

1988

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

Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

J. MARIUS NIELSON and)	BRIEF OF RESPONDENTS
FAYE K. NIELSON,)	
)	
Plaintiffs/Respondents,)	
)	
vs.)	
)	
PROSWOOD, LTD., a Utah corpora-)	
tion dba PROSWOOD REALTOR,)	
)	
Defendant/Appellant,)	
)	
and)	Docket No. 880709-CA
)	
RITA LUKE, individually and as an)	Priority 14b
agent for PROSWOOD REALTOR,)	
)	
Defendant/Respondent.)	

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
JUDGE DAVID S. YOUNG

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RITA LUKE, individually and as an)	Priority 14b
agent for PROSWOOD REALTOR,)	
)	
Defendant/Respondent.)	

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction over this case pursuant to sections 78-2-2(3)(j) and 78-2a-3(2)(j) of the Utah Code. This matter was transferred to the Court of Appeals from the Utah Supreme Court on December 22, 1988.

NATURE OF THE PROCEEDINGS BELOW

The plaintiffs, J. Marius Nielson and Faye K. Nielson, brought this action against defendants Prowswood, Ltd., dba Prowswood Realtor ("Prowswood"), and Rita Luke, a Prowswood real estate agent, seeking specific performance of an agreement to purchase a condominium, which they claimed Ms. Luke entered into on behalf

of Prowswood. This is an appeal from a judgment in favor of the Nielsons and against the defendants jointly and severally entered after a bench trial before the Honorable David S. Young.

STATEMENT OF THE ISSUES

1. Did Prowswood waive any defense based on Utah Code Ann. § 25-5-1 that it may have had?

2. Does section 25-5-1 of the Utah Code apply to the facts of this case?

3. Was the trial court's finding that Ms. Luke had authority to bind Prowswood to an agreement to purchase the Nielsons' condominium clearly erroneous?

4. Was the trial court's finding that Prowswood ratified the agreement clearly erroneous?

5. Did the trial court commit reversible error in limiting evidence of Mr. Nielson's experience as a real estate broker?

DETERMINATIVE STATUTES AND RULES

Interpretation of rules 8(c) and 12(h) of the Utah Rules of Civil Procedure is determinative of the first issue stated above. Rules 8 and 12 are set out verbatim in the Addendum.

Interpretation of section 61-2-2(7) and (9) of the Utah Code is determinative of the third issue stated above. Section 61-2-2 is set out verbatim in the Addendum.

Interpretation of rules 401, 402 and 403 of the Utah Rules of Evidence, which are set out verbatim in the Addendum, is determinative of the fifth issue stated above.

STATEMENT OF THE CASE

The Nielsons brought this action seeking specific performance of an agreement requiring Prowswood to purchase a condominium unit that the Nielsons bought through Prowswood and its agent, Rita Luke. The matter was tried before the Honorable David S. Young, who granted judgment in favor of the Nielsons against Prowswood and Luke jointly and severally.

The facts relevant to this appeal are as follows:

1. Defendant Luke has been a licensed real estate sales agent for defendant Prowswood for ten years. 1 Trial Transcript (hereinafter "Tr.") at 156. Ms. Luke was initially an employee of Prowswood. Id. at 159. In 1984 she entered into a written agreement with Prowswood entitled Agreement--Independent Contractor. Id. at 202; Exhibit 15-D(a). The written agreement did not change how Ms. Luke acted vis-a-vis Prowswood. 1 Tr. at 160.

2. Ms. Luke has worked exclusively for Prowswood ever since she obtained her real estate license. Id. at 166.

3. At all relevant times, Prowswood provided Ms. Luke with an office, secretary, telephone, business cards and Prowswood letterhead for stationery. Id. at 161-65. See also Exhibit 7-P.

4. Ms. Luke was Prowswood's leading sales producer for the last ten years and is a lifetime member of the Million Dollar Club of the Salt Lake Board of REALTORS. 1 Tr. at 168.

5. Prowswood has accordingly granted Ms. Luke a great deal of authority. Ms. Luke has authority to sign listing agreements, to sell and lease property on behalf of Prowswood. Id. at 171-74. Moreover, Prowswood has given her "the latitude to waive receipt of commissions both for herself and for [Prowswood] as a brokerage when she feels that circumstances justify such an action." Exhibit 4-P.

