

1981

Hal Taylor Associates, a Utah Corporation v.
Unionamerica, Inc., a Corporation, aka Westmor;
Ramshire, Inc., a Corporation; William R.
Stevenson; Park City Reservations, Inc, a
Corporation dba Skyline Realty; Harry F. Reed and
Gary Cole : Brief of Appellant

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsP.S. Prince, Jr.; Attorney for Respondents Unionamerica, Inc., Ramshire, Inc., and William R. StevensonStephen G. Crockett; Attorney for Respondents Park City Reservations, Inc., Harry F. Reed and Gary ColeKent B. Linebaugh; Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah
Corporation,

Plaintiff-Appellant,

vs.

UNIONAMERICA, INC., a corpora-
tion, aka WESTMOR; RAMSHIRE,
INC., a corporation; WILLIAM
R. STEVENSON; PARK CITY RESER-
VATIONS, INC, a corporation
dba SKYLINE REALTY; HARRY F.
REED and GARY COLE,

Defendants-Respondents.

Case No. 17359

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a case in which Appellant seeks to recover from Respondents \$96,000, an amount equal to a 6% real estate listing broker's commission based on the sale of real property at a purchase price of \$1,600,000, plus interest, punitive damages, attorneys' fees and costs; and Respondent, Park City Reservations, Inc., seeks to recover from Appellant \$57,600 as a real estate selling broker's commission equal to 60% of said 6% commission, plus interest.

DISPOSITION IN LOWER COURT

Following a trial to the court without a jury, the Trial Court awarded Appellant judgment against Unionamerica, Inc. for the amount of \$96,000 plus interest, but the Trial Court refused to award Appellant any attorneys' fees or costs. The Trial Court also awarded

Park City Reservations, Inc. judgment against Appellant in the amount of \$57,600 plus interest. The Trial Court also awarded Appellant judgment against Unionamerica, Inc. for the amount of a listing broker's 6% commission in the separate sum of \$2,550 plus interest, based on a separate sale transaction, but again refused to award Appellant any attorneys' fees or costs. The Trial Court also ruled against Appellant and in favor of Respondents on other causes of action pled as tort, and refused to award Appellant any punitive damages. This appeal contests only the following portions of the Judgment:

1. The portion of the of Judgment in favor of Park City Reservations, Inc. and against Appellant for the amount of the selling broker's commission of \$57,600, plus interest;
2. The Trial Court's failure to award compensatory damages against Park City Reservations, Inc. as an offset to the portion of the Judgment in favor of Park City Reservations, Inc.;
3. The Trial Court's failure to award compensatory damages against all Respondents other than Park City Reservations, Inc. in the amount of the portion of the Judgment in favor of Park City Reservations, Inc.;
4. The Trial Court's failure to award punitive damages against all Respondents;
5. The Trial Court's failure to award Appellant its attorneys' fees and costs against Unionamerica, Inc.

RELIEF SOUGHT ON APPEAL

Appellant seeks:

1. Reversal of that portion of the Judgment awarding Park City Reservations, Inc. any amount from Appellant, and judgment in Appellant's favor and against Park City Reservations, Inc., no cause of action; or
2. In the event that portion of the Judgment in favor of PCR is affirmed on this appeal, an award of compensatory damages against all Respondents, or any of them, in the amount of any such award in favor of Park City Reservations, Inc.; and
3. Remand of the case for the purpose of taking evidence to determine the amount of punitive damages to which Appellant is entitled from all Respondents; and
4. Remand of the case for the purpose of taking evidence to determine the amount of attorneys' fees and costs to which Appellant is entitled, including such attorneys fees and costs incurred with respect to prosecuting this appeal; or in lieu of the relief sought in paragraphs 1, 2, 3 and 4 above
5. Remand of the case for a new trial.

STATEMENT OF FACTS

The Transcript of Proceedings contained in the Record on Appeal will be referred to herein by the letter "T." followed by the number of the specific page or pages referred to. Exhibits will be referred to herein as "Ex." followed by the number of the specific exhibit or exhibits referred to. Two witnesses, whose testimony is pertinent to this appeal, Robert Volk and Jack W. Davis, testified at

trial by way of deposition which testimony by stipulation was not transcribed as part of the Transcript of Proceedings. Accordingly, their testimony will be cited as "Volk Dep." and "Davis Dep." respectively, followed by the page or pages referred to.

1. At all times pertinent hereto, Appellant was a Utah corporation in good standing having its principal place of business in Summit County, Utah and was owned by its sole shareholder Harold W. Taylor ("Taylor"), a plaintiff in the Trial Court but not a party to this appeal. Taylor was a real estate broker licensed by the State of Utah to conduct his business in the State of Utah, was the individual Utah licensed real estate broker acting for Appellant, and Appellant was a corporate real estate broker duly licensed by the State of Utah to conduct its business in the State of Utah. ¶¶ 1 and 2, Trial Court Findings; Ex. P-1, P-35, P-36, P-37 and P-38; T. 30, 31.

2. Respondent Unionamerica, Inc. and its wholly owned subsidiary Respondent Ramshire, Inc. were foreign corporations qualified to transact their businesses in the State of Utah, having their principal place of business in the State of Utah in Summit County. William R. Stevenson ("Stevenson") was a vice-president of Ramshire, Inc. and the authorized agent of Unionamerica, Inc. and Ramshire, Inc. ¶¶ 3, 4 and 6, Trial Court Findings. Unionamerica, Inc. and Ramshire, Inc. were one and the same entity for purposes of the subject lawsuit, which entity will be referred to herein as "Unionamerica." T. 33.

3. Respondent Park City Reservations, Inc. ("PCR") was a Utah Corporation having its principal place of business in Summit County, Utah and was owned by its sole shareholder Respondent Harry

Reed ("Reed"). ¶¶ 5 and 7, Trial Court Findings. PCR "doing business as Skyline Realty" was both a defendant and a counterclaimant in the Trial Court.

4. Reed was a real estate broker licensed by the State of Utah to conduct his business in the State of Utah. However, at all times pertinent hereto, Reed was a branch broker for a sole proprietorship owned by Ladd E. Christensen ("Christensen"), an individual, who did business under the assumed name of Skyline Realty and Investment Co. At all times pertinent hereto, Christensen was the broker for such sole proprietorship. Ex. P-45, P-46, P-47, P-48, P-49, P-50; T. 630, 631. Christensen has never been a party to the subject lawsuit, either in his own name or under any assumed name.

5. Christensen's company was a different company than PCR, and at trial Reed could not produce nor did he know of any document that would establish that Reed at any time was ever a broker for PCR, the defendant and Counterclaimant in the subject lawsuit. T. 624, 637.

