

1975

# Cleo R. Powell v. Dick E. Bastian. Dee V. Sharp, Sharp Reality, and Prudential Federal Savings and Loan Association : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Justin C. Stewart; Attorney for appellant.

Dallas H. Young, Jr.; Ivie and Young; S. Red Lewis; Howard, Lewis & Peterson; Glen J. Ellis; Maxfield, Gammon, Ellis and McGuire; Attorneys for Respondents.

---

## Recommended Citation

Brief of Respondent, *Powell v. Bastian*, No. 13939.00 (Utah Supreme Court, 1975).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/143](https://digitalcommons.law.byu.edu/byu_sc1/143)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

LEO R. POWELL, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. )  
 )  
 JACK E. BASTIAN, DEE V. )  
 )  
 ARP, dba SHARP REALTY, )  
 )  
 and Provo Branch PRUDEN- )  
 )  
 TIAL FEDERAL SAVINGS & )  
 )  
 AN ASSOCIATION, a Fed- )  
 )  
 erally Chartered Savings )  
 )  
 and Loan Association, )  
 )  
 Defendants-Respondents. )

04 FEB 1976

Case No. 13939  
Utah State Law School

BRIEF OF DEFENDANT-RESPONDENT  
 PRUDENTIAL FEDERAL SAVINGS &  
 LOAN ASSOCIATION

Appeal from a Judgment of Fourth District Court, Utah County,  
 following a trial to the Court, Honorable J. Robert Bullock, Judge

**FILED**  
 MAY 2 - 1975

Clerk, Supreme Court, Utah

S. Rex Lewis, for:  
 Howard, Lewis & Petersen  
 Attorneys for Defendant-  
 Respondent, Prudential  
 Federal Savings & Loan  
 Association  
 120 East 300 North  
 Provo, Utah 84601

Clinton C. Stewart  
 Attorney for Appellant  
 Newhouse Building  
 Lake City, Utah 84111

Glen J. Ellis  
 Maxfield, Gammon, Ellis &  
 McGuire  
 Attorney for Respondent  
 Sharp  
 P. O. Box 1097  
 Provo, Utah 84601

Thomas H. Young, Jr.  
 & Young  
 Attorney for Respondent Bastian

TABLE OF CONTENTS

	Page
Nature of the Case . . . . .	1
Disposition in Lower Court . . . . .	2
Relief Sought on Appeal . . . . .	2
Statement of Facts . . . . .	2
ARGUMENT	
POINT I. THE TRIAL COURT'S DISMIS- SAL OF PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION WAS CORRECT BECAUSE PRUDENTIAL DID NOT OWE ANY FIDUCIARY DUTY TO MRS. POWELL	2
Conclusion . . . . .	9

CASES CITED

Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (1965) . . . . .	6
In re Cover's Estate, 188 Cal. 133, 204 P. 583 (1922) . . . . .	5
Milliner v. Elmer Fox and Co., 529 P.2d 806 (1974) . . . . .	7
Neagle v. McMullen, 334 Ill. 168, 165 N.E. 605 (1933) . . . . .	5

OTHER AUTHORITIES CITED

Black's Law Dictionary (4th Ed. 1968) . . . . .	4
--	---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

CLEO R. POWELL,

Plaintiff-Appellant,

vs.

DICK E. BASTIAN, DEE V. SHARP,  
dba SHARP REALTY, and PROVO  
BRANCH PRUDENTIAL FEDERAL  
SAVINGS & LOAN ASSOCIATION, a  
Federally Chartered Savings  
and Loan Association,

Defendants-Respondents.

---

Case No.

13939

BRIEF OF DEFENDANT-RESPONDENT  
PRUDENTIAL FEDERAL SAVINGS  
AND LOAN ASSOCIATION

---

STATEMENT OF THE NATURE OF THE CASE

This is an action involving the sale of a home in which it is alleged Mrs. Powell was deprived of her share of the sale price. Prudential Federal Savings & Loan Association loaned money to Mr. and Mrs. Ethington, the buyers, and officiated on September 10, 1970, at the closing transaction of the sale.

## DISPOSITION IN THE LOWER COURT

The trial court, on September 18, 1974, granted a summary judgment in favor of the defendant, Prudential Federal Savings & Loan Association, dismissing them from the action.

## RELIEF SOUGHT ON APPEAL

Defendant, Prudential Federal Savings & Loan Association, seeks to affirm the summary judgment dismissing them from the action.

## STATEMENT OF THE FACTS

The plaintiff's statement of facts is generally correct and defendant, Prudential, would add only that Prudential merely officiated at a transaction which sold a piece of property for \$20,500.00. The only client of Prudential was Mr. and Mrs. Ethington, the buyers, who had applied to Prudential for a loan which was to be secured by a mortgage on the residence.

## ARGUMENT

### POINT I.

## THE TRIAL COURT'S DISMISSAL OF

PRUDENTIAL FEDERAL SAVINGS & LOAN  
ASSOCIATION WAS CORRECT BECAUSE  
PRUDENTIAL DID NOT OWE ANY FIDUCIARY  
DUTY TO MRS. POWELL.

