

1988

J. Marius Nielson and Faye K. Nielson v.  
Prowswood Ltd. dba Prowswood Realtor & Rita  
Luke : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

88 0709

IN THE UTAH COURT OF APPEALS

J. MARIUS NIELSON and  
FAYE K. NIELSON,

Plaintiffs and  
Respondents

vs.

PROSWOOD, LTD., a Utah  
corporation dba PROSWOOD  
REALTOR,

Defendant and Appellant;

and

RITA LUKE, individually and  
as an agent for  
PROSWOOD REALTOR,

Defendant and Respondent :

BRIEF OF APPELLANT  
PROSWOOD, LTD.

880709-CA

Docket No. 880431

#46

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,

JUDGE DAVID S. YOUNG

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IN THE UTAH COURT OF APPEALS

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J. MARIUS NIELSON and  
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vs.

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### JURISDICTIONAL AUTHORITY

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann Sec. 78-2a-3(2)(j) (1953). This matter was transferred to the Court of Appeals from the Utah Supreme Court by notice of the Clerk of the Utah Supreme Court dated December 22, 1988.

### NATURE OF THE PROCEEDINGS

This is an appeal from a judgment in favor of Plaintiffs J. Marius Nielson and Faye K. Nielson ("the Nielsons") and against Defendants Prowswood, Ltd. dba Prowswood Realtor ("Prowswood") and Rita Luke ("Luke") entered after a bench trial before District Judge David S. Young.

### STATEMENT OF THE ISSUES

At issue on this appeal is an agreement to purchase real property which Luke, a real estate agent, signed, purportedly on behalf of Prowswood, her broker. The Nielsons later attempted to enforce the agreement against Prowswood. The following issues are presented:

1. Without written authority, could Luke legally bind Prowswood to purchase real property?
2. Where the Nielsons had no communications with Prowswood regarding Luke's authority, but relied exclusively

on Luke's own representations, did Luke have apparent authority to bind Prowswood?

3. Where Prowswood lacked both knowledge of the purchase agreement and an intent to ratify it, did Prowswood's acceptance of a commission under the Koch listing agreement ratify the Luke purchase agreement?

4. Was evidence of Maurius Nielson's experience as a licensed real estate broker relevant and therefore admissible?

5. Should the reasonable rental value of the property during the period of the Nielsons' occupancy offset the Nielsons' damage award?

6. If the Nielsons' Judgment against Prowswood is affirmed, is Prowswood entitled to judgment over against Luke?

#### DETERMINATIVE STATUTES AND RULES

Interpretation of the following statutes and rules is determinative of the first and fourth issues stated above:

Utah Code Ann. Section 25-5-1 (1953):

No estate or interest in real property . . . shall be created . . . otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating . . . the same, or by his lawful agent thereunto authorized by writing.



Utah Code Ann. Section 25-5-3 (1953):

Every contract for . . . the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the . . . sale is to be made, or by his lawful agent thereunto authorized in writing.

RULE 402, UTAH RULES OF EVIDENCE:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. . . .

STATEMENT OF THE CASE

Nature and Disposition. This is an action brought by the Nielsons seeking specific performance of an agreement to purchase a condominium entered into by Luke, a real estate agent, purportedly on behalf of Prowswood, her broker. The matter was tried before District Judge David S. Young, who granted judgment in favor of the Nielsons against Prowswood and Luke jointly and severally.

Relevant Facts. The following facts of the case are relevant to the issues on review:

1. At all material times, Luke was a licensed real estate agent of Prowswood under a contract entitled "Agreement of Independent Contractor" ("the Independent Contractor Agreement"). Trial Transcript, Vol 1, p. 156; Exhibit 15-D(a).

2. Paragraph 9 of the Independent Contractor Agreement expressly withheld from Luke the authority "to incur any expense, enter any contract, or make any representation or commitment for and on behalf of [Prowswood] unless such authority is specifically given, in writing, with respect to each such transaction." Exhibit 15-D(a).

3. Prowswood never authorized Luke in writing or otherwise to purchase real property on its behalf. Trial Transcript, Vol. 1, p. 206.

4. The Nielsons were looking for a home to lease in Salt Lake City; Luke showed the Nielsons a condominium owned by Mr. and Mrs. Koch and listed with Prowswood ("the property"). Trial Transcript, Vol. 1, pp. 14-16.

5. On or about November 19, 1985, the Nielsons executed an Earnest Money Receipt and Offer to Purchase the property. On that same date, Luke, purportedly on behalf of Prowswood, executed an agreement with the Nielsons stating that if the Nielsons elected not to retain possession of the property prior to June 1, 1986, Prowswood would have 120 days to sell or "repurchase" the property at a price that would net the Nielsons \$160,000, the full purchase price paid by them ("Luke Agreement" or "the Agreement"). Exhibits 1-P and 2-P.

6. Prowswood granted Luke no authority, written or oral, to bind Prowswood to purchase the property. Trial Transcript, Vol. 1, p. 206.

7. Luke knew that she lacked authority to bind Prowswood to purchase the property. Trial Transcript, Vol. 2, p. 206.

8. Prowswood has never had a guaranteed sales program with respect to properties not owned by Prowswood. Trial Transcript, Vol. 2, p. 15.