6. No one, including Reed was ever a broker for PCR and at no time was PCR a corporate real estate broker licensed by the State of Utah to conduct its business in the State of Utah. Ex. P-34; T. 586.

7. In July of 1978, after the subject transaction had been completed, Reed as an individual doing business as Skyline Land Company became his own real estate broker and was no longer a licensed real estate salesman or broker/branch manager under Christensen. Ex. D-43, P-44, P-48, P-49, P-50, P-51; T. 633, 634.

8. When the original complaint was filed and served, Reed was named personally as a defendant doing business as Skyline Realty,

and PCR was not made a party to the action. Prior to the time any of the defendants had responded to the original Complaint, Stephen G. Crockett ("Crockett"), as counsel for PCR, Reed and Cole, telephonically advised counsel for Appellant that the name "Skyline Realty" was a "dba" for the corporation, PCR, rather than Reed, and Crockett then suggested that an Amended Complaint be filed and served prior to any defendants formally responding to the original Complaint. Thereafter, prior to the time any of the defendants formally responded to the original Complaint, and with the oral approval of counsel for all defendants, counsel for Appellant caused the Amended Complaint to be filed and served upon all defendants, including PCR, the new corporate defendant. The naming of PCR as a defendant was done in response to Crockett's direct representations to counsel for Appellant that PCR was the proper party in the case and was in fact the entity doing business under the assumed name "Skyline Realty." September 21, 1979 Affidavit of Kent B Linebaugh in Support of Plaintiff's Motion For Leave to File a Fourth Amended Complaint (the "September 21, 1979 Affidavit"); and ¶¶ 1, 2, 3, 4 and 5 of the September 3, 1980 Affidavit of Kent B Linebaugh in Support of Plaintiff's Motion for Order Amending Findings of Fact, Making Additional Findings of Fact, Amending Conclusions of Law, Adopting Additional Conclusions of Law and Amending Judgment or in the Alternative, Granting a New Trial (the "September 3, 1980 Affidavit").

9. On November 30, 1978, Reed stated under oath: "I entered into an agreement with Harold W. Taylor wherein we were to split the

commission on a 60-40 basis. My company was to receive the 60% . . .
." ¶ 3 of Affidavit of Harry F. Reed in Opposition to Motion for
partial Summary Judgment by Plaintiff.

10. On December 8, 1978, counsel for Appellant took the
deposition of Reed at which time Reed testified that Skyline Realty
was a company he formed with the actual name being Park City Reserva-
tions, Inc., and that the name Skyline was an assumed named for PCR.
In his deposition, Reed further testified that PCR was the only cor-
poration he had ever owned and that it was originally incorporated
under the name of Park City Reservations Inc. Reed further testified
that for purposes of the subject lawsuit, the parties were only to be
concerned with the corporation PCR doing business as Skyline, and that
since November of 1976 he had only been doing business in the corpo-
rate form of Park City Reservations, Inc. doing business as Skyline.
¶ 7 of the September 3, 1980 Affidavit; pp. 7-10 of Reed's deposition.

11. During the first week of January, 1980, during counsel
for Appellant's due diligence investigation of public records as part
of his preparation for the trial herein which began January 14, 1980,
said counsel first discovered PCR had not filed an assumed name certi-
ficate to conduct its business under the assumed name of Skyline
Realty, but that defendant Reed in his individual capacity had filed
an application to conduct his business under the assumed name of "Sky-
line Land Company." It was also at that same time that said counsel
first discovered that PCR had never been licensed as a corporate real
estate broker. Ex. P-34, P-51, P-52; ¶ 10 of the September 3, 1980
Affidavit.

12. By the time counsel for Appellant made the discoveries as recited in the next preceding paragraph, trial of the above captioned matter was scheduled for less than 30 days hence, and said counsel was accordingly prohibited by Rule 10 of the Supplemental Rules Adopted by the Third Judicial District to Rules of Practice in the District Courts of the State of Utah from moving to dismiss the claims of PCR on either the ground that PCR was not a licensed corporate real estate broker or on the ground that PCR had not made application for an assumed name certificate authorizing PCR to do business under the assumed name of Skyline Realty. Accordingly, counsel for Appellant explained to the Trial Court the reasons why such facts had not been presented to the Trial Court in advance of trial. Over Respondents' objections to the contrary, the Trial Court expressly held that counsel for Respondents were not surprised by Appellant's evidence that PCR was not in fact a licensed corporate real estate broker or that no assumed name certificate had been filed for PCR. ¶ 12 of the September 3, 1980 Affidavit; T. 640, 641.

13. At trial, according to Reed and based upon the representations of Reed's counsel, for purposes of the subject lawsuit: Reed's claims were really the claims of the corporation, PCR; PCR and Skyline Realty were one and the same corporation; and the names Skyline Realty, Skyline Realty and Investment Company, Skyline Realty, Inc., Skyline Realty and Park City Reservations, Inc. were all different names for the same corporate entity, PCR, which is the defendant and counterclaimant in the subject lawsuit. T. 428, 429, 607, 623, 624, 627, 628, 629.

14. Neither PCR, Reed and/or Cole ever filed an assumed name certificate with the Secretary of State of the State of Utah to do business under the assumed name of either Skyline Realty or Skyline Realty and Investment Company. Ex. P-52; T. 638.

15. No Respondent presented or proffered any evidence that any assumed name certificate had ever been filed on behalf of PCR to enable PCR to do business under any assumed name. T. 650, 651.

16. The first and only time that Respondents ever claimed that Appellant had waived any rights that Appellant had arising out of PCR's failure to be licensed as a corporate real estate broker and/or PCR's failure to file an assumed name certificate to do business under the assumed name of Skyline Realty, was after the Respondents had rested their cases and at the conclusion of the opening argument of Appellant's counsel. T. 650, 653.

17. At all times pertinent hereto, Respondent Gary Cole ("Cole") was a real estate salesman licensed by the State of Utah to conduct his business in the State of Utah under Christensen as his primary broker and under Reed as his broker/branch manager. Ex. P-46.

18. Prior to and on February 17, 1977, in the Summit County District Court, Taylor had pending against Unionamerica and others a lawsuit pursuant to which Taylor sought to recover damages for breach of contract and certain torts. One of the other defendants in that previous lawsuit was Greater Park City Corporation ("GPCC") whose President was Ray Johnson ("Johnson"). Neither GPCC nor Johnson is a Party to the subject lawsuit. On February 17, 1977, Taylor acting on behalf of Appellant, Stevenson acting on behalf of Unionamerica and

Johnson acting on behalf of GPCC, without the aid of counsel, negotiated, drafted, had typed, and signed an agreement settling the aforesaid lawsuit (the "Settlement Agreement"). Pursuant to the Settlement Agreement Unionamerica and GPCC severally agreed to enter into 5 year exclusive listing agreements with Appellant with respect to any Summit County real properties owned by either of them which real properties they wished to sell. ¶ 9, Trial Court Findings, Appendix C; Ex. P-2, Appendix E.