6. The authority that Prowswood gave Ms. Luke to act on its behalf in waiving its commissions was generally given orally and not in writing. Id. at 171.

7. In the fall of 1985, the Nielsons were residents of California, where Mr. Nielson was involved in the mortgage banking business. 1 Tr. at 12 & 58.

8. At that time, the business that Mr. Nielson worked for was sold, and the Nielsons decided to move back to Utah. Id. at 12 & 59.

9. In November 1985, the Nielsons came to Salt Lake City to look for a home. Id. at 12-15 & 61. The Nielsons decided to lease a home because Mr. Nielson had not yet found a job in Salt Lake City and they did not know whether they would stay there permanently. Id. at 14 & 62-63.

10. The Nielsons contacted Ms. Luke and clearly told her that they wanted to lease property for at least one year and did not wish to buy. Id. at 30, 33, 63 & 102.

11. Ms. Luke showed the Nielsons unit 25 of the Brookstone Condominiums, which was owned by Mr. and Mrs. Koch and listed with Prowswood. Id. at 15-16.

12. Within two days of their first visit to the Koch unit, the Nielsons told Ms. Luke that they were interested in leasing the unit, and arrangements were made for a second visit. Id. at 16.

13. Before showing the Nielsons the Koch unit a second time, Ms. Luke obtained verbal authority from her broker at Prowswood, John Langley, to waive Prowswood's commission if the unit were to be resold. Id. at 125.

14. At the time she made arrangements for the second visit, Ms. Luke knew that the Koches had to sell the unit by April 1986 and thus could not take a lease for more than four months, which was unacceptable to the Nielsons. Id. at 177-79 & 183-84.

15. After the second visit, Mr. Nielson asked Ms. Luke the terms of the lease, and Ms. Luke informed him that there was a problem. Id. at 65, 103-05. Ms. Luke told the Nielsons that the Koches could not lease the unit for more than four months, and the Nielsons told her that such terms were unacceptable. Id. at 17 & 65-66.

16. Ms. Luke proposed the following solution: If the Nielsons would buy the unit and later decided that they did not want it, Prowswood would sell the unit and waive its commission if necessary so that the Nielsons would get back their net price of \$160,000; if Prowswood could not sell the unit within 120 days, it would take the property back, provided that the Nielsons would let Prowswood try to sell the property during the summer, the prime selling months. Id. at 18-19, 37-38, 65-66 & 105.

17. Ms. Luke told the Nielsons that Robert Wood, executive vice-president of Prowswood Corporation, had authorized the same offer to another prospective buyer of unit 25 and that she had talked to Mr. Wood, who had agreed to let her make the offer to the Nielsons. Id. at 18-19, 66; see also 2 Tr. at 7-8.

18. Mr. Nielson asked Ms. Luke if she had authority to enter into the proposed agreement, and Ms. Luke told him that she did, that Mr. Wood had given her the authority. 1 Tr. at 18-19, 41, 67 & 105-06.

19. On November 29, 1985, while Ms. Luke wrote up the earnest money agreement on unit 25, Mr. Nielson reduced the purchase agreement to writing. Id. at 19-20, 39-40, 67-68 & 108. The agreement (hereinafter "Agreement") stated that, as a condition of the Nielsons' buying the condominium,

Prowswood 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, Prowswood Realtor shall have 120 days to effect sale or purchase property as aforementioned.

Exhibit 1-P.

20. Ms. Luke read the Agreement, said that it was fine and signed it. 1 Tr. at 111.

21. Upon returning to California in November 1985, Mr. Nielson sent a copy of the Agreement to Ms. Luke. Ms. Luke testified that she did not receive a copy, nor did she ask for one. Id. at 81, 113 & 190.

22. After the Agreement was signed, John Langley did not ask to see a copy of the Agreement and had no further discussions with Ms. Luke regarding it. 1 Tr. at 189-90.

23. The Nielsons relied upon the Agreement and purchased unit 25 from the Koches for the sum of \$160,000. Id. at 22, 44 & 69; Exhibit 2-P. The Nielsons would not have bought the property were it not for the Agreement. Id. at 22 & 69.