9. Although Maurius Nielson was concerned as to whether Luke had authority to bind Prowswood, he made no inquiry of anyone at Prowswood, including his own son-in-law, as to whether she had such authority. Trial Transcript, Vol. 1, pp. 105-06.

10. Neither Mr. nor Mrs. Nielson ever testified that they relied upon any act or omission of Prowswood, or anything other than Luke's own representations, in determining whether she was authorized to bind Prowswood to the Luke Agreement. Trial Transcript, Vols. 1 & 2.

11. Prior to the date of the Luke Agreement, Prowswood had no communication with the Nielsons regarding Luke's authority or its limits. Trial Transcript, Vol. 1, pp. 52-53; 144.

12. Marius Nielsen is a licensed real estate broker in California and since 1962 has been a licensed real estate broker in Utah. Exhibit 12-D(a).

13. Maurius Nielson was previously employed by a Prowswood subsidiary, Transwest Building Supply, as a vice president in charge of day-to-day operations; in that capacity, he had no authority to purchase real property. Trial Transcript, Vol. 1, pp. 142-43.

14. Expert witness Wilburn McDougal testified that, although he was familiar with guaranteed sales programs, a guaranteed buy-back at 100% of the purchase price would be unusual. Trial Transcript, Vol. 1, pp. 132-33.

15. Mr. McDougal further testified that, with respect to his own company's guaranteed sales program, while some agents were at times authorized to sign a buy-back agreement, such authorizations were made on an individual basis. Trial Transcript, Vol. 1, p. 132.

16. Upon the sale of the property to the Nielsons, Prowswood and Luke received sales commissions paid by the sellers, Mr. and Mrs. Koch. Trial Transcript, Vol. 1, p. 197; Trial Transcript, Vol. 2, p. 12, 16.

17. Prowswood was unaware of the Luke Agreement at the time it accepted a commission from Mr. and Mrs. Koch on the sale of the property. Trial Transcript, Vol. 2, p. 12.

18. By letter dated May 10, 1986, the Nielsons demanded that Prowswood either resell or purchase the property within 120 days pursuant to the Luke Agreement. The 120 days expired on September 10, 1986. Exhibit 3-P.

19. By letter dated June 10, 1986, Prowswood notified the Nielsons that binding Prowswood to purchase the property "was far in excess" of Luke's authority as a sales agent. Exhibit 4-P.

20. Also in that letter, Prowswood offered to list the property for sale and to waive its commission on the sale. Exhibit 4-P.

21. The Nielsons occupied the property through trial. Trial Transcript, Vol. 1, p. 16.

22. Gene C. Jorgensen further testified that the fair market rental value of the property was between \$900.00 and \$1,000.00 per month for each month during the period 1986 through the date of trial. Trial Transcript, Vol. 2, p. 33.

#### SUMMARY OF THE ARGUMENT

Prowswood's arguments may be summarized briefly as follows:

1. Written Authority. Pursuant to Utah Code Ann. Sections 25-5-1, -3, and -4 (1953), a contract to purchase real property is void unless the agent signing on behalf of a principal had written authority. Since Prowswood did not

authorize Luke in writing to enter into an agreement to purchase real property, Prowswood is not bound by the Luke Agreement.

2. Apparent Authority. For apparent authority to exist, the principal must cause the third party to reasonably believe that the agent is clothed with authority. The Nielsons did not infer Luke's authority from the acts or conduct of Prowswood; in fact, they received no communications from Prowswood relating to Luke's authority. They relied exclusively on Luke's own representations of her authority. Therefore, Luke lacked apparent authority and Prowswood is not bound by the Luke Agreement.

3. Ratification. a. To ratify an act, a principal must have knowledge of all material facts and an intent to ratify. Since Prowswood lacked both, it could not ratify the Luke Agreement.

b. Where, as here, the original grant of authority must be in writing, its ratification must also be in writing. Since Prowswood's purported ratification was not written, it is void. c. A principal's acceptance of a benefit constitutes an affirmance only where he has no claim to the benefit except through the act purportedly affirmed. Since Prowswood was entitled to its commission exclusively through the Koch listing agreement, accepting and retaining the commission did not ratify the Luke Agreement.

4. Admission of Evidence. The fact that Marius Nielson is a himself a licensed real estate broker is relevant to his knowledge of the authority of real estate agents and therefore increased his burden to ascertain Luke's authority. It should have been admitted.

5. Rental Offset. The parties agreed that Prowswood was entitled to an offset for the fair rental value of the property for the 22 months between the alleged breach and trial. Fair rental value is between \$900.00 and \$1,000.00 per month. It should have been awarded.

6. Judgment Against Luke. Prowswood is entitled to judgment over against Luke for damages it suffered as a result of her clear breach of the Independent Contractor Agreement.

#### ARGUMENT

##### 1.

WITHOUT WRITTEN AUTHORITY, LUKE WAS AS A MATTER OF LAW

UNABLE TO BIND PROWSWOOD TO PURCHASE THE PROPERTY

It is undisputed that Luke did not have written authority to enter into an agreement to purchase property on behalf of Prowswood. Yet without written authority, an agent cannot bind her principal to purchase real property. Utah Code Ann. Section 25-5-1 (1953) states in pertinent part:

No estate or interest in real property . . . shall be created . . . otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating . . . the same, or by his lawful agent thereunto authorized by writing.

