

2009

Michael C. Posner v. Equity Title Insurance Agency, Inc. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

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

Catherine James; David E. Ross II; Attorneys for Plaintiff/Appellant.

David M. Bennion; Parsons, Behle and Latimer; Attorneys for Defendant/Appellee.

Recommended Citation

Brief of Appellee, *Michael C. Posner v. Equity Title Insurance Agency, Inc.*, No. 20090058 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1473

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Plaintiff/Appellant,

vs.

EQUITY TITLE INSURANCE AGENCY,
INC., a Utah Corporation, and NRT, INC., a
New Jersey Corporation dba COLDWELL
BANKER RESIDENTIAL BROKERAGE

Defendants/Appellees.

Appeal No. 20090058-CA

District Court No. 040901853

BRIEF OF APPELLEE EQUITY TITLE INSURANCE AGENCY, INC.

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Tyrone E. Medley, Presiding
Granting Two Motions for Summary Judgment Against Plaintiff/Appellant

Catherine James
5945 Sierra Drive
Mountain Green, Utah 84050

David E. Ross II
1912 Sidewinder Drive, Suite 209
Park City, Utah 84060

*Attorneys for Plaintiff/Appellant
Michael C. Posner*

David M. Bennion (5664)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant/Appellee Equity
Title Insurance Agency, Inc.*

ORAL ARGUMENT NOT REQUESTED

IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Plaintiff/Appellant,

vs.

EQUITY TITLE INSURANCE AGENCY,
INC., a Utah Corporation, and NRT, INC., a
New Jersey Corporation dba COLDWELL
BANKER RESIDENTIAL BROKERAGE

Defendants/Appellees.

Appeal No. 20090058-CA

District Court No. 040901853

BRIEF OF APPELLEE EQUITY TITLE INSURANCE AGENCY, INC.

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Tyrone E. Medley, Presiding
Granting Two Motions for Summary Judgment Against Plaintiff/Appellant

Catherine James
5945 Sierra Drive
Mountain Green, Utah 84050

David E. Ross II
1912 Sidewinder Drive, Suite 209
Park City, Utah 84060

*Attorneys for Plaintiff/Appellant
Michael C. Posner*

David M. Bennion (5664)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendant/Appellee Equity
Title Insurance Agency, Inc.*

ORAL ARGUMENT NOT REQUESTED

PARTIES TO THE PROCEEDINGS BELOW

1. Plaintiff-appellant is Michael C. Posner, referred to herein as “Posner.”
2. Defendant-appellee Equity Title Insurance Agency, Inc., referred to herein as “Equity Title,” was a defendant below. The district court granted summary judgment to Equity Title on May 23, 2005, which Posner appealed.
3. Defendant Independence Title Insurance Agency, referred to herein as “Independence Title,” was a defendant below. The district court granted summary judgment to Independence Title in the same ruling that also granted summary judgment to Equity Title. Posner did not appeal the grant of summary judgment to Independence Title, and it is not a party to this appeal.
4. Defendant-appellee NRT, Inc. dba Coldwell Banker Residential Brokerage, referred to herein as “Coldwell Banker,” was named as a defendant below in Posner’s First Amended Complaint. The district court granted Coldwell Banker’s motion for summary judgment against Posner, on November 12, 2008, which Posner appealed.

Note: Posner’s appellate brief (at page i) incorrectly states that Coldwell Banker is not a party to this appeal. In this appellee brief, Equity Title addresses only Posner’s appeal of the grant of summary judgment in Equity Title’s favor.