24. By a letter dated May 10, 1986, which the parties stipulated Prowswood received before June 1, 1986, the Nielsons informed Prowswood that they were electing to exercise their rights under the Agreement. 1 Tr. at 55, 74; Exhibit 3-P.

25. Richard S. Prows, President of the Prowswood Corporation and Chairman of the Board of Prowswood, Ltd., wrote the Nielsons on June 10, 1986, and stated, in part:

Rita [Luke] 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 [sic] 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".

Exhibit 4-P.

26. Prowswood did not purchase the property on or before September 10, 1986.

27. The Nielsons filed their complaint in this action on May 5, 1987, Record at 2, and Prowswood filed its answer on

June 2, 1987, id. at 34. Nowhere in that answer did Prowswood plead the statute of frauds as a defense. Id. at 34-38.

28. On May 23, 1988, a pretrial conference was held in this case, at which time trial of this matter was set for June 7, 1988. Id. at 98. The statute of frauds was not raised in any pretrial order.

29. On June 3, 1988, Prowswood moved for leave to amend its answer to assert as an affirmative defense the statute of frauds, Utah Code Ann. § 25-5-1. Id. at 107-08. A hearing on the motion was scheduled for June 7, 1988, the day of trial. Id. at 105.

30. On June 7, 1988, the court continued the trial to July 19, 1988, because another case was being tried on June 7. Id. at 174.

31. At Prowswood's request, the hearing on its motion for leave to file an amended answer was continued four times, the last time to July 18, 1988, the day before trial. See id. at 181-87.

32. On July 18, 1988, the court denied Prowswood's motion for leave to file an amended answer, id. at 261, and the case went to trial as scheduled, id. at 262.

33. At trial, Wilbern McDougal, a realtor with over twenty-five years of experience and past President of the Utah Association of REALTORS and the Salt Lake Board of REALTORS,

testified that, in his opinion, "most companies have had some type of a guaranteed sales program" by which a brokerage agrees to buy a seller's property if it cannot sell the property. 1 Tr. at 130, 129.

34. Mr. McDougal further testified that his experienced real estate agents were authorized to sign guaranteed sales program agreements. Id. at 132, 135-36.

SUMMARY OF ARGUMENT

Prowswood raises several issues on appeal. The first issue--whether Ms. Luke could bind Prowswood to purchase the Nielsons' property without written authority--was not raised by the pleadings or addressed by the trial court and therefore is not properly before this court. Prowswood waived the issue by failing to timely raise it in the trial court. (Point II.)

Even if the issue of written authority were properly raised, it does not constitute grounds for reversal because the statute of frauds is inapplicable on the facts of this case. (Point III.)

The second and third issues Prowswood raises--Ms. Luke's power to bind Prowswood to the Agreement and Prowswood's ratification of the Agreement--are factual issues. The trial court's findings of fact cannot be set aside unless they are clearly erroneous. (Point I.)

The trial court did not clearly err in finding that Ms. Luke had power to bind Prowswood to the Agreement, under a theory of either apparent authority (Point IV) or inherent agency power (Point V). Ms. Luke was Prowswood's general agent, and, in entering into the Agreement, she was only doing what was incidental to a transaction she was authorized to perform, namely, agreeing to list and sell real estate.

Neither did the trial court clearly err in finding that Prowswood ratified the Agreement after it learned all the material facts. Mr. Prows wrote the Nielsons in June 1986, evidencing his intent to stand by Prowswood's agent whatever the parties' agreement was. (Point VI.)

As for the fourth issue, the trial court did not commit reversible error in excluding evidence as to Mr. Nielson's experience as a real estate broker because such evidence was cumulative at best. (Point VII.)

Finally, the Nielsons take no position with respect to the last issue Prowswood raises, namely, whether it is entitled to a judgment over against Ms. Luke.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT CANNOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

This is an appeal from a judgment entered after a trial to the court. Utah Rule of Civil Procedure 52(a) states that

findings of fact entered after a bench trial, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The clearly erroneous standard applies whether the case is one in equity or at law. Barker v. Francis, 741 P.2d 548, 551 (Utah Ct. App. 1987).