The Utah Supreme Court applied this provision in Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983), where it stated:

Utah law is clear that only a written power of attorney will authorize one to bind another to a contract for the sale of real property.

[Quotation of Section 25-5-1]

In the instant case, there was no dispute as to the absence of the written power of attorney. Therefore, no authorization was ever established. There being no authorization, there could be no contract; there being no contract, there could be no right to recover . . .

Accord, Utah Code Ann. Sec. 25-5-3 (1953); Bradshaw v. McBride, 649 P.2d 74, 78-79 (Utah 1982) ("an agent executing an agreement conveying an interest in land on behalf of his principal must be authorized in writing.") See also, Utah Code Ann. Section 25-5-4 (1953).

For this Court to affirm the enforcement of an agreement to purchase real property against a principal without written authority would wreak havoc in the real estate industry in this state. It would effectively repeal the cornerstone of real estate law and open a Pandora's Box of uncertainty and litigation.



2.

LUKE LACKED APPARENT AUTHORITY TO BIND PROWSWOOD

The trial court found as a matter of fact and a matter of law that "Rita Luke had the apparent authority to bind Prowswood and execute the Agreement." Findings of Fact and Conclusions of Law, p. 12. The trial court entered no other findings or conclusions concerning Luke's authority to bind Prowswood. It found no actual, express, inherent, or implied authority.

As pointed out above, the authority to enter into an agreement to purchase real property can never be merely apparent, since it must be evidenced by a writing. But even if that were not the case, the trial court's conclusion of law that Luke had apparent authority misreads the law of apparent authority.

City Electric v. Dean Evans Chrysler-Plymouth, 672 P.2d 89 (Utah 1983) is the leading Utah case on the subject of apparent authority. There, an officer of Dean Evans Chrysler-Plymouth instructed a car salesman to make a purchase from City Electric and have it billed to Dean Evans. The salesman placed the order, informed City Electric that he was acting on the officer's directions, and instructed City Electric to charge Dean Evans' account. The issue treated on appeal was whether the salesman was clothed with apparent

authority. The Utah Supreme Court held that he was not. The Court stated:

It is well settled law that the apparent or ostensible authority of an agent can be inferred only from the acts and conduct of the principal. Bank of Salt Lake v. Corporation of Pres. of Ch., etc., Utah, 534 P.2d 887 (1975). . . . It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations. Bradshaw v. McBride, Utah 649 P.2d 74 (1982).

Id. at 90. Accord, Restatement (Second) of Agency, Sec. 27 (1957). See also, Malia v. Giles, 114 P.2d 208 (Utah 1941); Larson v. Bear, 230 P.2d 610 (Wash. 1951).

In the instant case, Mr. Nielson testified that he asked Luke if she had authority to sign the Agreement and that she assured them that she did. The Nielsons signed the Agreement solely on the strength of this representation of Luke. Neither Mr. nor Mrs. Nielson ever testified that they inferred her authority from the acts or conduct of Prowswood. In fact, Mr. Nielson testified emphatically and repeatedly that despite his concern about whether or not Luke had authority to bind Prowswood to the Agreement, he did not inquire of anyone at Prowswood, including his own son-in-law, as to Luke's authority to execute the Agreement. Trial Transcript, Vol. 1, pp. 105-07.

The fact that Prowswood provided Luke with business cards and letterhead is wholly irrelevant to this issue. First of all, there was no testimony that a real estate

agent's letterhead or business card creates any implication that the agent has authority to bind the brokerage to purchase a property. Second, there was no testimony that the Nielsons ever saw either her letterhead or her business card. Third, the Nielsons never testified that they relied on her letterhead or business card in concluding she had authority to bind Prowswood.

Furthermore, as a matter of law, promotional materials without more do not create apparent authority. The Utah Supreme Court so ruled in State v. GAF Corp., 760 P.2d 310 (Utah 1988). There, the State Department of Consumer Protection sought to enforce against GAF a warranty made by one of its retailers, relying upon promotional materials supplied by GAF to retailers as a basis for finding apparent authority. After quoting the passage from City Electric excerpted above, the Court held that:

Merely providing promotional materials to Pendleton [the retailer] is not sufficient to establish GAF's liability for Pendleton's statements on a theory of apparent authority.

760 P.2d at 314. For purposes of this analysis, Rita Luke's letterhead and business cards and this retailer's GAF promotional materials are indistinguishable. Both suggest an affiliation with a principal; neither creates apparent authority.

In sum, the record here is devoid of any evidence that the Nielsons inferred from Prowswood's acts or conduct that

Luke was authorized to bind Prowswood. For this Court to affirm a finding of apparent authority on this state of the record would throw the law of apparent authority into a state of disarray.

3.

