

1988

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

Utah Court of Appeals

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J. MARIUS NIELSON and
FAYE K. NIELSON,

Plaintiffs and Respondents

vs.

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

Defendant and Appellant;

and

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

Defendant and Respondent :

REPLY BRIEF
OF
APPELLANT PROWSOOD, LTD.

Docket No. 880709-CA

Priority 14b

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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PROSWOOD, LTD., a Utah
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ADDITIONAL RELEVANT FACTS

The following facts are relevant to issues not apparent from the trial court's Findings of Facts and Conclusions of Law, and therefore not treated in Appellant's Brief, but raised initially in Respondents' Brief:

1. Paragraph 9 of Rita Luke's Independent Contractor Agreement states:

[Luke] shall have no authority to incur any expense, enter any contract or make any representation or committment [sic] for and on behalf of [Prowswood] unless such authority is specifically given, in writing, with respect to each such transaction.

2. As of the date of the Luke Agreement, November 29, 1985, John Langley was "the broker" or "the acting broker" at Prowswood. Trial Transcript, Vol. 1, pp. 125, 161.

3. John Langley had no authority to purchase real property on behalf of Prowswood. Trial Transcript, Vol. 1, p. 126.

4. Expert witness Wilburn McDougal testified, "I think most companies have had some type of a guaranteed sales program." Trial Transcript, Vol. 1, p. 130 (emphasis added).

5. Mr. McDougal further testified that, with respect to his own company's guaranteed sales program, at times only he was authorized to sign a buy-back agreement, at times one of his managers could sign, and at times certain real estate

agents, those that had "the experience," could sign. Trial Transcript, Vol. 1, p. 132.

6. Mr. McDougal further testified that some agents were authorized to sign buy-back agreements for his company and some were not; it was an "individual situation." Trial Transcript, Vol. 1, p. 132.

7. Mr. McDougal did not testify that it was usual, typical, or incidental to their express authority for real estate agents to bind their brokers to buy-back agreements.

8. The Nielsons' son-in-law, Vince Clayton, was a Prowswood employee at the time the Agreement was signed, and had been for 15 years. Trial Transcript, Vol. 1, p. 38.

9. On June 10, 1986, Richard S. Prows wrote a letter to the Nielsons on behalf of Prowswood in which the corporation refused to accept the obligation to purchase the Nielsons' property. Exhibit 4-P. (A copy is included in the Addendum to Prowswood's Brief of Appellant.)

10. According to the uncontradicted testimony of Richard S. Prows, Prowswood did not consider itself obligated to repurchase the Nielsons' property. Trial Transcript, Vol. 2, p. 11.

SUMMARY OF ARGUMENT

1. Standard of Review. The trial court's rulings on agency and ratification are best viewed as presenting questions of law or mixed questions of law and fact. As such, they are entitled to no deference on appeal but should be reviewed for correctness.

2. Statute of Frauds. The statute of frauds was sufficiently raised below and should be addressed on appeal.

3. The "General Agent" Exception. The general agent exception to the statute of frauds does not apply to this case because Rita Luke was a special agent with respect to the purchase of real estate.

4. Statutory Authority of Real Estate Agents. White v. Fox misreads the predecessor to Section 61-2-2. Furthermore, it is distinguishable on several grounds, the most important being that John Langley, not Prowswood, was Rita Luke's broker. White should not be extended by this Court.

5. Inherent Authority. The trial court did not find that Ms. Luke exercised inherent authority, nor does the record warrant such a finding.

6. Ratification. Far from manifesting an intent to be bound, Richard S. Prows' June 10, 1986 letter rejects any obligation to purchase the Nielsons' property.

ARGUMENT

1.

THIS COURT IS ENTITLED TO REVIEW THE TRIAL COURT'S JUDGMENT FOR CORRECTNESS

a. Agency Presents a Mixed Question of Law and Fact.