The appellate court presumes the findings of fact of the trial court to be correct. Gillmore v. Gillmore, 745 P.2d 461, 462 (Utah Ct. App. 1987). On review, the appellate court "views the evidence and all the inferences that can reasonably be drawn therefrom in the light most supportive of the trial court's findings." Id. (quoting Horton v. Horton, 695 P.2d 102, 106 (Utah 1984)). To challenge a finding of fact, the appellant must marshal all the evidence that supports the trial court's finding and show why, even viewing it in the light most favorable to the trial court, it is insufficient to support the finding made. General Glass Corp. v. Mast Constr. Co., 766 P.2d 429, 433 (Utah Ct. App. 1988).

As long as the evidence was sufficient to sustain the judgment of the trial court, the appellate court should sustain the judgment even if it might have come to a different decision had it been trying the matter. Wash-A-Matic, Inc. v. Rupp, 532 P.2d 682, 683 (Utah 1975).

II. THE DEFENDANTS HAVE WAIVED ANY DEFENSE BASED ON UTAH CODE ANN. § 25-5-1.

It is axiomatic that issues not raised by the pleadings and not addressed by the trial court cannot be raised for the first time on appeal. See, e.g., Lane v. Messer, 731 P.2d 488, 491 (Utah 1986); Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984). This is especially true of affirmative defenses based on the statute of frauds. See, e.g., L & M Corp. v. Loader, 688 P.2d 448, 449-50 (Utah 1984); City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89, 90 (Utah 1983); Phillips v. JCM Dev. Corp., 666 P.2d 876, 884 (Utah 1983). See also Utah R. Civ. P. 8(c) (statute of frauds is an affirmative defense that must be pled).

Prowswood did not plead the statute of frauds, Utah Code Ann. §§ 25-5-1 and -3, as an affirmative defense in its Answer to the plaintiff's Complaint. On May 23, 1988, a pretrial conference was held in this case, and the issue of the statute of frauds was not brought up at that time, nor was it raised in any pretrial order pursuant to Utah Rule of Civil Procedure 16(b). On June 3, 1988--four days before the scheduled trial date--Prowswood moved for leave to amend its Answer to assert an affirmative defense based on section 25-5-1. A hearing on the motion was scheduled for June 7, 1988, the day of trial. On June 7, 1988, the court continued the trial date to July 19, 1988, because another case was being tried on June 7.

At Prowswood's request, the hearing on its motions for leave to file an amended answer was continued four times, the last time to July 18, 1988, the day before trial. The Utah Rules of Civil Procedure, like their federal counterparts, prohibit the introduction of new theories on the eve of trial. See, e.g., Gibraltar Sav. v. LDBrinkman Corp., 860 F.2d 1275, 1300 n.42 (5th Cir. 1988) petition for cert. filed, 57 U.S.L.W. 3689 (U.S. Apr. 7, 1989).¹ On July 18, 1988, the court denied Prowswood's motion for leave to amend, and the case went to trial the next day.

Prowswood has not appealed from the trial court's denial of its motions, nor has it raised any issue as to the propriety of the trial court's action in either the docketing statement or its brief on appeal. Rather, Prowswood is attempting to raise on appeal issues that the trial court has previously ruled were not timely raised. The consequence of Prowswood's failure to timely assert the statute of frauds defense is that the defense is waived. See Utah R. Civ. P. 12(h); Phillips, 666 P.2d at 884.

Because the statute of frauds issue was never considered by the trial court and is not properly before this court, the court should not consider the issue.

¹ To the extent that the Utah Rules are substantially similar to federal rules, this court can look to federal courts' interpretation of the federal rules in construing the applicable Utah Rules. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 958 (Utah 1984).

III. SECTION 25-5-1 IS INAPPLICABLE ON THE FACTS OF THIS CASE.

Section 25-5-1 of the Utah Code states:

No estate or interest in real property . . . 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.

(Emphasis added.)

Courts have adopted an exception to the rule that an agent's authority to contract for the sale of real property be in writing when the person who acts under an oral authorization is a general agent of the principal. See, e.g., Mathis v. Madsen, 1 Utah 2d 46, 261 P.2d 952, 956 (1953). The trial court's decision and findings make it clear that Ms. Luke was a general agent of Prowswood.