PROWSWOOD DID NOT RATIFY THE AGREEMENT WITH THE NIELSONS  
BY ACCEPTING A REAL ESTATE COMMISSION FROM THE KOCHES

The trial court found as a matter of fact and a matter of law that Prowswood ratified the Luke Agreement. Findings of Fact and Conclusions of Law, p. 12. This conclusion rests, apparently, on the findings that Prowswood received a sales commission (Finding No. 45) and that it "has retained its commission and has not returned the commission to Rita Luke." Finding No. 46. It is unclear what the court meant by "returning" the commission to Rita Luke, since Prowswood did not receive the commission from her. The commission was paid by the Koches, sellers of the property to the Nielsons.

For at least three reasons, Prowswood did not ratify Luke's execution of the Agreement by accepting and retaining a sales commission.

A. Prowswood Lacked Both Knowledge and Intent to Ratify

In Bradshaw v. McBride, 649 P.2d 74 (Utah 1982), the Utah Supreme Court explained that to ratify an agent's acts,

a principal must have both knowledge of the material facts and an intent to ratify:

A principal may impliedly or expressly ratify an agreement made by an unauthorized agent. Ratification of an agent's acts relates back to the time the unauthorized act occurred and is sufficient to create the relationship of principal and agent. [Citations omitted.] . . . However, a ratification requires the principal to have knowledge of all material facts and an intent to ratify.

Id. at 78 (emphasis added). Both knowledge and intent are necessary.

Prowswood was unaware of the Luke Agreement when it accepted the commission from Mr. and Mrs. Koch on the sale of the property. That is undisputed. Since Prowswood lacked "knowledge of all material facts," it could not have ratified the Luke Agreement at that time.

But did Prowswood ratify the Agreement by retaining the commission after learning the material facts? Clearly not. Prowswood learned of the of the existence of the Agreement and the Nielsons' reliance upon it through the Nielsons' letter dated May 10, 1989. By letter dated June 10, 1986, Prowswood notified the Nielsons that the authority to bind Prowswood to purchase the property "was far in excess" of Luke's authority as a sales agent. In other words, it repudiated the Agreement. Clearly, it did not manifest an intent to ratify.

Since Prowswood lacked both knowledge and intent, it did not ratify the Luke Agreement at any time.

B. Any Ratification Had to Be in Writing

Further in Bradshaw v. McBride, the Court held:

Where the law requires the authority to be given in writing, the ratification must also generally be in writing. [Citations omitted.]

649 P.2d at 79. As noted above, Utah law requires that an agent executing an agreement to purchase real property must be authorized in writing. Therefore, the principal's ratification of the agent's acts must also be in writing. The trial court found no such writing. No such writing exists.

Nor may Prowswood's retention of the commission be deemed a part performance sufficient to take the case outside the statute of frauds, since "the acts of part performance must be exclusively referable to the contract." Id. In this case, retaining the commission was not "exclusively referable" to the Luke Agreement. In fact, the Luke Agreement does not even mention a commission; the commission is provided for in the listing agreement between Prowswood and the Koches, as discussed below.

C. Prowswood Did Not Ratify the Luke Agreement By Accepting a Commission Under the Listing Agreement

The Restatement (Second) of Agency, Sec. 98, specifically addresses when receipt of a benefit may be construed as an affirmance or ratification. That section states in pertinent part:

The receipt by a purported principal . . . of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance . . .

Prowswood's commission was not "something to which [it] would not be entitled" absent affirmance, nor did Prowswood claim its commission through the Luke Agreement. Prowswood was entitled to its commission through a different agreement altogether: the Koch listing agreement. When it fulfilled the conditions of the listing agreement, Prowswood became legally entitled to receive a sales commission from Mr. and Mrs. Koch, irrespective of the enforceability of the Luke Agreement. Therefore, acceptance of the commission cannot be construed as ratification of the Luke Agreement.

Implicit in the trial court's finding that Prowswood did not "return" its commission to Luke is the suggestion that doing so would have had the effect of repudiating the Luke Agreement. That suggestion does not withstand analysis. Since Prowswood did not claim the commission through the Luke Agreement, returning the commission could not have had the effect of repudiating the Luke Agreement. Although Mr.

Nielson made much of the fact that he would not have purchased the property without the Luke Agreement, the two agreements were legally independent.

4.

EVIDENCE OF MARIUS NIELSON'S EXPERIENCE AS A  
LICENSED REAL ESTATE BROKER SHOULD HAVE BEEN ADMITTED

Marius Nielson holds brokerage licenses in Utah and California. At times these licenses have been active, at other times inactive. He had two companies, one called J. Marius Nielson Real Estate Company, another called J. Marius Nielson Associates. Trial Transcript, Vol. 1, p. 139.

On cross-examination, Prowswood's counsel attempted to elicit from Mr. Nielson testimony regarding his experience as a broker in these real estate companies, and specifically his understanding of a real estate agent's authority to bind his or her broker. Trial Transcript, Vol. 1, p. 140. Also relevant to the action would have been Mr. Nielson's experience, if any, with guaranteed buy-back programs. However, the trial court sustained an objection based on relevance, thereby preventing counsel from exploring these issues with Mr. Nielson. Id.

The testimony sought from Mr. Nielson was clearly relevant to the issue of apparent authority. In Associated Creditors' Agency v. Davis, 530 P.2d 1084, 1100 (Cal. 1975),



the California Supreme Court stated the requirements for a finding of apparent authority as follows:

It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person relying on the agent's apparent authority must not be guilty of negligence. [Emphasis added, citations omitted.]