The nature and extent of a person's agency authority has been held to be a mixed question of law and fact. Marquez v. Rapid Harvest Co., 1 Ariz.App. 138, 400 P.2d 345, 349 (1965), vacated on other grounds, 99 Ariz. 363, 409 P.2d 285 (1965); Fidelity & Casualty Co. v. D.N. Morrison Construction Co., 116 Fla. 66, 156 So. 385, 387 (1934); Hartley v. The Red Ball Transit Co., 344 Ill. 534, 176 N.E. 751, 757 (1931); State v. Keeton Packing Co., 487 S.W.2d 775, 779 (Tex.App. 1972); 3 C.J.S. Agency @ 547, p. 479. It has also been said that while the existence of agency generally presents a question of fact, when the underlying facts are not in dispute, the question of whether an agency relationship exists is a question of law. Sparks v. Republic National Life Insurance Co., 132 Ariz. 529, 647 P.2d 1127, 1140 (1982). In what is apparently the only Utah case on the subject, the Utah Supreme Court seemed to reflect this view, citing the rule that agency is "as a general rule a question of fact for the jury, aided by proper instructions from the court," then distinguished it and affirmed the trial court's withholding

of the issue of agency from the jury. Adamson v. United Mine Workers, 3 Utah 2d 37, 277 P.2d 972 (1954).

In this case, the underlying facts are not in dispute: none of the testimony is contradicted or challenged as untrue. The controversy centers on what legal conclusion to draw from those facts: do they "add up" to any sort of agency? In such a circumstance, the question of the existence of agency is best viewed as a question of law or a mixed question of law and fact.

The trial court tacitly acknowledged the mixed nature of its finding of agency by reciting "Rita Luke had the apparent authority to bind Prowswood to the terms of the Agreement" as both a finding of fact and a conclusion of law.

Significantly, while a trial court's findings of fact will not be set aside on review unless they are clearly erroneous, Utah R. Civ. P. 52(a), mixed questions of law and fact are not entitled to similar deference. Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985). Generally, mixed questions of law and fact are treated as questions of law and reviewed de novo by the appellate court. State v. Bishop, 753 P.2d 439, 464, n. 76 (Utah 1988), citing United States v. McConney, 728 F.2d 1195 (9th Cir. 1984)(en banc), cert. denied, 469 U.S. 824 (1984); accord, State v. Crestani, 771 P.2d 1085, (Utah 1989). Conclusions of law are reviewed on appeal "for correctness without any deference to the trial

court." Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474, 477 (Utah App. 1988).

Therefore, the trial court's determination that Rita Luke had authority to bind Prowswood is not entitled to deference on review, but may be reviewed de novo for correctness.

b. The Nielsons Cannot Both Claim the Benefit of the "Clearly Erroneous" Standard and also Introduce New Theories of Agency on Appeal.

The Nielsons cannot deny that agency presents at least a mixed question of fact and law without being bound by the trial court's "finding" of apparent--not inherent--authority. In its Memorandum Decision, the trial court concludes that Prowswood's liability is based "on the apparent authority of Ms. Luke as shown to plaintiffs." Memorandum Decision, p. 7. The Findings of Fact and Conclusions of Law, drafted by the Nielsons, speak exclusively of apparent authority. The trial court appeared to be quite clear on the legal principle on which it relied.

Yet on appeal, the Nielsons rely most heavily on the theory of inherent authority, which the trial court never mentioned. In so doing they argue that an appellate court should affirm a judgment if it is sustainable "on any legal theory apparent on the record, even if it different from the theory stated by the trial court as the basis for its ruling" (Emphasis added.) Respondent's Brief, p. 21, n.4.

Implicit in this argument is the assumption that what is at issue here is not a factual finding but a legal conclusion: what legal theory best accommodates the undisputed facts?

If the difference is indeed one of legal theory only, and Prowswood believes that it is, the clearly erroneous standard does not apply, and the trial court's decision is reviewable for correctness.

If, on the other hand, the trial court's finding of apparent authority was one of pure fact--an assumption of the Nielson's contention that the "clearly erroneous" standard applies--a finding of inherent authority would also be a purely factual finding. Affirming on that basis would therefore require this Court to find a fact that the trial court never found.

c. Construction of a Written Document Presents a Question of Law on Appeal.