19. The Settlement Agreement required Appellant to perform the usual real estate broker activities incumbent upon a listing broker transacting its business in Summit County, and Appellant performed all services and discharged all obligations to be performed discharged by it pursuant to the Settlement Agreement. ¶ 2, Memorandum Decision, Appendix B; ¶ 1, Trial Court Conclusions, Appendix C.

20. The Settlement Agreement also required Unionamerica and GPCC to pay to Appellant a 6% commission on all of their respective Summit County real properties sold during the aforesaid 5 year period and at the same time required Appellant to split said 6% commission with a selling broker, with 60% of said commission going to such selling broker and 40% of such commission being retained by Appellant as the listing broker. ¶ 9, Trial Court Findings, Appendix C; Ex. P-2, Appendix E. Said provision in the Settlement Agreement requiring Appellant and any such selling brokers to split the 6% commissions will be referred to herein as the "60-40 Provision."

21. While the real estate brokers in Park City had not entered into any written multiple listing agreement, at all times pertinent hereto the real estate industry in such area, in custom and

practice, had a multiple listing arrangement which according to Reed was referred to as the "Park City Multiple," and which Reed characterized as a "casual multiple listing service." Reed personally participated in organizing the Park City Multiple and, according to Reed, pursuant thereto the participating brokers would exchange notices of listings weekly and split sales commissions with 60% of the commissions going to the selling brokers and 40% of the commissions going to the listing brokers. T. 433, 478-480, 486, 490, 491, 507-508.

22. Although the Park City Multiple was not in writing, Reed personally felt bound by its customs and practices. Reed and other Park City Brokers, including Appellant and Taylor, participated in the Park City Multiple, and both Reed and Appellant had exchanged notices of listings and had split commissions between them in 20-30 transactions over a period of several years. Ex. P-13, P-29; T. 441, 442, 479-491, 516.

23. According to Stevenson, at the time the 60-40 Provision was agreed to, Stevenson also knew how the Park City Multiple worked, including the fact that it was the custom and practice under the Park City Multiple for a selling broker and a listing broker to split the commissions on a 60%-40% basis. T. 283, 291, 292.

24. Also on February 17, 1977, shortly after entering into the Settlement Agreement that same day, and pursuant to the Settlement Agreement, Appellant and Unionamerica entered into a written vacant property exclusive listing (the "Listing") pursuant to which Listing Unionamerica listed for sale with Appellant as the listing broker approximately 10.5 acres of real property (the "Village Land") owned

by Unionamerica and located in Summit County. ¶ 10, Trial Court Findings, Appendix C; Ex. P-3, Appendix F.

25. Even though Unionamerica had entered into the Listing calling for a purchase price of \$1,685,000 for the Village Land, and Appellant began working on a sale at that price, Stevenson was not willing to have Unionamerica sell the Village Land at that price but didn't disclose such fact to Appellant. T. 382, 383.

26. Prior to the sale of the Village Land pursuant to the subject sale, Dempsey Construction Company ("Dempsey") through Appellant indicated a definite interest in purchasing the Village Land. Although Stevenson knew of Dempsey's interest and that Dempsey was soliciting a counteroffer from Unionamerica, Stevenson still did not properly respond to Dempsey's overtures as a result of which he was severely reprimanded by his boss at Unionamerica. Ex. P-3; T. 306, 310.

27. On February 26, 1979, PCR, Reed and Cole moved for partial summary judgment herein. Judge Bryant H. Croft denied said motion, but with respect to the legal effect of the Settlement Agreement and the Listing, Judge Croft held as follows:

The court finds that the Settlement Agreement and the Listing Agreement contemplate that other parties not involved in the lawsuit might find buyers for the listed properties and negotiate a sale therefor, and that neither agreement contains any express or implied provision that Unionamerica or Ramshire would direct any "walk in buyer" to plaintiffs. Such issues are thus now resolved for all future proceedings in this case.

Judge Croft's Order, Appendix A.

28. The Trial Court considered itself bound by Judge Croft's Order. ¶ 3, Memorandum Decision, Appendix B; ¶ 4, Trial Court Conclusions, Appendix C; T. 567.

29. For purposes of this case the parties stipulated that the term "walk-in" is understood to be a potential buyer who comes to the owner unsolicited and not referred to the owner by a licensed real estate agent, and the term will have that meaning when used herein. T. 201.

30. In custom and practice, upon Appellant and Unionamerica entering into both the Settlement Agreement and the Listing, all licensed brokers became eligible to become a selling broker with respect to the Village Land. T. 552, 556-558.

31. Although the Settlement Agreement required Unionamerica to enter into an "exclusive listing agreement" with Appellant, the Settlement Agreement did not specify the details of such listing. Pursuant to the custom and practice in the State of Utah, there are two types of exclusive listing agreements in use, which types are known as either an exclusive right to sell listing, or an exclusive agency listing. Pursuant to the same custom and practice under an exclusive right to sell listing, the owner cannot sell the property himself and avoid paying the agreed upon commission, while under the exclusive agency listing the owner can sell the property himself and avoid paying the agreed upon commission. T. 39, 40, 42, 126, 127, 172, 546-549.

32. Pursuant to the custom and practice in the State of Utah, and according to Reed, the Listing constituted what is known as an exclusive right to sell listing, and was in the standard exclusive

right to sell listing form generally in use in the State of Utah in general, and by Reed in particular, at all times pertinent hereto. Ex. P-3, Appendix E, P-33; T. 45, 439, 448, 548, 549.

33. Pursuant to the custom and practice in the State of Utah, and according to Reed, there is no inconsistency between the 60-40 Provision and an exclusive right to sell listing in the form of the Listing. Ex. P-2, Appendix D, P-3, Appendix E, P-33; T. 436, 553-555.