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE POSNER IS BOUND BY HIS AGENT’S INSTRUCTION TO EQUITY TITLE THAT POSNER HAD APPROVED THE FINANCIAL GUARANTEE AND THAT EQUITY TITLE SHOULD CLOSE THE TRANSACTION	5
A. Posner Is Bound by the Statements of His Agent to Equity Title Regarding His Approval of the Financial Guarantee and Instruction to Proceed with the Closing	6
B. Ms. Christoffersen Acted Within the Scope of the Actual and/or Apparent Authority Granted to Her by Posner	7
II. THE DISTRICT COURT CORRECTLY RULED THAT EQUITY TITLE DID NOT BREACH ANY DUTY OWED TO POSNER WHEN EQUITY TITLE FOLLOWED THE DIRECTIONS GIVEN BY POSNER’S AGENT	13
CONCLUSION	15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>White v. Dunbar</i> , 119 U.S. 47 (1886)	10
---	----

STATE CASES

<i>Au v. Au</i> , 626 P.2d 173 (Haw. 1981).....	7
<i>Diston v. EnviroPak Medical Products, Inc.</i> , 893 P.2d 1071 (Utah App. 1995)	6, 7
<i>Gaw v. State</i> , 798 P.2d 1130 (Utah Ct. App. 1990).....	10
<i>Horrocks v. Westfalia Systemat</i> , 892 P.2d 14 (Utah App. 1995).....	7, 12
<i>Producers Livestock Loan Co. v. Miller</i> , 580 P.2d 603 (Utah 1978)	6
<i>Salt Lake County v. Bangerter</i> , 928 P.2d 384 (Utah 1996)	11
<i>Watson v. Tom Growney Equip., Inc.</i> , 721 P.2d 1302 (N.M. 1986).....	7
<i>Webster v. Sill</i> , 675 P.2d 1170 (Utah 1983).....	10
<i>Zions First National Bank v. Clark Clinic Corp.</i> , 762 P.2d 1090 (Utah 1988)	6, 7, 11, 12

STATE STATUTES

Utah Code Ann. § 78A-3-102	1
----------------------------------	---

MISCELLANEOUS

E. Gallagher, <i>The Law of Suretyship</i> at 81 (2d ed. 2000)	14
L. Moelmann & J. Harris, <i>The Law of Performance Bonds</i> at 8-9 (1999).....	14

STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction of this matter under Utah Code Ann. § 78A-3-102(3)(j). The Supreme Court transferred this matter to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4).

ISSUES PRESENTED FOR REVIEW

Equity Title is satisfied with Posner's statement of the issues presented for review (as related to Equity Title), and Posner's statement of the standard of review for those issues.

STATEMENT OF THE CASE

Equity Title is satisfied with Posner's Statement of the Case (as related to Equity Title), including Posner's description of the course of proceedings below.

STATEMENT OF FACTS

In 2002, Posner, a Florida resident, listed for sale two parcels of property he owned in Park City, Utah. R. 326. His real estate agent in Park City was Kandis Christoffersen of defendant Coldwell Banker. *Id.* In July, 2002, Posner began negotiations to sell the parcels to Strachan & Associates, LLC ("Strachan") (R. 327), which resulted in the execution of a Real Estate Purchase Contract (the "REPC") between Posner and Strachan. R. 287-98.

Strachan financed its purchase of Posner's property by borrowing part of the purchase price from a third-party lender and borrowing the remainder from Posner. R. 324. Addendum No. 4 to the REPC requires Strachan to provide a "Surety Bond" for the seller financing. R. 297. The REPC does not specify who would issue the bond, does not

impose any eligibility requirements on the bond provider, nor does it state any other requirement for the bond. R. 287-98. The REPC does not require Posner's personal approval of the surety bond. *Id.*

The transaction was closed through a "split closing," with Equity Title acting as Posner's escrow agent, and defendant Independence Title, which is not a party to this appeal, acting as Strachan's escrow agent. R. 327. On or about August 23, 2002, Posner signed closing documents, but Strachan was not able to close the transaction at that time, and had not yet supplied a bond agreement. *Id.* After signing the closing documents, on August 23, 2002, Posner returned to his home in Florida. *Id.*

In Posner's absence, he delegated to his agent, Ms. Christoffersen, responsibilities relating to closing the transaction and the surety bond. R. 285-86. Specifically, in response to his own attorney's question regarding Ms. Christoffersen's "role at closing," Posner testified in deposition:

The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess *my agent* was to make sure that it [the subject transaction] closed. *And she was the one that was negotiating back and forth with the contract as far as making sure that we had a surety bond and how much it was and everything else.*