The trial court also concluded that Prowswood ratified the Agreement. The Nielsons defend this conclusion by reliance upon Richard S. Prows' letter of June 10, 1986. They admit that no extrinsic evidence supports the conclusion of ratification. Respondent's Brief, p. 27. Indeed, the only relevant extrinsic evidence was the uncontradicted testimony of Richard S. Prows that Prowswood did not consider itself obligated to repurchase the property.

The trial court's interpretation of an unambiguous written document, unaided by reference to extrinsic evidence, is accorded no particular weight on review, but will be reviewed under a correctness standard. Craig Food Industries, Inc. v. Weihing, 746 P.2d 279, 283 (Utah App. 1987). Consequently, the proper standard for this Court to apply in reviewing the trial court's finding or conclusion of ratification is simply whether it was correct, without indulging any deference to the trial court's determination.

2.

THE ISSUE OF RITA LUKE'S AUTHORITY, INCLUDING WRITTEN AUTHORITY, WAS TRIED AND IS PROPERLY BEFORE THIS COURT

It is indisputable that the statute of frauds is an affirmative defense that must be pled. Utah R. Civ. P. 8(c). What is less clear is when the statute of frauds may be said to have been pled.

While it is true that Prowswood did not cite Section 25-5-1 or 25-5-3 in its Answer, or use the words, "statute of frauds," it may not be assumed without analysis that Prowswood failed to affirmatively plead this defense. Indeed, many courts have held that a denial of the existence of a contract is sufficient to raise the statute of frauds. See, e.g., Hunt v. Hunt, 261 N.C. 437, 135 S.E.2d 195, 199

(1964); Padgham v. Wilson Music Co., 3 Wis.2d 363, 88 N.W.2d 679, 683 (1958).

Prowswood's Answer meets or exceeds this principle. Prowswood affirmatively alleged that "the acts of the Defendant Rita Luke were without the express, implied or apparent authority of the Defendant Prowswood, Ltd. . . ." Answer of Prowswood, Fifth Defense. This allegation was not merely a general denial of liability, but went directly to Rita Luke's authority. If she lacked express, implied, or apparent authority, she surely lacked written authority. This allegation was therefore sufficient to put all parties to the action on notice that the lack of written authorization was an issue to be tried. The policy of Rule 8(c) was thus fulfilled.

Furthermore, since the Nielsons conducted no discovery even on issues set forth in detail in the pleadings, failure to plead the statute of frauds with greater specificity worked no prejudice against them insofar as pretrial discovery was concerned.

Finally, the lack of written authorization was implicit in the Independent Contract Agreement between Rita Luke and Prowswood, which, like the statute of frauds, required written authorization for her to enter into a contract to purchase real estate. This Agreement was entered into

evidence at trial. Exhibit 4-P. Thus, the issue of written authority was before the trial court at trial.

Obviously, Prowswood would have preferred leave to amend its Answer based upon its motion filed more than one month prior to trial. This housekeeping measure would have obviated any dispute later. But this Court may still conclude, and should conclude, that Prowswood did not waive its defense of the statute of frauds.

3.

RITA LUKE WAS NOT PROSWOOD'S GENERAL PURCHASING AGENT,
SO THE MATHIS EXCEPTION TO SECTION 25-5-1 DOES NOT APPLY

Respondents cite evidence from which the trial court could possibly have concluded that Rita Luke was Prowswood's general agent. Brief of Respondents, p. 16. In fact, the trial court did not so conclude, but even if it had, its conclusion would have been mistaken.

Mathis v. Madsen, 1 Utah 2d 46, 261 P.2d 952, 956 (1953) reads into Utah Code Ann. @ 25-5-1 an exception for general agents or executive officers of corporations. In that case, the agent was General Manager and President of the corporation.