"A general agent is an agent authorized to conduct a series of transactions involving a continuity of service." Restatement (Second) of Agency § 3(1) (1957). The distinction between a general agent and a special agent, that is, an agent authorized to conduct only a single transaction or series of transactions, is one of degree. Id. comment a. "Continuity of service rather than the extent of discretion or responsibility is the hallmark of the general agent." Id.

Ms. Luke had worked exclusively for Prowswood for over ten years. She was Prowswood's leading sales agent throughout this time. Prowswood provided her with an office, a secretary, business cards and Prowswood letterhead. It placed a great deal of confidence in her and gave her the latitude to act on its behalf in listing, selling and leasing real property. It allowed her to enter into negotiations on its behalf and to waive its commissions when she felt the circumstances justified such action. From this evidence, the trial court would certainly be justified in concluding that Ms. Luke was a general agent of Prowswood. Moreover, the trial court found that Ms. Luke had apparent authority from Prowswood to enter into the Agreement. Because Ms. Luke was Prowswood's general agent, that authority did not have to be in writing.

In any event, any error that the trial court may have made in failing to consider the statute of frauds was harmless error under the circumstances. The trial court not only found that Ms. Luke had apparent authority to bind Prowswood, but it also found that Prowswood subsequently ratified the Agreement. Because that ratification was in writing, see infra, part VI, the absence of a writing authorizing Ms. Luke to enter into the Agreement in the first place is simply irrelevant. See Bradshaw v. McBride, 649 P.2d 74, 79 (Utah 1982); Zeese v. Estate of Siegel, 534 P.2d 85, 89 (Utah 1975).

IV. THE TRIAL COURT PROPERLY CONCLUDED THAT MS. LUKE
HAD AUTHORITY TO BIND PROSWOOD.

The trial court found, as a matter of fact and of law, that Ms. Luke had apparent authority to bind Prowswood to the Agreement. Record at 305 ¶¶ 55 & 1. The trial court's finding of fact was not clearly erroneous.

It is well settled that apparent authority can be inferred only from the acts and conduct of the principal. City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89, 90 (Utah 1983). There is ample evidence in the record to support the trial court's conclusion that, by its acts, Prowswood clothed Ms. Luke with apparent authority to act in its behalf. Prowswood had employed Ms. Luke as an exclusive sales agent for ten years. During that time, while she obtained lifetime membership in the Million Dollar club, it received and retained the benefits of her services. It provided her with an office, secretary, telephone, business cards, and Prowswood stationery. Neither the business cards nor the stationery indicated any limitations on Ms. Luke's authority nor on her relationship with Prowswood. Prowswood gave her broad latitude to waive receipt of commissions both for herself and for Prowswood and "never had a moment's hesitation about her representations

nor the contract negotiations in which she has been involved."

Exhibit 4-P.²

From this evidence, the trial court properly concluded that Prowswood had given Ms. Luke apparent authority--if not actual authority--to do those acts that a real estate agent is authorized to do.

Under Utah law, "real estate agents are vested with very broad powers." White v. Fox, 665 P.2d 1297, 1302 (Utah 1983). Subject to certain limitations, "real estate agents are empowered to perform all acts or transactions that their real estate broker may perform." Id.³

² All of these facts distinguish this case from State By and Through Division of Consumer Protection v. GAF Corporation, 760 P.2d 310 (Utah 1988). In that case, the state alleged that GAF had committed deceptive acts or practices in violation of the Utah Consumer Sales Practices Act based on, among other things, certain warranties its alleged agent gave a consumer. The state admitted that GAF did not even know its alleged agent existed until seven years after the fact. The court held that, on those facts, merely providing promotional materials that happened to fall into a third party's hands was insufficient to pin liability on GAF on a theory of apparent authority. 760 P.2d at 314.

³ White was decided under former section 61-2-3, which defined "real estate salesman" to include "any person employed or engaged by or on behalf of a licensed real estate broker to do or to deal in any act or transaction set out or comprehended by the definition of a real estate broker in section 61-2-2" Utah Code Ann. § 61-2-3 (1953). Section 61-2-3 was repealed in 1983. See 1983 Utah Laws ch. 257 § 3. However, the substance of section 61-2-3 was carried over into new section 61-2-2, which defines a "real estate sales agent" and "sales agent" as "any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration." Utah Code Ann. § 61-2-2(9) (Supp. 1988). For the text of subsection (7), see

Under Utah law, real estate brokers are authorized to perform a wide range of activities. Utah law defines a "principal real estate broker" as

any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon . . . or who advertises or holds himself, itself, or themselves as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate

Utah Code Ann. § 61-2-2(7)(a) (Supp. 1988) (emphasis added).