Mr. Nielson testified that he relied upon Rita Luke's assurances that she had authority to execute the Agreement for Prowswood. In accepting her representations without further independent investigation, Mr. Nielson acted negligently. Mr. Nielson's knowledge and experience with real estate agents and their authority heightened his duty to inquire of Prowswood as to Luke's authority and were therefore relevant to his negligence.

Similarly, if his testimony had shown that he did not offer guaranteed buy-back programs or that he was largely unfamiliar with them, those facts would have indicated an even greater degree of negligence on his part in relying upon Luke's representations.

His testimony would therefore have been relevant. Rule 402 of the Utah Rules of Evidence establishes the admissibility of relevant evidence absent countervailing considerations:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. . . .

Because counsel's questioning was designed to elicit relevant and therefore admissible testimony, it was error to exclude it on the ground of relevancy or on any other.

5.

THE REASONABLE RENTAL VALUE OF THE PROPERTY  
SHOULD OFFSET THE NIELSONS' JUDGMENT

On May 10, 1986, the Nielsons gave notice of their election, pursuant to their understanding of the Luke Agreement, to have Prowswood sell or purchase the property. On their view, Prowswood anticipatorily breached the Agreement in June of 1986. They seek prejudgment interest from that time.

At trial, all parties agreed that Prowswood and Luke were entitled to offset against the judgment entered against them the fair rental value of the property from the date of alleged breach through trial. The Nielsons state in their Amended Trial Brief, "Because the Nielsons lived in the home, Prowswood is entitled to an offset for the fair rental value of the property together with a deed." Plaintiffs' Amended Trial Memorandum, p. 15. Furthermore, the Nielsons' counsel stated at trial that "under the doctrine of equity [Defen-

dants] are entitled to an offset of fair rental value." Trial Transcript, Vol. 1, p. 83. See also, Id. at p. 7. This is a correct statement of the law. See Eliason v. Watts, 615 P.2d 427 (Utah 1980).

However, the trial court failed to award an offset in any amount. Even if the balance of the trial court's judgment is affirmed, the case should be remanded for entry of an offset in favor of Prowswood and Luke.

According to the expert testimony of Gene C. Jorgensen, the fair market rental value of the property was between \$900.00 and \$1,000.00 per month for each month during the period 1986 through the date of trial. Prowswood and Luke are therefore entitled to an offset against the Nielsons' judgment of between \$19,800 (\$900.00 X 22 months) and \$22,000.00 (\$1,000.00 X 22 months).

6.

IF THE NIELSONS' JUDGMENT AGAINST PROSWOOD IS AFFIRMED,  
PROSWOOD IS ENTITLED TO A JUDGMENT OVER AGAINST LUKE

Prowswood strenuously denies that Rita Luke had apparent authority to bind Prowswood to the Agreement or that Prowswood ratified her execution of the Agreement. But if Prowswood is ultimately found to have granted her apparent authority, it is entitled to indemnification from Luke for breach of her Independent Contractor Agreement. Prowswood

pled this cross-claim, briefed it, and argued it at trial, but the trial court did not rule on it. The Court of Appeals should grant Prowswood's cross-claim against Luke as a matter of law.

As stated in General Motors Acceptance Corp. v. Turner Insurance Agency, 96 Idaho 691, 535 P.2d 664, 670 (Idaho 1975),

It is well established in agency law that a principal has judicial recourse against an agent who subjects his principal to liability because of a wrongful act beyond the agent's authority.

Accord, Restatement (Second) of Agency, Sec. 401, Comment d. Among the principal's remedies in this situation is an action on the agent's contract. Restatement (Second) of Agency, Sec. 399(a).

Luke lacked authority to bind Prowswood to purchase the property. Paragraph 9 of her Independent Contractor Agreement expressly withholds the authority "to incur any expense, enter any contract, or make any representation or commitment for and on behalf of [Prowswood] unless such authority is specifically given, in writing, with respect to each such transaction." Luke herself specifically testified that she lacked authority to execute a purchase agreement on behalf of Prowswood.

Indisputably, Luke breached her Independent Contractor Agreement by executing the Agreement on Prowswood's behalf. As a result of her breach, Prowswood may suffer damages in

the form of the judgment entered against it in this matter. If the judgment against Prowswood is upheld on appeal, Prowswood is as a matter of law entitled to contract damages from Luke for her breach of Independent Contractor Agreement, since Prowswood's liability will flow directly from that breach. Prowswood's damages would consist of the amounts it is required to pay the Nielsons plus its attorney's fees incurred in defending against this action.

Prowswood can discover no basis, given the lack of knowledge, intent, a writing, or any ratifying act, for this Court to affirm the trial court's finding of ratification. However, Prowswood concedes that ratification would bar its claim against Luke, since ratification releases the agent from liability to the principal for unauthorized acts. Restatement (Second) of Agency, Sec. 416.