The Nielsons contend that Rita Luke was Prowswood's general agent because she was "authorized to conduct a series of transactions involving a continuity of service," the test

set out in Restatement (Second) of Agency @ 3(1)(1957). Prowswood concedes that Ms. Luke was its general agent for purposes of selling listed real estate, since she did conduct a series of such transactions over a period of years. She was therefore a general agent with respect to selling listed properties. But she never purchased properties for Prowswood.

Comment b. to the Restatement section quoted above addresses just this situation:

One is a general agent only as to those matters in which there is continuity of employment. Thus one who is a general agent with respect to some matters may be a special agent with respect to a particular transaction, as where the owner of a manufacturing business directs his manager to purchase a country estate for him.

(Emphasis added.) Unlike selling properties, purchasing properties was not a matter "in which there [was] a continuity of employment." Indeed, the Nielsons were unable to cite even a single instance where Ms. Luke purchased property on behalf of Prowswood. Therefore, with respect to purchasing properties she was a special agent only, and the Mathis exception to Section 25-5-1 does not apply.

To ignore this qualification to the general rule of the Restatement would effectively repeal Section 25-5-1 for corporations. It would, for example, permit a real estate agent without written authority to sell his broker's personal residence or to obligate her to purchase a second residence.

4.

NEITHER SECTION 61-2-2(3) NOR WHITE v. FOX APPLIES HERE

The Nielsons rely upon Utah Code Ann. @ 61-2-2(7) and White v. Fox, 665 P.2d 1297 (Utah 1983) to support the trial court's conclusion that Rita Luke had apparent authority to bind Prowswood to purchase the property. In fact, these authorities are irrelevant to a determination of apparent authority. The third party's reliance on the purported principal's statements or actions regarding the agent's authority is the sina qua non of apparent authority, and there is not a shred of evidence that the Nielsons ever relied upon any statement or act of Prowswood here. Mr. Nielson himself testified that he did not. See Trial Transcript, Vol. 1, p. 144.

However, these authorities are relevant to a different theory of agency, which may perhaps be called "statutory agency," since it seems to owe its existence solely to one statutory provision. Although the trial court did not address this theory, the Nielsons urge it on appeal.

The former Section 61-2-3, predecessor to our present Section 61-2-2(3), was part of Title 61, Chapter 2, "Division of Real Estate." It was strictly definitional in nature. It defined a real estate salesman as one "employed or engaged on behalf of a licensed real estate broker to do or to deal in any act or transaction" listed within the definition of a

broker. In White, the Utah Supreme Court read this section not as a definition, but as a grant of power. It also read the word "any" to mean "all." Thus it wrote, "Our statutes provide that, subject to certain limitations, real estate agents are empowered to perform all acts or transactions that their real estate broker may perform." 665 P.2d at 1302 (emphasis added). Prowswood submits that this was a misreading of the statutory intent of that section.

However, based on that reading, the court reasoned that since the broker could waive his own commission, his real estate agent could waive the commission of his broker, in that case Parley White dba Parley White Realty Company. Id.

While the reasoning of White is dubious, the Nielsons would extend it even further, arguing by analogy that since a broker may bind himself to purchase property, his real estate agent can bind the broker to purchase property. Therefore, they reason, since Prowswood could bind itself to purchase the Koch's condominium, Rita Luke had statutory authority to bind Prowswood to purchase the condominium. There are a number of reasons why this line of reasoning should be rejected:

First. Section 61-2-2 is definitional: a person who does any one of certain enumerated acts is deemed to be a "real estate sales agent" for purposes of the Chapter and therefore subject to its provisions. This section was not

intended to grant every real estate agent blanket authority to do everything his broker could do. If a person must be authorized to perform every act within the definition of a broker to be a real estate agent, then Rita Luke was not one, because she had no authority to obligate anyone to purchase property.

Second. A broker qua broker may purchase property "for another" and, as in White, to collect commissions. Section 61-2-2(1). Additionally, a broker has the same right as other persons to purchase property for himself, in which case the Chapter does not apply. See Section 61-2-3.