R. 286 (emphasis added).

On or about August 28, 2002, Strachan supplied Independence Title with the documents necessary to close Strachan's side of the transaction, including a six-page document entitled "Financial Guarantee," issued by American Natural Resources Corporation. R. 21, 317-22. Pursuant to the Financial Guarantee, American Natural

Resources Corporation guaranteed payment of Strachan's loan from Posner in the event Strachan defaulted on the seller financing. R. 317-22. On the same day, August 28, 2002, Independence Title delivered the Financial Guarantee and the other closing documents to Helen Smith at Equity Title. R. 310. Ms. Smith faxed the Financial Guarantee to Ms. Christoffersen, who acknowledged receipt thereof in a telephone conversation with Ms. Smith on August 28, 2002. R. 302-03, 312, 314.

On August 30, 2002, Ms. Christoffersen told Ms. Smith that she had spoken with Posner, and that Posner had approved the Financial Guarantee, and that Posner had instructed her to have Ms. Smith complete the closing. R. 314 (Smith Depo.), 306 (Christoffersen Depo.). In his First Amended Complaint at ¶ 25, Posner expressly admits that “. . . *Ms. Christoffersen informed Ms. Smith that Mr. Posner had approved the Financial Guarantee written for the amount of \$260,000 and stated that Equity could proceed with the closing.*” R. 328-29 (emphasis added).

Consistent with Posner's instructions communicated through Ms. Christoffersen, Equity Title closed the transaction on August 30, 2002 with the Financial Guarantee in place. R. 308, 329. After the closing, Strachan failed to make any payments to Posner. R. 329. Despite demand from Posner, American Natural Resources Corporation failed to make good on the Financial Guarantee. *Id.*

SUMMARY OF THE ARGUMENT

The district court's summary judgment in favor of Equity Title should be affirmed because Posner's instructions to Equity Title, conveyed through his agent, Ms. Christoffersen, are binding upon Posner. It is undisputed and expressly admitted by

Posner that Posner's agent, Ms. Christoffersen, informed Equity Title that Posner had approved the Financial Guarantee and specifically instructed Equity Title that it should close the transaction. Ms. Christoffersen's statements to Equity Title in this regard were within the scope of her actual and/or apparent authority, and are binding upon Posner.

Equity Title cannot be liable for a breach of duty, fiduciary or otherwise, to Posner for following the specific instructions of his agent. With respect to Posner's fiduciary duty argument, Posner is incorrect in asserting that the REPC was materially changed because the guarantee contract was called "Financial Guarantee" rather than "Surety Bond," and had a face amount of \$260,000 rather than \$263,900. These differences are immaterial as a matter of law. If the Financial Guarantee had been entitled "Surety Bond," Posner would be in no different position than he is today. A surety bond is simply a performance bond, which is precisely what the Financial Guarantee purports to be. The cause of Posner's loss was not the title of the document; it was the selection of the guarantor and that guarantor's failure to make good on its promise to make payment if Strachan failed to do so, which is a matter that did not involve Equity Title.

Likewise, the \$3,900 difference between the face amount of the Financial Guarantee and Posner's belated revision to Addendum No. 9 to the REPC is also immaterial. Posner admitted that neither Strachan nor the guarantor, American Natural Resources Corporation, ever made a single payment to Posner. R. 329. Thus, there is no causal connection between the guarantor's default and the fact that the Financial Guarantee had a face amount of \$260,000 rather than \$263,900. Moreover, Posner changed Addendum No. 9 to the REPC, crossing out the figure \$260,000 and

interlineating the figure \$263,900, after Strachan had closed his side of the transaction and after American Natural Resources had executed the Financial Guarantee for \$260,000. R. 411, 317-22; Brief of Appellant at 7.

In any event, the issues concerning the title “Financial Guaranty” versus “Surety Bond” and the contract amount of \$260,000 versus \$263,000 are moot because Posner’s agent expressly instructed Equity Title that Posner had approved the Financial Guarantee and that Equity Title should close the transaction.