A different rule governs apparent authority. Again, Prowswood can discover no basis, given Mr. Nielson's testimony that he relied exclusively on Luke's own representations of authority, for this Court to affirm the trial court's finding of apparent authority. However, a finding of apparent authority would not impair Prowswood's cross-claim against Luke. Unlike ratification, apparent authority is not a defense against a principal's indemnification claim, See Restatement (Second) of Agency, Sec. 399 et seq. And at least one court has specifically opined that where a princi-

pal is held liable to a third party on an apparent authority theory, the principal may seek indemnification from the agency for exceeding its actual authority. Stuart v. National Indemnity Co., 7 Ohio App.3d 63, 454 N.E.2d 158, 165 (Ct.App. Ohio 1982).

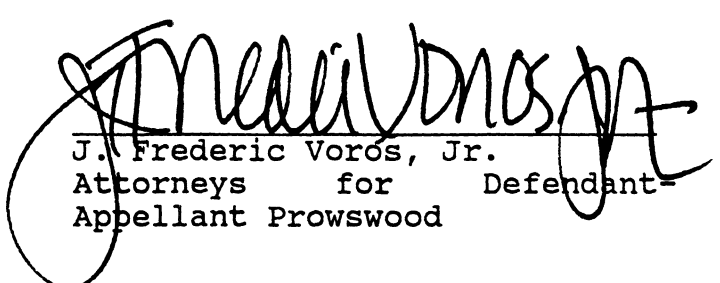
#### CONCLUSION

The fundamental issues on this appeal are simple. Did Rita Luke have authority to bind Prowswood to purchase real property? If not, did Prowswood later ratify her acts? Clearly, under well settled statutory and case law, the answer to both questions must be "no." Therefore, the judgment below must be reversed.

If the Court affirms the judgment below, it should at least award Prowswood the offset all parties agree it is entitled to, and direct that judgment be entered against Rita Luke and in favor of Prowswood for breach of the Independent Contractor Agreement.

DATED: May 17, 1989

POOLE & SMITH

  
J. Frederic Voros, Jr.  
Attorneys for Defendant-  
Appellant Prowswood

#### ADDENDUM

1. Utah Code Ann. Section 25-5-1 (1953)
2. Utah Code Ann. Section 25-5-3 (1953)
3. Utah Code Ann. Section 25-5-4 (1953)
4. Restatement (Second) of Agency, Section 27
5. Restatement (Second) of Agency, Section 98
6. Restatement (Second) of Agency, Section 399
7. Restatement (Second) of Agency, Section 401 (with comments)
8. Luke/Nielson Agreement
9. May 10, 1986 Letter from the Nielsons to Prowswood
10. June 10, 1986 Letter from Richard Prows to the Nielsons

**25-5-1. Estate or interest in real property.**

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.



**25-5-3. Leases and contracts for interest in lands.**

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

#### **25-5-4. Certain agreements void unless written and subscribed.**

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith

- (1) Every agreement that by its terms is not to be performed within one year from the making thereof
- (2) Every promise to answer for the debt, default or miscarriage of another
- (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry
- (4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate
- (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

§ 27. Creation of Apparent Authority: General Rule

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

§ 98. Receipt of Benefits as Affirmance

The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election of the other party to the transaction.

§ 399. Remedies of Principal

A principal whose agent has violated or threatens to violate his duties has an appropriate remedy for such violation. Such remedy may be:

- (a) an action on the contract of service;
- (b) an action for losses and for the misuse of property;
- (c) an action in equity to enforce the provisions of an express trust undertaken by the agent;
- (d) an action for restitution, either at law or in equity;
- (e) an action for an accounting;
- (f) an action for an injunction;
- (g) set-off or counterclaim;
- (h) causing the agent to be made party to an action brought by a third person against the principal;
- (i) self-help;
- (j) discharge; or
- (k) refusal to pay compensation or rescission of the contract of employment.

## § 401. Liability for Loss Caused

**An agent is subject to liability for loss caused to the principal by any breach of duty.**

### **Comment:**

*a. Action of tort or on the contract of employment.* The relation between principal and agent is always consensual but not always contractual. See § 16. A failure to perform a gratuitous promise when there has been loss because of reliance by the principal may cause the agent to be liable only in an action of tort. See § 378. On the other hand, if the sole basis for an action is a promise by the agent to act, as when the agent agrees to represent the principal for a year and fails to do so, there being no element of reliance by the principal, the latter has only an action for breach of contract. But if a paid agent does something wrongful, either knowing it to be wrong, or acting negligently, the principal may have either an action of tort or an action of contract. This is true when an agent negligently harms a chattel of the principal, or, by negligence or fraud, causes a principal to be liable to a third person, exceeds his authority in selling goods, or violates a duty of loyalty. This choice of remedy may be important for procedural reasons, or because of a difference between the statute of limitations for torts and for contracts.

### **Comment:**

*b. Where no damages.* A failure of the agent to perform his duties which results in no loss to the principal may subject the agent to liability for nominal damages for breach of contract, under the rule stated in Section 400, to liability for any profits he has thereby made (see § 403), to discharge (see § 409), or to loss of compensation (see § 469), but not to an action of tort.