The Nielsons fail to observe this distinction. They urge this Court to apply the Chapter in a situation where Prowswood would purchase real estate for itself. To do so, this Court would have to extend Section 61-2-2 past even White. Whatever its flaws, at least White only empowered the real estate agent to bind his broker to a transaction in his role as a broker, where he acted for another; the Nielsons would empower a real estate agent to bind her broker with respect to a transaction for itself, and therefore a transaction outside the Chapter.

Third. In White, there was no contractual provision relevant to the scope of the agent's authority. Therefore, holding that Section 61-2-2 defined the limits of the agent's authority did no violence to a lawful contract. Here, Rita

Luke's authority was expressly limited by the following provision in Paragraph 9 of her contract with Prowswood:

[Luke] shall have no authority to incur any expense, enter any contract or make any representation or committment [sic] for and on behalf of [Prowswood] unless such authority is specifically given, in writing, with respect to each such transaction.

Holding Section 61-2-2 applicable to this case would wreak havoc in the real estate industry by instantly invalidating every limitation on every broker's delegation of authority to every real estate agent in the State of Utah. Such a ruling would represent a broad and unwarranted extension of White.

Fourth. Most importantly, the fatal flaw in the Nielsons' attempt to apply White here is that Prowswood was not Rita Luke's broker. The uncontested evidence at trial established that her broker as of the date of the Luke Agreement, November 29, 1985, was Mr. John Langley. Therefore, the only conclusion permissible under White is that Rita Luke had authority to bind John Langley, who is not a party to this action.

Moreover, Mr. Langley's uncontradicted proffer of testimony was that he had no authority to purchase real property on behalf of Prowswood. Therefore, even if, under White, Rita Luke had statutory authority to do every act which John Langley was authorized to do, still she lacked authority to bind Prowswood to the Agreement.

5.

LUKE LACKED INHERENT AUTHORITY TO BIND PROSWOOD

The Nielsons argue on appeal that Rita Luke had inherent authority to bind Prowswood.

a. The Trial Court Did Not Find Inherent Authority.

The trial court did not find that Rita Luke had inherent authority in either its Memorandum Decision or its Findings of Fact and Conclusions of Law. There is therefore no finding of fact to which this Court must defer on appeal. But even if there were, a determination of agency may be viewed as a mixed question of law and fact and reviewed de novo for correctness. See pp. 4-6 supra.

Prowswood did not address this theory in its Brief of Appellant because it was not apparent in the Court's Memorandum Decision, Findings, or Conclusions. As pointed out above, pressing this theory on appeal, as the Nielsons do, is consistent only with the view that a finding of inherent authority is not factual in nature but a mixed question of law and fact, and therefore entitled to no particular deference by this Court.

Indeed, there is no factual conflict on this issue in any event, only a question of the legal significance of largely uncontradicted facts.

b. The Evidence Does Not Support a Finding of Inherent Authority.

The doctrine of inherent authority is twofold. One aspect concerns the nature of the agent's acts. The other concerns the level of knowledge or belief of the third party.

Under the doctrine of inherent authority, an agent's acts bind her principal only if they "fall within the apparent scope" of her authority, Harrison v. Auto Securities Co., 70 Utah 11, 18, 257 P. 677, 679 (1927), or, under the Restatement's version of the rule, "usually accompany or are incidental to transactions which the agent is authorized to conduct." Restatement (Second) of Agency @ 161 (1957).

Rita Luke's acts meet neither criterion. The Nielsons claim that "It is a common marketing technique for a broker to agree to purchase property in order to obtain a listing or a sale, with its attendant commission." Brief of Respondents, p. 19. This statement finds no basis in the evidence and is merely the naked assertion of counsel. The Nielsons cite only the testimony of Richard S. Prows. He testified that while "there have been occasions" where Prowswood would agree to purchase a property, "it is uncommon" that it would take trade-ins. He also testified that Prowswood would "not normally" have a program where if someone buys its product it would buy theirs, but would do so only on "very rare occasions."