The crux of Mrs. Powell's contention against Prudential was that Prudential had a fiduciary duty to protect the interest of Mrs. Powell upon a closing transaction which was held September 10, 1970, at its Provo Branch. It is contended this fiduciary duty to Mrs. Powell existed even though Prudential had no information that Mrs. Powell claimed any interest as an owner in the property. It is elementary that before a fiduciary relationship can exist, there must be at least some relationship between two parties. In this case, the interrogatories, pleadings and deposition of Mrs. Powell clearly show that there was no relationship of any kind between Mrs. Powell and Prudential Federal Savings.

For example, on Page 11 of Mrs. Powell's deposition she was asked:

Q: Did you have any conversations prior

to the closing of the loan and the closing of the sales transactions with the Ethingtons, with anyone at Prudential Federal Savings & Loan?

A: No.

On Page 21 and 22 of her deposition she was asked:

Q: You told me previously that you did not have any conversations with, or dealings with anyone at Prudential Federal Savings & Loan Association.

A: No, I had not talked with anyone there. Mr. Sharp was handling the house, handling the sale on the house. I had nothing until they came to me with this earnest money.

Q: Alright, and thereafter, through the closing and thereafter you still didn't have any conversation with anyone at Prudential?

A: No.

Black's Law Dictionary, 4th Ed. 1968,

defines a fiduciary relationship as:

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

"A relation subsisting between two persons in regard to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith."  
(emphasis added)

Id. at 754

A fiduciary relationship exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence. Neagle v. McMullen, 334 Ill. 168, 165 N.E. 605, 608. (1933). Sometimes confidential and fiduciary relations are regarded as synonyms. In re Cover's Estate, 188 Cal. 133, 204 P. 583, 508 (1922). It is clear from the pleadings, deposition and answers to interrogatories, and other information on file, that Prudential Federal Savings & Loan Association's only clients and the only persons to whom they owed a fiduciary



duty were Mr. and Mrs. Ethington, the buyers of the property. It was Mr. and Mrs. Ethington who had applied to Prudential Federal Savings for a loan which was to be secured by a mortgage on the residence. Mrs. Powell had no contact whatsoever with Prudential Federal Savings. This was admitted by both parties, therefore, it was impossible for a fiduciary relationship to exist.

Appellant cites Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (1965) as authority that Prudential owed a fiduciary duty to Mrs. Powell. This case involved confidential relationships between family members involving the transfer of water stock certificates. The Utah Supreme Court discussed confidential relationships between parent and child and other kinship relationships which may be a factor in determining the existence of a confidential relationship. The Utah Supreme Court stated:

"While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be

a showing, in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party."

Id. at 713.

The Utah Supreme Court did not discuss a so-called fiduciary relationship. The quote of appellant from Bradbury on page 21 of her brief is completely out of context. In Bradbury there is no reference to any fiduciary relationship, let alone one which would be similar to the factual situation in the instant case. This Court's reference in Bradbury is merely a reference to a confidential relationship which reference is not in point, either in law or fact.

Appellant cites Milliner v. Elmer Fox Co., 529 P.2d 806 (1974) as support for "the standard of care on which Mrs. Powell relies in making her claim against Prudential." The Utah Supreme Court in Milliner held that an accountant, despite a lack of privity, may nevertheless still be held liable to a

third party when the accountant is aware that such third party may extend credit on the basis of the accountant's financial reports. The instant case is factually distinguishable because Prudential is unaware of any reliance which any third persons could conceivably repose in whatever Prudential does at the closing transaction.

Appellant cites Title 12, § 1464, United States Code, which sets forth the required standard upon which federal charters should be issued to savings and loan associations. Any such standard is not relevant to the issue of whether a fiduciary relationship existed between Prudential and Mrs. Powell. Likewise appellant's argument as to a conspiracy is irrelevant because the amended complaint did not plead any conspiracy in which Prudential was a co-conspirator.

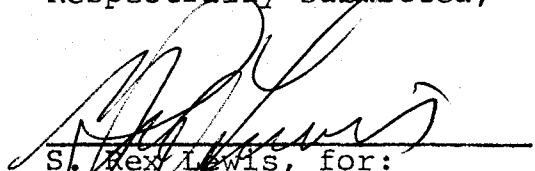
Prudential merely officiated at a transaction which sold a piece of property for \$20,500.00. Certain costs attached to

that transaction, which included real estate commission, title insurance and other fees. After these fees had been deducted from the purchase price, \$18,000.00 was returned to the seller, Bastian, as his equity, and the balance represented Mrs. Powell's remaining interest in the property. At no time did there exist any relationship of trust or confidence between Mrs. Powell and Prudential which could create any kind of fiduciary relationship.

#### CONCLUSION

The trial court properly dismissed Prudential Federal as a party in the action because Prudential owed no fiduciary duty to Mrs. Powell. It owed no fiduciary duty because Prudential merely officiated at a closing transaction in which it had loaned money to the buyers of the property. It had no relationship whatsoever, fiduciary or otherwise, with Mrs. Powell, therefore, the trial court properly dismissed Prudential.

Respectfully submitted,



S. Rex Lewis, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Defendant-  
Respondent Prudential  
Federal Savings & Loan  
Association  
120 East 300 North  
Provo, Utah 84601

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief to Justin C. Stewart, Attorney for Plaintiff, 425 Newhouse Building, Salt Lake City, Utah 84111, this 1st day of May, 1975.