ARGUMENT

I. THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE POSNER IS BOUND BY HIS AGENT’S INSTRUCTION TO EQUITY TITLE THAT POSNER HAD APPROVED THE FINANCIAL GUARANTEE AND THAT EQUITY TITLE SHOULD CLOSE THE TRANSACTION.

The district court properly granted summary judgment in Equity Title’s favor because Posner’s agent told Equity Title that Posner had approved the Financial Guarantee, and told Equity Title to proceed with the closing. Thus, Equity Title’s actions in closing the transaction with the Financial Guaranty in place were taken on the express consent, approval and instruction of Posner’s agent. Ms. Christoffersen’s statements to Equity Title were within the scope of her actual and/or apparent authority to act in Posner’s behalf, and therefore are binding against Posner.

Posner’s attempt to create factual issues relating telephone records, facsimiles and Posner’s approval of the Financial Guaranty are of no avail because it is undisputed and expressly admitted by Posner that, “*Ms. Christoffersen informed Ms. Smith that Mr. Posner had approved the Financial Guarantee written for the amount of \$260,000 and*

stated that Equity could proceed with the closing.” R. 328-29 (emphasis added). Significantly, Posner made this admission in his First Amended Complaint, which he filed on March 29, 2005 (R. 323-36), after he had completed discovery related to Equity Title, and after Equity Title filed its Motion for Summary Judgment. Both Equity Title’s employee, Helen Smith, and Posner’s agent, Kandis Christoffersen, testified that, on August 30, 2002, Ms. Christoffersen told Ms. Smith that she had spoken with Posner, and that Posner had approved the Financial Guarantee, and that Posner had instructed her to have Ms. Smith complete the closing. R. 314 (Smith Depo.), 306 (Christoffersen Depo.).

A. Posner Is Bound by the Statements of His Agent to Equity Title Regarding His Approval of the Financial Guarantee and Instruction to Proceed with the Closing.

Ms. Christoffersen was Posner’s agent with respect to the subject transaction, and had Posner’s actual and/or apparent authority to accept the Financial Guarantee supplied by Strachan and to instruct Equity Title to proceed with the closing of the transaction. Accordingly, Posner is bound by the representations and instructions Christoffersen conveyed to Equity Title. *See Producers Livestock Loan Co. v. Miller*, 580 P.2d 603, 605-606 (Utah 1978) (“It is fundamental that where one authorized another to act for him and for his intended benefit that, insofar as the latter is doing acts within the scope of the authority given, or acts reasonably calculated to further that purpose, the principal so authorizing is deemed to be performing those acts himself.”).

“Actual authority can be either express or implied.” *Diston v. EnviroPak Med. Products, Inc.*, 893 P.2d 1071, 1076 (Utah App. 1995). In *Zions First Nat’l Bank v. Clark Clinic Corp.*, 762 P.2d 1090 (Utah 1988), the Utah Supreme Court explained that:

Actual authority incorporates the concepts of express and implied authority. Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf. Implied authority, on the other hand, embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.

Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988).

In contrast to actual authority, “[a] finding of apparent authority requires that the acts or conduct of the principal, [Posner], creates an appearance which causes a third party, [Equity Title], to reasonably believe that a second party, [Ms. Christoffersen], has authority to act on the principal's behalf.” *Diston*, 893 P.2d at 1076. “Basic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority.” *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah App. 1995). *See also Watson v. Tom Growney Equip., Inc.*, 721 P.2d 1302, 1304 (N.M. 1986) (seller's agent who told buyer that approval had been granted for sale of backhoe and who had apparent authority to make representation bound seller to contract with buyer); *Au v. Au*, 626 P.2d 173, 178 (Haw. 1981) (“[A]n owner is responsible for the representations of his agent made within the scope of his agent's selling authority.”).