34. According to Stevenson there was nothing in the Settlement Agreement or the Listing intended to be inconsistent with granting Appellant an exclusive right to sell listing with respect to the Village Land, because:

a. Prior to signing the Settlement Agreement and the Listing, even though Unionamerica wanted to sell the Village Land, Stevenson hadn't wanted Unionamerica to list the Village Land with any broker because he wanted every licensed broker to be eligible to earn a full 6% commission, and he understood that once the Listing was given, Appellant would be the only broker eligible for the full amount of such commission, and the most a selling broker could earn would be 60% of such commission. T. 285, 286, 292, 328, 359.

b. Stevenson did not read the language in the listing which provides "I hereby grant you for the period of five years from date hereof the exclusive right to sell or exchange said property or any part thereof at the price and terms stated hereon or such other price or term to which I may agree in writing." until after the subject sale had been

consummated and a 6% commission had been earned, but Stevenson nevertheless intended that Unionamerica be bound by the Listing. T. 303, 304.

c. The 60-40 Provision was Stevenson's idea and he insisted on its inclusion in the Settlement Agreement, but the Settlement Agreement in general and the 60-40 Provision in particular are both silent on the subject of a walk-in, and nothing in the Settlement Agreement had anything to do with whether a walk-in would be referred. T. 291, 305.

d. Prior to the signing of the Settlement Agreement it was orally agreed between Appellant and GPCC, that GPCC would refer any GPCC walk-in to Appellant, but if another broker "originated" the sale, then the 60-40 Provision would require Appellant and such other broker to split a 6% commission. T. 202, 203, 210, 229.

e. Such oral agreement was reached at the time of the signing of the Settlement Agreement when GPCC had Summit County properties it had not decided to sell, and with respect to which it did not give a listing that day, while Unionamerica was listing substantially all of its Summit County property with Appellant on the date of the Settlement Agreement, and therefore Unionamerica was not a party to the oral agreement with respect to a walk-in because Stevenson understood that the Listing as given to Appellant that same day protected Appellant with respect to the subject of the Appellant-GPCC oral agreement. T. 295, 300, 380, 381.

35. Pursuant to the custom and practice in the State of Utah, the listing broker has an advantage over a potential selling broker with respect to any property about which they exchange notices of listing or split commissions. These advantages include:

a. The fact that the listing broker may put signs on the property with the listing broker's name, address and telephone number, while potential selling brokers are not permitted to put signs on any property listed with another broker.

b. Usually the listing broker has better access to the owner and the information helpful in making the sale because the owner has in fact selected the listing broker as his direct agent.

c. Under an exclusive right to sell listing the listing broker through the owner has access to any referrals from the owner. T. 176, 177.

36. Pursuant to the custom and practice in the State of Utah, certain advantages are inherent to both the listing broker and a selling broker in the use of an exclusive right to sell listing in conjunction with a multiple listing arrangement. Such advantages include:

a. The selling broker becomes an agent of the listing broker and a sub-agent of the owner, and through the listing broker a selling broker has access to the money or other consideration the owner receives when the sale is completed.

b. The listing broker gets paid for his promotional efforts, even though a selling broker consummates the sale.

c. The owner, as a result of the exclusive right to sell listing, is required to refer a walk-in to the listing broker.

d. The listing broker can control the transaction or be what is called "a captain of the deal." As such the listing broker is designated by the owner as the owner's representative in the transaction, who looks out for the owner's interest, monitors the conduct of all of the potential selling brokers, and usually reviews any earnest money agreement or offer which is presented, all in such a way that the potential selling brokers work through the listing broker.

T. 127, 128, 563, 564.

37. Pursuant to the custom and practice in the State of Utah, under an exclusive right to sell listing, if none of the potential selling brokers rises to the level of being the procuring cause of the sale in question, the listing broker is entitled to keep all of any commission earned. T. 561.

38. On May 15, 1978, a portion of the Village Land was conveyed by Unionamerica to Jack W. Davis, Inc., a corporation (the "Buyer") which corporation was wholly owned by its president Jack W. Davis ("Davis") and his family. As a result of such conveyance, there then became due and owing from Unionamerica to Appellant a sales commission of 6% of the \$1,600,000 purchase price or \$96,000 (the "Commission"). ¶ 26, Trial Court Findings, Appendix C; Davis Dep. 8, 36; see also the averments of ¶ 13 of the Fourth Amended Complaint which averments were admitted by Unionamerica.

39. Appellant performed all services and discharged all obligations to be performed and discharged by it pursuant to the Listing. ¶ 2, Memorandum Decision, Appendix B; ¶ 1, Trial Court Conclusions, Appendix C.

40. Before the Trial Court, Unionamerica and Stevenson conceded that Unionamerica rather than PCR had "found" the Buyer with respect to the subject sale. T. 14, 18.

41. Before the Trial Court, PCR, Reed and Cole conceded that PCR, Reed and Cole were involved in the transaction as representative of the Buyer rather than acting for Unionamerica, which concession was confirmed by Davis who testified that he wanted Reed to represent his interests in Park City. ¶ 22, Trial Court Findings, Appendix C; T. 22; Davis Dep. 51.

42. That PCR, Reed or Cole did not "find," "originate," "procure," or otherwise act as the agents of Appellant or sub-agents of Unionamerica with respect to the subject sale, is further confirmed by the following facts based upon the testimony of Stevenson, Reed, Cole, Davis (who was very antagonistic to Taylor. T. 259) and/or Robert Volk ("Volk"), the latter being the president and chief executive officer of Unionamerica, Inc., a lawyer and former Commissioner of Corporations of the State of California:

a. Sometime between September 1 and October 1, 1977 the first mention to the Buyer of the Village Land was made when Gordon Luce ("Luce"), a member of the board of directors of Unionamerica, Inc., first told Davis about the Village Land and its availability for purchase. Such mention was made during a face to face meeting between Luce and Davis at Late

Tahoe, California, at which time Luce was well acquainted with Davis and already knew of Davis' credit worthiness because Luce managed a bank in San Diego, California, in which area Davis resided, and which bank financed some of Davis' business ventures. T. 88; Volk Dep. 18, 24; Davis Dep. 14.

b. Sometime between September 1 and October 1, 1977, Volk spoke with Davis by telephone at which time Davis told Volk he was interested in purchasing the Village Land. ¶ 13, Trial Court Findings, Appendix C; Volk Dep. 19, 21; Davis Dep. 15.

c. Approximately two weeks prior to October 3, 1977, Stevenson learned from Volk about Davis' interest in the Village Land, but at that time Stevenson did not know Davis by name. ¶ 14, Trial Court Findings, Appendix C; T. 321; Volk Dep. 20, 21.

d. Sometime during that same period, Unionamerica sent Davis a feasibility study with respect to the future development and anticipated economic returns on the Village Land (the "Feasibility Study"), which Feasibility Study disclosed Unionamerica's asking price for the Village Land of \$1,600,000. Ex. P-5; Davis Dep. 18, 19.

e. Shortly before October 3, 1977, Volk and Davis agreed by telephone to meet in Park City to inspect the Village Land and discuss the Buyer's purchase thereof. Volk Dep. 19, 22; Davis Dep. 15.