The Nielsons' own expert witness, Wilburn McDougal, was hardly more supportive of their position. Contrary to the Nielsons' representation that Mr. McDougal "testified that 'most companies' in this area have some type of guaranteed sales program" Brief of Respondents, p.23 (emphasis added), he in fact testified, "I think most companies have had some type of a guaranteed sales program" (emphasis added). The clear implication of this statement is that while most companies have in the past had guaranteed sales programs, they no longer do. With respect to his own company, Mr. McDougal further testified as follows:

Q Were agents authorized to sign that [guaranteed buy-back] agreement?

A We have, in the last ten years we've had times when it is only my signature that is authorized or one of my managers or certain real estate agents, those that had the experience.

Q So agents as a whole were not authorized to sign?

A No, some agents were authorized. It is an individual situation.

Q So some agents were not authorized to sign?

A This is right.

Trial Transcript, Vol. 1, p.132.

The testimony before the trial court on the issue of whether it was usual for an agent to be authorized to enter into a guaranteed sales agreement may be summarized as follows:

1. Guaranteed sales programs were very uncommon for Prowswood.

2. Many companies have had such programs in the past.

3. McDougal realty has had such programs.

4. Sometimes only Mr. McDougal was authorized to sign a guaranteed sales agreement.

5. Sometimes one of his managers was authorized to sign.

6. Sometimes certain real estate agents were authorized to sign.

7. At no time were all real estate agents authorized to sign.

This testimony falls far short of meeting the Nielsons' burden of proving that the authority to purchase property is apparent merely from the fact that a person is a real estate agent; or that the exercise of purchasing authority is usual for real estate agents in general; or that it is incidental to those acts--such as listing and selling property--that are within a real estate agent's actual authority.

The second aspect of inherent authority focuses on the third party, who must be "innocent," must have "dealt with

those agents in good faith," Harrison, supra, at 679, must reasonably believe the agent is authorized, and must have no notice that she is not authorized. Restatement (Second) @ 161.

Mr. Nielson was hardly an "innocent" third party. On the contrary, he was knowledgeable in the field of real estate, having been a licensed real estate broker in California and a licensed real estate broker in Utah since 1962. He was also knowledgeable about Prowswood, since he had previously been employed by a Prowswood subsidiary, TransWest Building Supply, as a vice president in charge of day-to-day operations. Also, his son-in-law, Vince Clayton, was a Prowswood employee. He was aptly described by his counsel at trial: "Mr. Nielson is a sophisticated man, there [is] no question about that." Trial Transcript Vol. 1, p. 6.

Mr. Nielson's experience and sophistication put him on notice that Ms. Luke might not be authorized to bind Prowswood. He testified at trial that he was "concerned as to whether or not a salesperson had authority to bind Prowswood" to purchase the condominium. A reasonable person with Mr. Nielson's sophistication, concern, experience, and family contacts would have taken some step, such as placing a single telephone call, to verify with Prowswood the authority that Ms. Luke claimed. But Mr. Nielson did nothing.

In short, the Nielsons have failed to make a showing, either below or on appeal, that Rita Luke had inherent authority to bind Prowswood.

6.

RICHARD S. PROWS' LETTER DID NOT RATIFY THE AGREEMENT

Since they do not respond to Prowswood's arguments, the Nielsons apparently concede that Prowswood's acceptance of a real estate commission from the Koches cannot constitute a ratification of the Luke Agreement. See Brief of Appellant, Point 3.

Instead, they contend that the letter of June 10, 1986 from Richard S. Prows to the Nielsons ratified the Luke Agreement.

As explained in Point 1.c. above, a trial court's interpretation of a written document, without reliance upon extrinsic testimony, is entitled to no deference on appeal but presents a question of law to be reviewed for correctness. See pp. 7-8, supra.

To ratify an act is to knowingly manifest an intent to treat it as though it was authorized--to be bound by it--when in fact it was unauthorized and not binding. See Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982); Restatement (Second) of Agency @@ 82 & 83.

A copy of Mr. Prows' June 10, 1986 letter is included in the Addendum to Prowswood's Brief of Appellant. Even a cursory reading of this document will disclose that Mr. Prows never manifested an intention to be bound by any agreement that would obligate Prowswood to purchase the Nielson's condominium. In fact, he emphatically denied any such obligation. Consider the following facts.