### **Illustration:**

1. A, the clerk of P, a contractor, being instructed to compute the cost of erecting a building and to submit a bid for its construction at 20 per cent. above cost, carelessly computes the cost to be \$45,000, and so submits a bid for \$54,000, which is successful. A careful computation would have shown the cost to be \$50,000 which would have resulted in a bid of \$60,000 and would not have obtained the contract. The performance of the contract does not interfere with other work by P, and his profit is \$4,000. A is not liable to P in an action of tort, but is subject to discharge.

### **Comment:**

*c. Gratuitous agents.* If an agent has custody or possession of land or chattels, he is subject to the liability to which any bailee is subject, both as to damage which he causes and for failure properly to guard them from harm. If his services are gratuitous, he is subject to the duties of care of gratuitous bailees or those gratuitously in charge of land. See § 379(2).

On the other hand, the mere failure of performance by a gratuitous agent who does not have possession or custody of something which it is his duty to protect results in liability only under the circumstances stated in Section 378. His liability in tort is limited to the damage caused by reliance. Thus, if the principal had no other means of averting a loss or making a profit except through performance by the agent, a promise by the agent followed by his nonperformance does not result in liability in tort. If, however, the principal has relied upon the promise and, but for such reliance, would have procured another who would have performed the service, the gratuitous promisor, as well as the paid agent, is subject to liability in tort for the loss suffered by the failure, including gains which the principal would have made had the promise been performed. Compare the Restatement of Torts, §§ 323, 324.

**Illustrations:**

2. P, an insurance broker, tells his friend, A, that he would go fishing if he could find someone to attend to his business. A volunteers to do this gratuitously and goes to P's office. Shortly after, however, he leaves and as a result P loses several profitable transactions. A is liable to P for the loss.

3. Having purchased a house, P asks his friend A for the name of a good insurance agent. A thereupon volunteers to obtain insurance in the amount of \$20,000 on the house immediately and without charge for his services. P authorizes A to do this. A obtains a blank application but delays in getting the insurance. A week later the house burns. P is entitled to damages caused by A's promise and P's reliance upon it.

4. A promises P that he will buy at auction a piece of land for P, without charge for his services, P stating truthfully that, unless A acts for him, he will have no way of making the bid. A attends the auction but does not make the promised bid, which would have been successful had it been made. A is not liable to P.

**Comment:**

*d. Subjecting principal to suit by third persons.* Unless he has been authorized to act in the manner in which he acts, the

agent who subjects his principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom. This includes the payment of damages by the principal to the third person, or of a fine to the state in case of a crime. Thus, a servant who, while acting within the scope of employment, negligently injures a third person, although personally liable to such person, is also subject to liability to the principal if the principal is thereby required to pay damages. See the Restatement of Restitution, § 96. If suit is brought against a principal alone, the principal, under the provisions of some modern statutes, can cause the agent to be made a party, or he can notify the agent to defend the suit with the consequences stated in Comment *h* on Section 399.

If the principal authorizes a tort, either advertently or inadvertently, he cannot recover for harm resulting to him from it. Hence, if the principal directs the agent to do an act which, to the knowledge of the agent, is either tortious or criminal, the agent is subject to no liability to the principal, unless he should realize that the principal is mistaken and believes the act to be a lawful one, in which case the agent would not be authorized to perform it.

Where the negligence of both principal and agent combine in causing loss to a third person, the principal has a right to contribution in states in which this is permitted between tortfeasors. Under some circumstances, although both are negligent, the principal may have a right to indemnity. For statements as to the situations in which this may be true, see the Restatement of Restitution, Sections 93, 95 and 97.

*e. Damage caused by disobedience.* If an agent acts contrary to the principal's orders or if he fails to act as directed in the control of the principal's things, and a loss to the principal results from such disobedience or failure to act, the agent is subject to liability for such loss if the loss is within the risk created by the disobedience, even though the risk of loss is less than it would have been had the principal's directions been followed. If the disobedience consists of wrongfully dealing with chattels, the agent may be liable for their full value, although the risk of loss was not increased by the disobedience. See § 402.

#### **Illustrations:**

5. P directs A, his collecting agent, to extend the time for payment by a debtor, T. A, reasonably believing that his



principal's judgment is erroneous and that a present attachment on T's goods will more readily secure the collection of the debt, levies an attachment. Because of this, T files a petition in bankruptcy, and P secures only a portion of his claim. A is subject to liability to P upon proof that, but for A's disobedience, a larger amount upon the claim would probably have been received.

6. P tells A to lend T \$4,000, taking as security a first mortgage on Blackacre, which is reasonably worth \$10,000. A lends T the money, taking a second mortgage as security. Upon T's bankruptcy without assets, both mortgages are foreclosed. Blackacre sells for its present value of \$4,000, of which \$1,000 is used for payment of the first mortgage and expenses of sale. A is subject to liability to P for \$1,000.

**Comment:**

*f.* The liability of the agent is limited by the rules as to contributory negligence and avoidable consequences where those rules are applicable. See § 415.

TO:

J. Marius & Faye L. Nielson

It is hereby agreed that a condition of above named parties making purchase of condominium property at 1515 East 64th South, Houswood Realtor agrees to guarantee resale or repurchase of property at a price that will generate net funds to Nielsons at least equal to their purchase price of \$160,000, provided they elect to not retain possession of property prior to June 1, 1986. If this election is made, Houswood Realtor shall have 180 days to effect sale or purchase of property as aforementioned.