f. On the morning of October 3, 1977 Volk ordered Stevenson to travel from Los Angeles, California to meet with Volk and Davis and Davis' wife in Park City to discuss the subject sale and show Davis the Village Land. ¶ 14, Trial Court Findings, Appendix C; T. 323.

g. Thereafter that same morning, Stevenson called the offices of Appellant and asked for Taylor, whereupon he was told by Appellant's personnel that Taylor was in San Francisco, California and would not be back until later in the week. During that same telephone conversation, Stevenson was asked whether he would like to be put in touch with Taylor in San Francisco, but Stevenson declined such accommodation. At the time of that same telephone conversation, Appellant had four licensed real estate salesmen in Park City, but during such telephone conversation Stevenson did not ask to speak with any such salesmen about selling the Village Land even though he was personally acquainted with one of them. T. 180, 187, 190-193, 324, 325.

h. On the evening of October 3, 1977, Volk and Stevenson met at the Salt Lake City Airport whereupon Volk told Stevenson that Volk had to go to Los Angeles and that Stevenson should go ahead and meet with Davis and Davis' wife as planned. ¶ 15, Trial Court Findings, Appendix C; T. 325, 326; Volk Dep. 22.

i. At the time Volk left Stevenson in Salt Lake City that evening, Stevenson knew that the involvement of a selling broker other than Appellant in a sale of the Village

Land would obligate Appellant to split the Commission with such selling broker. Notwithstanding that fact, at no time after the morning of October 3, 1977 and prior to the execution on October 17, 1977 of the subject Earnest Money Receipt and Offer to Purchase (the "Earnest Money Agreement"), did Stevenson attempt to involve Appellant in the sale of the Village Land to the Buyer. T. 328-333.

j. Prior to February 17, 1977 Unionamerica had listed certain of its real properties for sale with Reed as the listing broker, and prior to February 17, 1977 and at all times pertinent hereto Stevenson, Reed and Cole were close personal friends. T. 280, 281, 429.

k. At all times pertinent hereto, PCR, Reed and Cole did not know the terms of the Settlement Agreement and the Listing, but did know that Appellant and Unionamerica had been in a lawsuit and as a result of that lawsuit Unionamerica had listed the Village Land for sale with Appellant. ¶ 12, Trial Court Findings, Appendix C; T. 320, 340, 453.

l. At the time Reed knew the Village Land had been listed to Appellant, the standard form in use in Park City was in the same form as the Listing, and at that same time Cole did not know of any form of listing other than the standard form listing granting an exclusive right to sell. T. 394-397, 439, 448.

m. Shortly after Appellant entered into the Settlement Agreement and the Listing, and several months prior to October 3, 1977, Taylor contacted Reed and requested the

assistance of Reed in selling the Village Land with the understanding that should PCR be the selling broker, PCR would be entitled to receive 60% of the Commission and 40% of the Commission would be retained by Appellant as the listing broker. ¶ 12, Trial Court Findings, Appendix C.

n. As soon as Volk left Stevenson at the conclusion of their airport meeting the evening of October 3, 1977, Stevenson took the lead in the anticipated transaction, and in spite of Cole's inexperience in real estate, he called Cole by telephone and arranged a face to face meeting with Reed and Cole at Cole's home that same evening. Stevenson then traveled to Park City where he met with Reed and Cole at Cole's home, which meeting lasted from 10 to 15 minutes and during which meeting Stevenson told Reed and Cole the reason that he was in town was to meet with Davis concerning Davis' interest in purchasing the Village Land. During that same conversation, Stevenson told Reed and Cole that he had tried to reach Taylor with respect to the transaction, but Taylor was out of town. ¶ 18, Trial Court Findings, Appendix C; T. 326, 327, 339, 340, 370, 393, 398, 452, 453; Volk Dep. 37, 38.

o. At no time after Reed and Cole learned of the prospective sale to the Buyer and that Taylor was out of town, did Cole attempt to contact Taylor or any other personnel of Appellant, nor did Reed or Cole attempt to otherwise ascertain the details of the provisions of the Settlement Agreement or the Listing. T. 398-402, 409, 410.

p. Later that night of October 3, 1977, Stevenson met with Davis in Park City for 2 to 3 hours and the two of them discussed Park City in general and the Village Land and the Feasibility Study in particular. Thereafter that same night, Stevenson arranged to have Reed and Cole meet with Stevenson and Davis and Davis' wife the following morning for breakfast. ¶ 16, Trial Court Findings, Appendix C; T. 341, 372.

q. On October 4, 1977, such breakfast meeting occurred and was the first time Reed or Cole or any other agent or employee of PCR had met or had any involvement with Davis or the Buyer. Prior to this first involvement between Reed, Cole and Davis, Davis had already read the Feasibility Study. At such breakfast meeting, there was a general discussion about the merits of Park City and Davis' interest in the Village Land. ¶ 19, Trial Court Findings, Appendix C; T. 402, 458; Davis Dep. 25-30.

r. After such breakfast meeting, Davis, Davis' wife, Stevenson, Reed and Cole toured Park City together and ended the tour by viewing the Village Land on the afternoon of October 4, 1977, having further discussed the merits of Park City and the Village land. ¶ 19, Trial Court Findings, Appendix C; Davis Dep. 30-32.

s. Later that same afternoon, after Reed and Cole had left the group, Davis indicated to Stevenson the Buyer's definite interest in purchasing the Village Land. The sale to the Buyer was virtually made by then because by that time Davis was committed to purchasing the property and so far as

he was concerned it was an easy sale to make. T. 343; Davis Dep. 74, 75.

t. A few days after October 4, 1977, Davis called Volk on the telephone and orally agreed to the Buyer purchasing the Village Land at Unionamerica's asking price, and Volk felt good about the Buyer's ability to purchase because of Luce's recommendation of Davis. After such telephone conversation, Volk ordered Stevenson to follow through to make sure that the sale of the Village Land to the Buyer was consummated. According to Volk, Volk "solicited Jack Davis into this company, by reason of my conversations with Gordon Luce." Volk Dep. 23-26, 35.

u. On October 8, 1977, Cole wrote and mailed a letter to Appellant purportedly to put Appellant on notice that Cole, representing PCR, had shown the Village Land to Davis and Davis' wife, which letter was received by Appellant within a few days after October 8, 1977. Nothing in this letter disclosed to Appellant that Davis had been directed to PCR by Appellant's principal, Unionamerica. Ex. P-26; T. 66, 79, 403, 404.

v. On October 15, 1977, Reed sought out Taylor in Park City and told Taylor that Reed had a buyer interested in purchasing the Village Land. Reed asked Taylor to orally confirm that there would be a 60%-40% split of the Commission if such a sale occurred, and Taylor gave such confirmation. In spite of the fact that Taylor and Reed were both licensed

real estate brokers at the time, at no time during this October 15 meeting did Reed tell Taylor that Davis and the Buyer had been referred to Cole, Reed and PCR by Appellant's principal, Unionamerica. ¶ 23, Trial Court Findings, Appendix C; T. 81, 88, 462, 464.