Every reference to the Luke Agreement is placed in quotation marks: the "agreement." Use of quotation marks in this manner has the effect of negating the meaning of the quoted term. Thus, a reference to a man and his "wife" carries the clear implication that they are not in fact married. Similarly, referring to a "joke" communicates unmistakably that the attempt at humor was not in fact amusing. In this context, the quotation marks clearly conveyed Mr. Prows' belief that no agreement between the Nielsons and Prowswood existed. Had he ratified the Luke Agreement, he would have acknowledged its efficacy, not denied it.

In Paragraph 4 of his June 10 letter, Mr. Prows expressed concern to treat the dispute delicately in view of Prowswood's feelings of friendship toward the Nielsons. But despite those feelings, he never acknowledged any willingness to purchase the property.

In the letter's penultimate paragraph, Mr. Prows insisted that since Mr. Nielson was both a Utah real estate broker and a former Prowswood employee, it must have occurred to him 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 . . ." In other words, Mr. Prows, far from adopting Ms. Luke's acts, continued to disclaim them. This fact eloquently refutes the Nielsons' construction of his letter.

In short, Prowswood submits that it is not possible to reasonably detect in this letter any intent on the part of Prowswood "to ratify the Agreement and stand behind its leading sales agent, regardless of the outcome." Brief of Respondents, p. 26. Mr. Prows was very specific as to outcomes: Prowswood would waive its commission, but it would not purchase the unit.

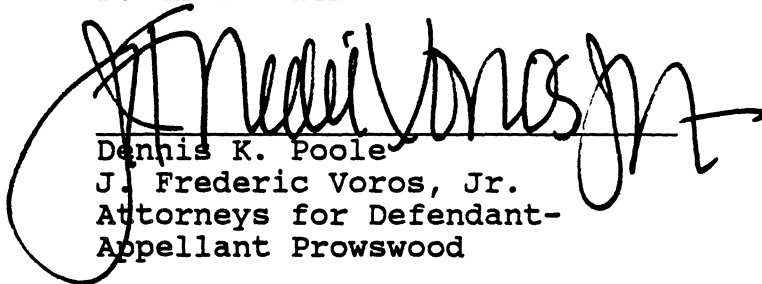
Under the law, ratification requires that the purported principal have "an intent to ratify" Bradshaw v. McBride, 649 P.2d 74, 78 (Utah 1982), that is, an intent to be bound by the acts of the purported agent. The only intent expressed in Richard S. Prows' June 10, 1986 letter is an intent not to purchase the property from the Nielsons. Therefore, no ratification could have occurred.

CONCLUSION

The trial court's rulings were ill-conceived, as witnessed by the Nielsons' arguments before this Court, which attempt to recast the record into legal categories defensible on appeal. But even artful arguments cannot make a silk purse out of the judgment below, which should be reversed.

DATED: July 20, 1989

POOLE & SMITH



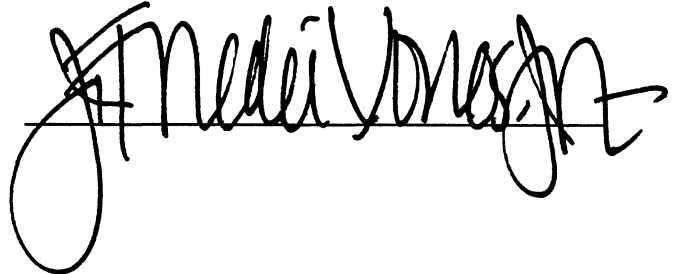
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CERTIFICATE OF DELIVERY

I certify that the 20 day of July, 1989, a true and correct copy of the foregoing Reply Brief of Appellant Prowswood, Ltd. was mailed, postage prepaid, to the following counsel and parties of record:

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A handwritten signature in black ink, appearing to read "J. Michael Vong", is written over a horizontal line. The signature is stylized with a large loop at the end.