code Ann. § 78-27-56 is primarily remunerative, as it is designed to compensate an innocent party for the costs associated with defending meritless claims brought in bad faith. Utah Code Ann. § 78-27-56 was promulgated as House Bill 100 and discussed on February 5, 1991 by the House of Representatives at the 44th Utah Legislative General Session. The sponsor of the Bill, Representative Richard L. Maxfield, stated that:

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

Statement of Rep. Maxfield, Third Reading of H.B. 100, 44th Utah Leg., Gen. Sess. (Feb. 5, 1981) (H.R. Recording Tape No. 6, side 1). Thus, the primary purpose of awarding attorney's fees where the losing party has filed a meritless claim in bad faith is to make the innocent party whole by compensating the prevailing party for the legal expenses incurred in defending against a groundless suit. *Id.*; see also *Gordon v. Heimann*, 715 F.2d 531, 539 (11th Cir. 1983); *Nemeroff v. Abelson*, 704 F.2d 652, 654 (2d Cir. 1983).

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

V. CANNON IS ENTITLED TO BE COMPENSATED FOR THE ATTORNEY'S FEES SHE EXPENDED IN DEFENDING AGAINST WARDLEY'S MERITLESS CLAIMS, WHICH WERE BROUGHT IN BAD FAITH

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

A. Wardley's Claims Were Without Merit

A claim is without merit if it is "frivolous" or "of little weight or importance having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Wardley claims that the complexity of the case, the length of the trial testimony and the multiplicity of the exhibits introduced preclude a determination that its claims were without merit. Wardley essentially argues that its claims had merit because it was difficult, time consuming and costly for Cannon to demonstrate that Wardley, through its agent, fraudulently altered contracts and unlawfully induced the execution of the very contracts with which Cannon was then accused of interfering. This Court should reject Wardley's proposition that merely because a party fights hard, and spends a lot of resources to capitalize on a fraud in court, that the effort had "merit."

In accusing Cannon of converting its property, violating the ethical standards which govern real estate agents, and interfering with contracts that 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 as a matter of law.¹

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 attorney's fees because it was unaware of its own agent's duplicity. This Court should reject that defense as a matter of law. This Court should not permit Wardley to claim Hanson was its agent for purposes of suing on an unpaid commission, and collecting that commission and other statutory damages if it succeeded in completing its agent's fraud, but suddenly was not Wardley's agent when the commission claim was ultimately found to be based on its own agent's 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

¹ Attorney's fees are particularly warranted here when, prior to trial, the court expressly cautioned Wardley about proceeding with claims against Cannon which, after a diligent exploration of the facts, would prove untenable. See Court's Ruling dated October 9, 1996. (R. at 269.)

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 Wardley should suffer no consequences from its agent's bad faith.

Moreover, Wardley is a corporation, and can only act through its employees, officers and agents. 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. These risks include paying the opposing parties' attorney's fees when one of its own agents caused a meritless claim, based on fraudulent inducement, to be 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 151.² Wardley's case against Cannon was not about collecting a debt based on a lawful and binding contract, or even upon a colorable claim

² Wardley cites Cady v. Johnson, 671 P.2d 149 (Utah 1983) for the proposition that Wardley's failure to properly research and investigate the validity of its claims against Cannon prior to trial does not give rise to a finding that Wardley acted in "bad faith" in pursuing its claims. Wardley's reliance on Cady is misplaced. Unlike the instant case, the plaintiffs in Cady did not engage in fraudulent activity, did not intentionally alter contracts with the express purpose to deceive and did not sue a third party to enforce these fraudulently induced and illegally obtained contracts. The facts of the instant case give rise to a finding of bad faith separate and apart from Wardley's failure to properly research and investigate its claims.

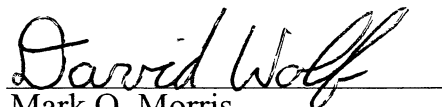
of such. Rather, this case was about a real estate brokerage that, through its authorized agent, altered the material terms of several contracts, and then elected to expand the scope of its attack to Cannon, a stranger to the dealings between the Mascaros and Wardley. Wardley effectively ratified that conduct by seeking to capitalize on it . . . at Cannon's expense. Thus, this Court should require that Wardley pay Cannon the attorney's fees she has incurred in defending against this action.

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 attorney's fees incurred in defending this case through trial. This Court should also instruct the trial court to award costs and attorney's fees incurred in bringing this appeal, pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

DATED this 22 day of September, 2000.

Snell & Wilmer L.L.P.

A handwritten signature in cursive script, reading "David Wolf", written over a horizontal line.

Mark O. Morris
David N. Wolf
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CERTIFICATE OF SERVICE

This will certify that on the 22 day of September, 2000, I caused to be mailed two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to each of the following:

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