w. On the morning of October 17, 1977, Reed and Cole met with Davis in San Diego, California at Davis' telephonic invitation and the three of them drafted the Earnest Money Agreement. Ex. P-9, D-27; Davis Dep. 33, 45, 46.

x. That same morning, after drafting the Earnest Money Agreement, Reed called Stevenson in Los Angeles, California and after 5 minutes conversation Stevenson told Reed that Unionamerica would accept the Earnest Money Agreement as drafted. This was the first time Stevenson and Unionamerica had considered a sale of the Village Land pursuant to provisions similar to the provisions of the Earnest Money Agreement. T. 88, 332, 333, 345.

y. That same morning Davis signed the Earnest Money Agreement on behalf of the Buyer and the Buyer paid the earnest money deposit required, whereupon Reed and Cole flew the Earnest Money Agreement to Los Angeles where Stevenson signed the Earnest Money Agreement on behalf of Unionamerica on the afternoon of October 17, 1977. ¶ 21, Trial Court Findings, Appendix C; Ex. P-9, D-27; T. 346, 347, 466.

z. On October 19, 1977, Reed personally delivered the fully executed Earnest Money Agreement to Taylor in Park City, whereupon Taylor asked Reed where PCR had found the

Buyer. According to Reed, he then did a "dumb" and "ridiculous" thing, by intentionally misleading Taylor by stating: implying that the Buyer had been found as a result of skill in Park City. Such statement or implication was not true. Ex. P-17; T. 87, 98, 110, 463, 468-470.

aa. On October 19 or 20, 1977 Reed told Cole that Reed had intentionally misled Taylor about where Cole had found the Buyer, but Cole did not take any action to tell Taylor that the true source of the Buyer was Appellant's principal Unionamerica. T. 415, 417.

bb. Just prior to October 24, 1977, Stevenson, Davis, Reed and Cole met in Salt Lake City to work out the details of a written real estate agreement pursuant to which Unionamerica would sell the Village Land to the Buyer. Davis De: 47, 48.

cc. On October 24, 1977 Appellant notified all Respondents of Appellant's contention that Appellant was entitled to 100% of the Commission based upon Appellant's position that the Buyer had been referred by Unionamerica to Reed, Cole and PCR. Ex. P-10; T. 90.

43. As of October 26, 1977, Unionamerica and the Buyer entered into a written real estate agreement (the "Real Estate Agreement") pursuant to which the Village Land was sold to the Buyer on 15, 1978 as aforesaid. Ex. P-12; T. 376; see also the averments of 13 of the Fourth Amended Complaint, which averments were admitted by Unionamerica.

44. Prior to June 10, 1977, Both Reed and Cole were involved in the preparation of the Feasibility Study and were aware of the future development and marketing possibilities of the Village Land over three months prior to meeting Davis. Ex. P-5; T. 317-319.

45. Not only were Reed and Cole brought into the subject transaction to represent the interests of Davis and the Buyer, but such representation continued to the date of trial inasmuch as at that time: Reed was Davis' broker with respect to marketing the 144 condominium units that had been or were in the process of being constructed on the Village Land; Reed and Cole were each given 5% of the profit from the development and sale of such condominiums; and Cole became an employee of the limited partnership which developed and was marketing such condominiums, and acted as a salesman of such condominiums. ¶ 25, Trial Court Findings, Appendix C; Ex. P-24; Davis Dep. 61-65.

46. At the time Reed first met Davis, Reed wanted Davis for a client regardless of whether PCR earned a selling broker's commission based upon the sale of the Village Land to the Buyer, and Reed eventually got Davis as a client for Davis' future transactions in Park City. T. 456, 618.

47. At all times pertinent hereto Appellant consistently took the position that Unionamerica owed Appellant 100% of the Commission. Ex. P-10, P-14; T. 90, 100-103, 473, 612.

48. Prior to the suit being instituted, Unionamerica conceded that its failure to pay 100% of the Commission to Appellant would constitute a breach of the Listing. Ex. P-13.

49. Unionamerica, Stevenson, PCR and Reed consistently conceded that Appellant was entitled to at least 40% of the Commission,

and at no time prior to suit being instituted herein did any Respondent ever contend that Appellant was not entitled to at least 40% of the Commission. Ex. P-12, P-13, P-17, P-32; T. 94, 104, 110, 350, 351, 419, 583, 584.

50. Notwithstanding the foregoing concessions, upon the Commission being earned and in response to Unionamerica's inquiry, Reed refused to agree to Unionamerica paying even 40% of the Commission to Appellant because in Reed's words, "that wouldn't be very smart," because Appellant would "have nothing he could gain by ever settling" T. 477, 478.

51. The Earnest Money Agreement provides at lines 49 and 50 as follows:

The seller agrees in consideration of the efforts of the agent in procuring a purchaser to pay said agent a commission of 6% of the sale price. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

¶ 20, Trial Court Findings, Appendix C; Ex. P-9, D-27.

52. Notwithstanding the foregoing provisions and Appellant's demands to the contrary, upon the Commission being earned counsel for Unionamerica insisted on Unionamerica not paying any of the Commission directly to Appellant, and Unionamerica took such position in spite of the custom and practice in the State of Utah that a split of any Commission does not involve the owner but is solely an issue between the listing broker and the selling broker. T. 418, 570, 571.

53. On May 17, 1978 Unionamerica deposited the Commission in escrow with Summit County Title Company (the "Escrow Holder"). ¶ 26, Trial Court Findings, Appendix C.

54. The Listing required Unionamerica to pay to Appellant reasonable attorneys' fees and all costs of collection as a result of Unionamerica's failure to pay the Commission to Appellant, and Appellant incurred reasonable attorneys' fees and costs of collection in an amount not determined by the Trial Court. ¶ 1, Judgment, Appendix D; Ex P-3.

55. On June 23, 1978, Unionamerica without the assistance of a real estate broker sold certain of its real property located in Summit County (the "Davis Property") to Davis for a total purchase price of \$42,500, and pursuant to the Settlement Agreement on that date there became due and owing to Appellant from Unionamerica a sales commission of 6% of said purchase price or \$2,550. ¶ 5, Memorandum Decision, Appendix B; ¶ 29, Trial Court Findings, Appendix C; ¶ 7, Trial Court Conclusions, Appendix C.