Witnessed  
Dated: 11/29/85

Houswood Realtor  
By: Rita Luke  
11-29-85

1565 East 6470 South  
Salt Lake City, UT 84121  
May 10, 1986

Mr. Scott Dean  
Broker  
Prowswood Realtor  
4385 South 900 East  
Salt Lake City, UT 84117

Dear Mr. Dean:

We enclose copy of Agreement dated 11/29/85 wherein Rita Luke, acting as an agent of Prowswood Realtor, commits, under prescribed conditions, to either sell or purchase our condominium, located at above address, at a price that will generate net funds to us the sum of \$160,000.

In keeping with the terms of the Agreement, we hereby give formal notice that we have elected to exercise referenced option and will look forward to receiving the proceeds of sale or purchase, totalling \$160,000, on or before September 10, 1986.

We solicit your cooperation to this end.

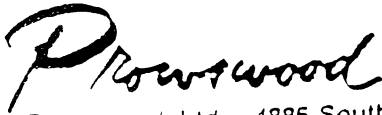
Sincerely,

---

J. Marius Nielson

---

Faye K. Nielson

The logo for Prowswood, featuring the word "Prowswood" in a stylized, cursive script font.

Prowswood, Ltd. • 4885 South 900 East  
Salt Lake City, Utah 84117 • Telephone (801) 262-4637

4-P  
✓

June 10, 1986

J. Marius and Faye K. Nielson  
1585 East 6470 South  
Salt Lake City, Utah 84121

Dear Marius and Faye;

In the last several weeks, and more particularly, in the last day or two I have been reviewing the "agreement" which you drafted on the 29th of November, 1985 and which was signed by Rita Luke. Also, I have reviewed carefully the subsequent communications that have been shared between yourself and Scott Dean representing Prowswood Realtor.

Rita and I have reviewed her understanding of this "agreement". I can appreciate the consternation that has obviously resulted for everyone in coming to a successful and satisfactory resolution. The "agreement" makes reference to Prowswood making a guarantee for "repurchase". Of course, other than the fact that Prowswood, Ltd. was the original builder, we have never owned the property and therefore the word "repurchase" adds to the ambiguities therein.

Rita has been a successful real estate agent for our firm for over 11 years. We have never had a moment's hesitation about her representations nor the contract negotiations in which she has been involved. Additionally, because of her reputation and the confidence we have in her, we have given her the latitude to waive receipt of commissions both for herself and for us as a brokerage when she feels that circumstances justify such an action. This current "agreement" is reflective of that type of commitment.

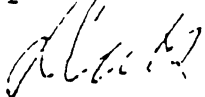
Our current reputation for honesty and clarity is being tested by this situation. Because you are valuable friends we have a special interest in seeing that your feelings and expectations are delicately dealt with. In light of this, we feel that it is a reasonable compromise that Rita, as the sub-agent for me, be permitted to immediately begin a marketing program of your property to affect a desired sale. In keeping with our original understanding of the "agreement", we will bear expenses relative to marketing your home and, of course, endeavor to net you the \$160,000.00 mentioned in the November 29th "agreement"... even if it is necessary for us to forgo all commissions to accomplish that end.

My involvement is to reaffirm our united stand and our deepest commitment to do all in our power to fulfill what we feel is our obligation under this "agreement".

As a licensed Utah broker yourself, familiar with real estate law and practices, and even more importantly, as one who was at one time employed by this company, it surely must have occurred to you that the commitment you felt Rita was making when she signed the "agreement" you prepared, ~~was~~ far in excess of the authority granted to her as an independent agent in behalf of the Company.

I hope this matter can be resolved to a mutually satisfying conclusion. My best to your wife.

Warm personal regards,



Richard S. Prows, Chairman  
Prowswood, Ltd.

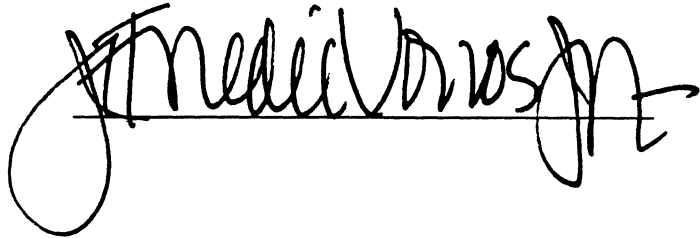
cc: Rita Luke  
Scott Dean  
Reed Harding

CERTIFICATE OF DELIVERY

I certify that the 17 day of May, 1989, a true and correct copy of the foregoing Brief of Appellant Prowswood, Ltd., was mailed, postage prepaid, to the following counsel and parties of record:

David R. Olsen, Esq.  
Gary R. Henrie, Esq.  
Sutiter, Axland, Armstrong & Hanson  
Attorneys for Plaintiff and Respondent  
700 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, Utah 84101-1480

Rita Luke  
Defendant-Respondent Pro Se  
4092 South 670 East #G  
Salt Lake City, Utah 84107

A handwritten signature in black ink, appearing to read "David R. Olsen", is written over a horizontal line. The signature is stylized with a large loop on the left and a long horizontal stroke.