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. For example, in order to complete a sale, a broker may agree to purchase the buyer's home after a specified time. The benefits to the broker are that the buyer can qualify to purchase one home, on which the broker receives a

infra. See also Addendum.

commission, and the broker obtains a future listing, with an opportunity to obtain a second commission. Or, in order to obtain a listing, a broker may agree to buy a prospective seller's home if it does not sell within a certain time. In either case there are obvious risks if the home does not sell. The broker may lose money. However, this is an accepted marketing technique based on business judgments as to its profitability. Prowswood itself has used the technique at times. See 2 Tr. at 8-9.

The Utah Supreme Court has held that a real estate agent has authority to waive her broker's commission since the broker itself may waive its own commission. White v. Fox, 665 P.2d 1297, 1302 (Utah 1983). Under the same reasoning, if a real estate broker may enter into a guaranteed purchase agreement, which it may under section 61-2-2(7)(a), the broker's real estate agent may also enter into such an agreement.

In short, the trial court correctly concluded that Ms. Luke had apparent authority to bind Prowswood.

This conclusion is supported by sound policy, as the Utah Supreme Court explained long ago: When "one of two innocent parties must suffer from the wrongful act of a third person, . . . the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong and cause the loss" Harrison v. Auto Securities Co., 70 Utah 11, 18, 257 P. 677 (1927). The brokerage firm, as the party

who placed its agent in a position to enter into the Agreement, should bear the responsibility for the Agreement.

V. MS. LUKE HAD INHERENT AGENCY POWER TO BIND PROSWOOD TO THE AGREEMENT.

Although the trial court framed its conclusion in terms of "apparent authority," see Record at 275 and 305 ¶¶ 55 & 1, it could just as easily have stated its conclusion in terms of inherent authority, or what the Restatement calls "inherent agency power."

Whereas "apparent authority" arises from and in accordance with the principal's manifestations to third persons, Restatement (Second) of Agency § 8 (1957), "inherent agency power" is "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with the servant or other agent," id. § 8A. Courts often use the term "apparent authority" loosely in cases involving inherent agency power. Id. § 8A comment b.⁴ In fact, one of the lead Utah cases

⁴ Even if the trial court did not mean inherent agency power when it referred to Ms. Luke's "apparent authority," this court may still affirm the judgment on the grounds of inherent agency power. See Acton v. Deliran, 737 P.2d 996, 999 n.4 (Utah 1987) (the appellate court can decide a case on a proper ground even though it was not argued by the parties); Goodsel v. Department of Bus. Reg., 523 P.2d 1230, 1232 (Utah 1974) (the appellate court should affirm a judgment if it is sustainable on any legal theory apparent on the record, even if it is different from the theory stated by the trial court as the basis for its ruling and even though it was not raised in the trial court).

on inherent agency power stated the applicable rule in terms of "apparent" authority:

It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of the authority of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties, who have dealt with those agents in good faith.

Harrison v. Auto Securities Co., 70 Utah 11, 18, 257 P. 677 (1927).

See also Forsythe v. Pendleton, 617 P.2d 358, 360 (Utah 1980).

The court in Harrison held that the principal was bound by its agent's sale of a car that the principal had expressly told the agent he could not sell. The plaintiff had dealt exclusively with the agent, and it does not appear from the court's opinion that the plaintiff even knew of the principal's existence. Thus, there could have been no apparent authority in the strict sense. Yet the court held the principal bound because the agent had acted "within the apparent scope" of its authority. 70 Utah at 18. Similarly, the trial court's use of the term "apparent authority" in this case does not preclude a finding of inherent agency power, which is amply supported by the record.

Under the doctrine of inherent agency power, a general agent for a disclosed principal can bind the principal by acts done on his account if the acts "usually accompany or are incidental to transactions which the agent is authorized to conduct" and if

"the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized." Re-statement (Second) of Agency § 161 (1957).