56. Unionamerica failed to notify Appellant of its intention to sell the Davis Property and failed to enter into an exclusive listing agreement with Appellant as contemplated by the Settlement Agreement. ¶ 5, Memorandum Decision; Ex. P-16; T. 112, 113.

57. Pursuant to the provisions of the Settlement Agreement and the contemplated written exclusive listing agreement with respect to the Davis Property, Appellant is entitled to recover from Unionamerica Appellant's reasonable attorneys' fees and costs of collection incurred with respect to collecting the \$2,550 due and owing to Appellant, but the reasonable amount of said attorneys' fees and costs of collection were not determined by the Trial Court. ¶ 5, Memorandum Decision, Appendix B; ¶ 1, Judgment, Appendix D; Ex. P-2, Appendix E, P-3, Appendix F.

58. Volk never saw either the Settlement Agreement or the Listing prior to the time his deposition was taken on November 8, 1979, which was nearly three years after such written instruments had been entered into, and nearly a year and one-half after the subject lawsuit had been started. Until after the lawsuit was started, Volk didn't even know such agreements existed, except he did have a vague understanding that the previous lawsuit had been settled. When Volk found out that Taylor was making some claim based upon such agreements, he was shocked. Volk Dep. 9, 10, 28-30.

59. Notwithstanding the fact that Volk knew nothing about the Settlement Agreement and the Listing until after the suit was started, and notwithstanding the fact that Volk never even looked at the language of the Settlement Agreement or the Listing until nearly a year and one-half after the suit was started, when told by Stevenson that the suit had been started, Volk's reaction was "well to hell with Mr. Taylor," or words to that effect. Volk Dep. 32, 33.

60. The Trial Court refused to admit into evidence the the spring 1979 issue of Volume 3 of "Utah Real Estate News," the official publication of the Real Estate Division of the Department of Business Regulations of the State of Utah, which issue in an article entitled "Listing and Selling Brokers' Relationship" on page 2 thereof (the "Real Estate Division Article") according to the director of the Real Estate Division described Utah real estate industry customs and practices as to the rights and duties between listing and selling brokers and which description had been approved by the state's Board of Real Estate Examiners. The customs and practices described in the Real

Estate Division Article were in effect at all times pertinent to this lawsuit. Ex. P-30; T. 520-529.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN AWARDING PCR A SELLING BROKER'S COMMISSION.

A. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT PCR WAS THE PROCURING CAUSE OF THE SUBJECT SALE.

1. The Trial Court's determination.

The Memorandum Decision is silent with respect to any specific finding or conclusion on the issue of whether PCR was the procuring cause of the subject sale. However, at ¶ 27, Trial Court Findings, Appendix C, it is said that PCR "by and through its agents, Reed and Cole, fully performed the obligations of a selling broker under the fee splitting agreement reached between plaintiffs" and PCR. That is as close as the Trial Court came to revealing any criteria by which PCR's sales efforts were measured. On the other hand, Judge Croft's Order held that a person or entity other than Appellant or Union-america would be entitled to a split of the Commission if such other person or entity were to both "find" and "negotiate" a sale of the property. Judge Croft's Order further held that it was to be the law of the case on such issue. See Judge Croft's Order, Appendix A.

2. The law and its application to the uncontroverted facts.

Appellant contends that the evidence in the record precludes all reasonable basis in fact which can reasonably support the Trial Court's decision.

An understanding of the type of listing given Appellant, its use in conjunction with a multiple listing arrangement and the resulting relationships between Appellant, Unionamerica and PCR, is important to our discussion of whether PCR was the procuring cause of the subject sale.

Pursuant to the Listing, Unionamerica agreed as follows:

In consideration of your agreement to list the property described above, and to use reasonable efforts to find a purchaser therefor, I hereby grant you for the period of five years from date hereof the exclusive right to sell or exchange said property or any part thereof

If said property or any part thereof is sold or exchanged during said term by myself or any other person, firm or corporation, I agree to pay you a commission (emphasis added)

It is elementary that the Listing is of a type known as an "exclusive right to sell listing." See ¶¶ 31 - 34, Statement of Facts; 88 A.L.R.2d 936 § 10; 12 Am. Jur.2d Brokers §§ 226, 227; Folz v. Begnoche, 222 Ka. 383, 565 P.2d 592 (1977); Carlsen v. Zane, 67 Cal. Rptr. 747 (1968); Patterson v. Blair, 123 Utah 216, 257 P.2d 941 (1953). Although Appellant agreed to allow other brokers to participate and share in the Commission, this did not in any way abrogate the exclusive right to sell granted by the Listing. Rather, the 60-40 Provision was dependent upon and could become operative only through the Listing as such other brokers became agents of Appellant and sub-agents of Unionamerica. By guaranteeing to Appellant as the listing broker a portion of the Commission, Appellant was protected as to the portion of the Commission corresponding to the effort necessary to obtain the Listing and perform the duties of a listing broker. The remaining effort required to accomplish the purpose of the Settlement

Agreement and the Listing, that being the procurement of a buyer, was to be compensated by that portion of the Commission reserved for a selling broker, and all licensed brokers could compete for such portion. Pursuant to the Settlement Agreement and the Listing, and the custom and practice in the real estate industry, if Appellant or Unionamerica procured the sale, then Appellant would be entitled to retain all of the Commission. See White v. Ragel, 82 N.M. 644, 485 P.2d 978 (1971); Carlsen v. Zane, 67 Cal. Rptr. 747 (1968).

Because of the "exclusive" nature of the Listing, to earn the 60% portion of the Commission, it is well settled that PCR had to act as an agent of Appellant and as a sub-agent of Unionamerica. See 45 A.L.R.3d 190; Frisell v. Newman, 71 Wa.2d 520, 429 P.2d 864 (1967); 71 A.L.R.3d 586 § 21 et. seq.

An excellent discussion of this same proposition and the duties and obligations of listing and selling brokers with respect to each other may be found in the Real Estate Division Article as published and approved by the Utah Board of Real Estate Examiners as follows:

The selling broker, as the sub-agent of the listing broker, is an agent of two principals - the listing broker, who is his immediate principal, and the listing broker's principal. As a sub-agent, the selling broker owes an agent's duty to both of his principals, and that duty is one of utmost loyalty. This duty requires the selling broker to exercise good faith, professional skill, and diligence pursuant to the listing broker's instructions as each fulfills his respective obligations to their mutual principal. This duty further requires the selling broker to disclose immediately to the listing broker all material and pertinent facts which concern transactions on behalf of their principal. This duty does not terminate upon the execution of a contract, but continues until the termination of the sub-agency.