B. Ms. Christoffersen Acted Within the Scope of the Actual and/or Apparent Authority Granted to Her by Posner.

The district court correctly found that Ms. Christoffersen was acting within the scope of her actual implied and/or apparent authority when she communicated to Equity Title that Posner had approved the Financial Guarantee and that he had instructed that Equity Title should proceed with the closing. R. 619-24. The undisputed facts in the

Record below confirm that Ms. Christoffersen had actual and/or apparent authority over all aspects of the closing, including determinations regarding the adequacy of “surety bond.” Posner admitted in his First Amended Complaint that Ms. Christoffersen was his agent for this transaction. R. 326, at ¶ 13. The Real Estate Purchase Contract identifies Ms. Christoffersen as Posner’s agent in the transaction. R. 288. Posner admitted under oath that Christoffersen was his agent with specific authority over the closing and the terms of the “surety bond”:

Q. Can you just elaborate on what your -- what her [Ms. Christoffersen’s] role at closing was? Was there an agreement in place that she would be contacted?

A. The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess *my agent* was to *make sure that it closed*. And she was the one that was *negotiating back and forth with the contract* as far as *making sure that we had a surety bond* and *how much it was and everything else*.

R. 285-86 (emphasis added). Ms. Christoffersen also testified that she was Posner’s agent. R. 300-01. Ms. Smith also testified that she understood Ms. Christoffersen to be Posner’s agent relating to issues beyond merely listing the properties for sale. R. 316; *see also* R. 312-14.

When Posner was confronted with the above-cited testimony in Equity Title’s Motion for Summary Judgment, he responded by asserting that he had hired Ms. Christoffersen for the limited purpose of listing his property, but not to act as his agent at the closing. R. 462, 465, 468. He also submitted an affidavit to that effect, notwithstanding the fact that it was substantively inconsistent with his prior deposition

testimony. R. 481-84. Posner's affidavit contains the following statements that are both inconsistent with his prior deposition testimony and are internally inconsistent:

2) I retained Kandis Christoffersen as my real estate agent at Colwell Banker to assist in locating a buyer and in preparing the Real Estate Purchase Contract for the sale.

3) I did not request that Kandis Christoffersen attend or participate in my closing at Equity on August 30th

. . .

10) I directed both Kandis Christoffersen and Helen Smith to make sure that the buyer supplied a "surety bond" at closing.

11) In making this instruction, I expected both Kandis Christoffersen and Helen Smith to act on my behalf in a manner consistent with the fiduciary level of duty that real estate agents and escrow agents owe respectively to their principal and to each party to the escrow agreement. This included the expectation that, if Ms. Christoffersen or Ms. Smith had any doubts or questions as the legitimacy of the buyer's surety bond, they would notify me of the problem. . . .

. . .

12) I never authorized Kandis Christoffesen [sic] to act as my *agent* at my closing, nor did I ever take any steps to give her apparent authority to act in my behalf.

R. 481-83 (emphasis original).

Thus, Posner testified in deposition that he authorized Ms. Christoffersen "to make sure that [the transaction] closed" (R. 286), and that Ms. Christoffersen "was one that was negotiating back and forth with the contract as far as making sure that we had a surety bond and how much it was and everything else." R. 286. He also testified in his affidavit that he expected Ms. Christoffersen to determine whether she "had any doubts or

questions as the legitimacy of the buyer's surety bond" (R. 483), evidencing his delegation to her of a continuing role and his grant of discretion to her regarding the matter.

Notwithstanding these clear admissions, Posner, citing the affidavit he submitted after his deposition, states in his Brief of Appellant at 20 that "he expressly authorized Christoffersen to help find a buyer for his land *and nothing more.*" (Emphasis added.) Posner apparently believes that he can create a genuine issue of material fact simply by offering inconsistent testimony. The truth, however, is not like "a nose of wax, which may be turned and twisted in any direction." *See White v. Dunbar*, 119 U.S. 47, 51 (1886). Posner's claim that he limited the scope of Ms. Christoffersen's agency to the sole function of finding him a buyer is belied by his own prior deposition testimony quoted above.

Furthermore, it is well recognized that, "when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983). *See also Gaw v. State*, 798 P.2d 1130, 1140 (Utah Ct. App. 1990) (general rule in Utah is that affiant may not raise issue of fact by his own affidavit which contradicts his deposition unless he provides an explanation).