Ms. Luke was clearly a general agent of Prowswood, a disclosed principal. See supra pp. 15-16. Thus, she had inherent power to bind Prowswood if the guaranteed purchase agreement was the sort of act that usually accompanies or is incidental to transactions that Ms. Luke was authorized to conduct. The trial court properly concluded that it was.⁵

Wilbern McDougal, a realtor with over twenty-five years experience, testified that "most companies" in this area have some type of guaranteed sales program by which the brokerage agrees to buy a home if it is unsuccessful in selling it. He further testified that some agents, especially the more successful agents (such as Ms. Luke) were authorized to enter into such agreements.

Richard S. Prows, President of Prowswood Corporation and Chairman of the Board of Prowswood, Ltd., testified that Prowswood has had, on occasion, programs under which it has agreed to buy a home or accept a home as a trade-in in order to sell

⁵ The trial court also properly concluded that the Nielsons reasonably believed that Ms. Luke was authorized and had no notice to the contrary. Prowswood had the burden of showing that the Nielsons knew or had reason to know that Ms. Luke had no authority to enter into the guaranteed purchase agreement. White v. Brock, 584 P.2d 1224, 1227 (Colo. Ct. App. 1978). Prowswood failed to meet its burden. The trial court found that the Nielsons acted reasonably under the circumstances. Record at 304 ¶ 53.

property. He further testified that Prowswood agents would handle sales under such a program. 2 Tr. at 8-9.

Moreover, under section 61-2-2 of the Utah Code, the Agreement was within Ms. Luke's statutory authority as a real estate sales agent.

From all this evidence, the trial court could conclude that Ms. Luke had inherent power to bind Prowswood to the Agreement.

The rationale for inherent agency power supports the trial court's conclusion. The rationale for finding liability based on inherent agency power is that it would be unfair for an enterprise that conducts its affairs through agents to have the benefit of their work without making it responsible for their excesses. Restatement (Second) of Agency § 8A comment a.

Commercial convenience requires that the principal should not escape liability where there have been deviations from the usually granted authority by persons who are such essential parts of his business enterprise. In the long run, it is of advantage to business, and hence to employers as a class, that third persons should not be required to scrutinize too carefully the mandates of permanent or semi-permanent agents who do no more than what is usually done by agents in similar positions.

Id. § 161 comment a. See also id. § 8A comment a (the inherent power of agents and the concomitant liabilities of their principals are created by the courts primarily for the protection of third persons, but, in the long run, "they inure to the benefit of the business world and hence to the advantage of employers as a class,

the members of which are plaintiffs as well as defendants in actions brought upon unauthorized transactions conducted by agents").

VI. THE TRIAL COURT DID NOT CLEARLY ERR IN CONCLUDING THAT PROWSWOOD RATIFIED THE AGREEMENT.

The trial court found as a matter of fact and a matter of law that Prowswood ratified the Agreement. Record at 305 ¶¶ 56 & 3. Prowswood argues that this conclusion erroneously rests on findings that Prowswood received and retained a sales commission on the sale of unit 25 to the Nielsons. The trial court's Memorandum Decision makes it clear, however, that the court's finding that Prowswood ratified the Agreement was based on the June 10, 1986, letter from Richard S. Prows to the Nielsons. Record at 275. In that letter, Mr. Prows clearly expressed an intention to stand behind Ms. Luke in her dealings with the Nielsons and fulfill its "obligation" under the Agreement:

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 [sic] 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"

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".

Exhibit 4-P.

It was certainly within the province of the trial court, as the trier of fact, to conclude that this letter evidenced Prowswood's intent to ratify the Agreement and stand behind its leading sales agent, regardless of the outcome. Prowswood obviously had a different understanding of the Agreement than the Nielsons had and offered what it believed was a "reasonable compromise." But the fact that Prowswood may have disputed the Nielsons' understanding of the Agreement does not mean that it was unwilling to stand behind the Agreement, whatever that Agreement was ultimately held to mean. The June 10, 1986, letter shows that willingness and thus Prowswood's intent to ratify.