In summary, Ms. Christoffersen's instruction to Equity Title that Posner had approved the Financial Guarantee and that Equity Title should go forward with the

closing was well within the scope of the express authority Posner had granted to her,¹ and in any event was certainly within the authority implicit to the main authority he had granted. Posner identified Ms. Christoffersen as his real estate agent in a writing signed by him, the REPC. R. 288. He also identified Ms. Christoffersen as his real estate agent in his Amended Complaint. R. 326. After Ms. Christoffersen found a buyer for Posner, her agency continued through the closing of the transaction and encompassed details relating to approval of the “surety bond.” Specifically, Posner authorized Ms. Christoffersen to “negotiate[e] back and forth with the contract *as far as making sure that we had a surety bond* and how much it was *and everything else*.” R. 286 (emphasis added). He also authorized her to determine if she “had any doubts or questions as the legitimacy of the buyer’s surety bond” R. 483. He further authorized her “to make sure that [the transaction] closed.” R. 286. Thus, Ms. Christoffersen had express authority because her principal, Posner, directly stated that she had his authority to perform the particular acts at issue in this case on his behalf. *See Zions First Nat’l Bank*, 762 P.2d at 1095.

In the alternative, Ms. Christoffersen had implied authority to perform the acts at issue because those acts were “incidental to, or [were] necessary, usual, and proper to

¹ Although the district court ruled that Ms. Christoffersen was acting within the scope of her “actual implied and/or apparent authority when she communicated plaintiff’s approval of the Financial Guarantee” (R. 620), the record on appeal also supports affirmation of the summary judgment order on the ground that Ms. Christoffersen was acting within the scope of her actual *express* authority. *See Salt Lake County v. Bangerter*, 928 P.2d. 384, 386 (Utah 1996) (appellate court may affirm summary judgment order on any ground appearing in the record, whether relied upon by the district court or not).

accomplish or perform, the main authority expressly delegated to [her]. *Id.* Posner's acts and conduct created an appearance which caused Equity Title to reasonably believe that Ms. Christoffersen had authority to act on Posner's behalf. The indicia of agency with which Posner clothed Ms. Christoffersen as his agent included his acts of identifying her as his listing agent on the REPC (R. 288), using her to negotiate the purchase contract (R. 286), returning to Florida before the closing while leaving Ms. Christoffersen to handle the details of transaction leading up to and including the closing (including, at Posner's instruction, her communications with Equity Title regarding those details) (R. 327-28), delegating to Ms. Christoffersen the responsibilities of making sure that the transaction closed (R. 286) and verifying that the buyer supplied a surety bond in the correct amount (*id.*).

Ms. Christoffersen's statements and instructions to Equity Title regarding Posner's approval of the Financial Guarantee and instruction to close the transaction were fully consistent with her apparent authority. *See Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah App. 1995). Posner's conduct clothed Christoffersen with apparent authority in a manner analogous to, and well beyond, the principal's acts in *Horrocks* (allowing agent to travel in car bearing principal's insignia and cashing check which agent obtained from plaintiff). Furthermore, and "[p]erhaps most importantly, [Mr. Posner] failed to give [Equity Title] notice of any limitations on [Ms. Christoffersen's] authority." *Horrocks*, 892 P.2d at 16.

Accordingly, Ms. Christoffersen's statements to Equity Title regarding the *Financial Guarantee* and the closing were within the scope of her actual (either express or implied or both) and/or apparent authority, and are binding upon Posner.

II. THE DISTRICT COURT CORRECTLY RULED THAT EQUITY TITLE DID NOT BREACH ANY DUTY OWED TO POSNER WHEN EQUITY TITLE FOLLOWED THE DIRECTIONS GIVEN BY POSNER'S AGENT.

Posner correctly states that it is the duty of the escrow agent (Equity Title) to follow the instructions of its principal (Posner). Brief of Appellant at 25. It is axiomatic, therefore, that following such instructions, as Equity Title did in this case, cannot be a breach of Equity Title's duty. The district court's order granting summary judgment in *Equity Title's* favor was proper and should be affirmed.