The June 10, 1986, letter, which is the basis for the trial court's finding of ratification, suffers from none of the defects of Prowswood's strawmen. The letter was written after the Nielsons had written Prowswood stating their understanding of

the Agreement and after they had met with Ms. Luke and Scott Dean, Ms. Luke's immediate supervisor, and had made their position clear. Thus, Prowswood had knowledge of the material facts. Moreover, the ratification was in writing, obviating any statute of frauds problem.

This court should defer to the trial court's factual finding that Prowswood ratified the Agreement because the trial judge "had the benefit of extraordinarily important evidence that is entirely unavailable" to this court--namely, the demeanor of those who testified. See Mountain States Tel. & Tel. v. Sohm, 755 P.2d 155, 160 (Utah 1988) (Zimmerman, J., concurring and dissenting). Mr. Prows testified regarding his interpretation of the Agreement and his intentions. The trial court heard that testimony and could properly reject it. The trial court concluded that the June 10, 1986, letter meant what it said, namely, that Prowswood would honor its "obligation," whatever that obligation might prove to be. That conclusion was not clearly erroneous and should be affirmed on appeal.

VII. THE TRIAL COURT DID NOT ERR IN LIMITING EVIDENCE OF MR. NIELSON'S EXPERIENCE AS A REAL ESTATE BROKER.

Prowswood claims that the trial court erred in excluding evidence of Mr. Nielson's experience as a real estate broker. However, the trial court admitted extensive evidence of Mr. Nielson's real estate experience. See 1 Tr. at 57-58, 97-99, 137-39,

142-44 & Exhibit 12-D (Mr. Nielson's licensure history). When counsel for Prowswood began asking Mr. Nielson about matters occurring as much as seventeen years before, the court asked counsel "to be expeditious with your questioning" because "it seems to me that we have dealt with enough information as to [Mr. Nielson's] background." 1 Tr. at 139. Counsel for Prowswood then asked specific questions about Mr. Nielson's experience with various companies in 1971, 1974-76 and 1976-80, and the court sustained objections on the grounds of relevance.

Utah Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Where, as here, the trial court has clearly been apprised of the witness's relevant experience, specific questions about that experience--such as how many agents were employed by the witness's company seventeen years before--would have limited usefulness in making the existence of any fact more or less probable and would therefore be of limited relevance.

Moreover, given the extensive evidence already of record concerning Mr. Nielson's real estate experience, the trial court could have properly excluded the proffered evidence in the interest of time or as cumulative. See Utah R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is sub-

stantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). If the trial court has sustained a specific objection on the wrong grounds, the appellate court should uphold the ruling if there is any ground for excluding the evidence. See, e.g., 1 J. Wigmore, Evidence in Trials at Common Law § 18 at 831 (P. Tillers rev. 1983). Although the excluded evidence may have been of limited relevance and hence technically admissible,⁶ the trial court could have properly excluded it under rule 403 as cumulative or in the interest of time. Thus, the trial court did not commit reversible error in excluding the evidence. See Godesky v. Provo City Corp., 690 P.2d 541, 548 (Utah 1984) (no prejudice where the erroneously excluded evidence was cumulative).

CONCLUSION

The trial court's conclusion that Ms. Luke had power to bind Prowswood to the Agreement and that Prowswood ratified the Agreement were not clearly erroneous. Therefore, the judgment of the trial court as to liability should be affirmed, and this matter should be remanded to the trial court to determine the amount of offset to which the defendants are entitled.

⁶ The Nielsons recognize that remoteness usually goes to the weight of the evidence and not its admissibility. Terry v. ZCMI, 605 P.2d 314, 323 n.30 (Utah 1979).

DATED this 20th day of June, 1989.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused true and correct copies
of the foregoing Respondents' Brief to be ^{hand delivered or} mailed this 20th day
of June, 1989, postage prepaid, to:

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ADDENDUM

Rule 8. General rules of pleadings.

(a) **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; form of denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within 20 days after the service of the summons is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1) — (7) in Subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in Subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot

reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in Subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended, effective Sept. 4, 1985.)

61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Commission" means the Real Estate Commission established under this chapter.

(3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(4) "Director" means the director of the Division of Real Estate.

(5) "Division" means the Division of Real Estate.

(6) "Executive director" means the director of the Department of Business Regulation.

(7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

(8) "Real estate" includes leaseholds and business opportunities involving real property.

(9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

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. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.