Posner erroneously argues that Equity Title breached fiduciary duties by closing the subject transaction that, "in both name and amount, did not match the specific requirements of the REPC terms." With respect to the title of the guarantee contract, Posner is incorrect in asserting that the REPC was materially changed because the contract was called "Financial Guarantee" rather than "Surety Bond." This difference is immaterial. If the Financial Guarantee had been entitled "Surety Bond," Posner would be in no different position than he is today.

Posner has offered no authority or even argument concerning any difference that would have resulted from entitling the contract "Surety Bond" versus "Financial Guaranty." Indeed, a surety bond is simply a performance bond, which is precisely what the Financial Guarantee purports to be. "Suretyship is a contractual relationship, synonymous with guaranty, in which one party [here, American Natural Resources

Corporation] promises to be answerable for the debt, default or miscarriage of another [here, Strachan].” E. Gallagher, *The Law of Suretyship* at 81 (2d ed. 2000). *See also* L. Moelmann & J. Harris, *The Law of Performance Bonds* at 8-9 (1999) (contractor’s surety bonds secure performance of duty secured by the bond; other bond products which also secure performance by bonds include “Financial Guaranty Bonds,” which “secure the payment of financial obligations, typically, promissory notes.”).

The cause of Posner’s loss was not the title of the contract; it was the selection of the guarantor, American Natural Resources Corporation, which failed to make good on its promise to make payment to Posner if Strachan failed to do so—which had nothing whatsoever to do with Equity Title.

Likewise, the \$3,900 difference between the face amount of the Financial Guarantee and Posner’s belated revision to Addendum No. 9 to the REPC is also immaterial. Posner admitted that neither Strachan nor American Natural Resources Corporation, ever made a single payment to Posner. R. 329. Thus, there is no causal connection between the guarantor’s default and the fact that the Financial Guarantee had a face amount of \$260,000 rather than \$263,900. Moreover, Posner changed Addendum No. 9 to the REPC, crossing out the figure \$260,000 and interlineating the figure \$263,900, after Strachan had closed his side of the transaction and after American Natural Resources had executed the Financial Guarantee for \$260,000. R. 411, 317-22; Brief of Appellant at 7.

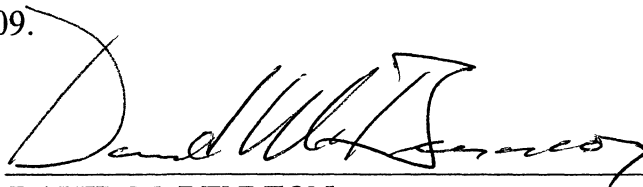
Accordingly, Posner failed to prove any breach of fiduciary duty by Equity Title, and the district court’s grant of summary judgment should be affirmed.

CONCLUSION

Posner's agent, Kandis Christoffersen, was acting within the scope of her actual and/or apparent authority when she told Equity Title that Posner had approved the Financial Guarantee and instructed Equity Title to close the transaction. Therefore, her instructions are binding upon Posner, and Equity Title cannot be held liable for breach of any duty to Posner for following those instructions.

Accordingly, Equity Title respectfully requests that the district court's order granting summary judgment in Equity Title's favor be affirmed.

DATED this 1st day of June, 2009.

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

DAVID M. BENNION
PARSONS BEHLE & LATIMER
*Attorneys for Robert Pearson dba Robert
Pearson Construction*

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2009, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE EQUITY TITLE INSURANCE AGENCY, INC.**, to each of the following sets of counsel:

Catherine James
5945 Sierra Drive
Mountain Green, UT 84050

David E. Ross II
1912 Sidewinder Drive, Suite 209
Park City, Utah 84060

David Overhold
Robert Ponte
RICHER & OVERHOLT
901 West Baxter Drive
South Jordan, Utah 80495

A handwritten signature in black ink, appearing to read "David M. Beatty", with a stylized flourish at the end.