The selling broker's failure to discharge this duty to his principals would be a breach of the fiduciary relationship, which in turn would subject him to liability for any harm which befalls the listing broker or the principal by reason of the breach. Since the listing broker is the only party with full knowledge of the seller's instructions and the seller's needs, it is imperative that the selling broker follow the instructions of the listing broker at all times, and to immediately inform the listing broker of all material and pertinent facts which concern the transaction.

Generally, it is assumed that the agreement between listing broker (principal) and selling broker (agent), subject to any agreement to the contrary, requires the listing broker to pay the selling broker, in the event the selling broker is the procuring cause to a sale, provided the sale is consummated and/or a commission is paid to the listing broker. Any claim for an earned commission by the selling broker should be made against the listing broker.

Page 2, Ex. P-30, which exhibit the Trial Court did not admit into evidence.

As the foregoing makes clear, whether PCR is entitled to collect a portion of the Commission from Appellant depends on whether PCR was the procuring cause of the sale to the Buyer. To make that decision we are concerned with how procuring cause is determined. A survey of the various jurisdictions, including Utah, reveals four different tests utilized by the courts to determine what constitutes procuring cause:

a. Finding the Purchaser.

Our Supreme Court in Frederick May v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962), in the process of holding that the broker had the exclusive right to sell listing with respect to the sale of corporate stock, held that entitlement to a brokerage commission depended on

whether the broker was the "procuring cause" of the sale. It was there said:

The cases use many different words in conjunction with, or in place of, the words, "procuring cause" to indicate the necessary extent the broker must induce the sale in order to be entitled to a commission, such as "proximate cause," "actuating cause," "moving cause" and the like; all meaning about the same thing. However, the extent to which the broker's efforts must induce the sale depends on the terms used in the contract and the understanding and intention of the parties in making such agreement and the facts and circumstances of the case. Usually, whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining whether the buyer [sic] is the procuring cause of the sale. (emphasis added)

Other courts have used synonymous language in applying or describing this test, to-wit:

"procuring cause" refers to efforts of a realtor in introducing, producing, finding or interesting a purchaser (emphasis added) Harkey v. Gahagan, 338 So.2d 133, La. App.2d Cir. (1976).

To be the "procuring cause" of a sale of real estate, the broker must show that he called the potential purchaser's attention to the property Dixon v. Kattel, 331 So.2d 827, Fla. App. (1975).

. . . where the sale is traced to his introduction of purchaser to owner or principal. Wilson v. Sewell, 50 N.M. 121, 171 P.2d 647 (1946).

. . . where broker brings parties together
. Jones v. Torrance, 141 S.W.2d 1007, Tex. Civ. App. (1940).

. . . the original discovery of the purchaser . . .
. . . Ware v. DosPassos, 38 N.Y.S. 673 (1896).

b. Initiation of Negotiations.

Most courts require that at the very least the broker claiming a commission must have initiated the negotiations which

result in the sale generating the commission. See for example She
v. Tapley, ___ Ok. ___, 329 P.2d 672 (1958); and Dixon v. Kattel,
supra.

c. But for Causation.

Some courts have applied the traditional negligence test respect to causation in determining whether a broker has been the procuring cause of a sale. That is, can it be said that "but for" efforts of the broker, there would have been no sale to the eventual purchaser. See for example Kadane v. Clark, 134 S.W.2d 448, Tex. App. (1939); J-B Motors v. Margolis, 75 Ariz. 392, 257 P.2d 588 (1953); Corbitt v. Robinson, 53 So.2d 259, La. App. (1951); and Ma shall v. White, 245 F. Supp. 514 (D.C.N.C. 1965).

d. Efficient Cause.

Several courts have equated procuring cause with what is described as the efficient cause of the sale. In practical application there appears to be no difference between the conduct required by this test and any of the other tests mentioned. See for example Hayden v. Ashley, 86 Wa. 653, 150 P. 1147 (1915); and Neumeier v. Spurzel, 223 Minn. 60, 25 N.W.2d 651 (1946).

In summary, a reading of the authorities makes it clear that a licensed selling broker claiming a real estate commission must, at a minimum, either find the buyer or initiate negotiations which lead to the sale generating the commission. According to Judge Croft's Opinion, such broker must both "find" and "negotiate." With respect to the instant case the question then becomes did PCR find the buyer and/or commence negotiations to thus rise to the level of being the procuring cause of the subject sale. A detailed examination of the facts in

record clearly indicates that PCR was not the procuring cause of the subject sale regardless of which test is applied. PCR's involvement was after the fact, tangential and relatively superficial, and it cannot be seriously questioned that such belated involvement was the result of Stevenson's effort to reward his personal friends, Reed and Cole. The chronology of the events as set forth in the table below demonstrates that the involvement of PCR was relatively insignificant:

<u>Event</u>	<u>Involvement of Unionamerica (Luce, Volk & Stevenson)</u>	<u>Involvement of PC (Reed and Cole)</u>
1. September, 1977. Initial contact between Unionamerica and the Buyer with respect to the Village Land.	Initial contact made between Luce, a member of the Board of Directors of Unionamerica, Inc., and Davis, the principal owner of the Buyer. ¶ 42 a, Statement of Facts.	Not present and not involved.
2. September, 1977. Initial contact between Volk, the president of Unionamerica, Inc., and Davis.	Luce, as a "mutual acquaintance" of both Volk and Luce brought them together by telephone. ¶ 42 a, b, Statement of Facts.	Not present and not involved.
3. September, 1977. Second contact between Unionamerica and the Buyer.	Consists of 1 or 2 telephone conversations between Volk and Davis during which Davis declares his interest in purchasing the Village Land. ¶ 42 b, e, Statement of Facts.	Not present and not involved.
4. September, 1977. Prequalification of credit worthiness of the Buyer.	Luce was well acquainted with Davis' credit worthiness because Luce managed a financial institution which had historically financed Davis' enterprises, and Volk was comfortable with the Buyer because of Luce's recommendation. ¶ 42 a, Statement of Facts.	Not present and not involved.

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|--|---|--------------------------------------|
| <p>5. September or prior to October 3, 1977. Initial furnishing of written materials to the Buyer extolling the virtues of the Village Land.</p> | <p>The Feasibility Study, containing a detailed analysis of the potential uses and value of the Village land, which value was stated to be the eventual selling price of \$1,600,000, was sent by Unionamerica and received by Davis. ¶ 42 d, Statement of Facts.</p> | <p>Not present and involved.</p> |
| <p>6. September or prior to October 3, 1977. Agreement to have representatives of Unionamerica and the Buyer meet to discuss the sales transaction and physically inspect the Village Land.</p> | <p>Volk and Davis telephonically agreed to meet in Park City, Utah which meeting would require the participants therein to come to Park City from out of State. ¶ 42 e, Statement of Facts</p> | <p>Not present and involved.</p> |
| <p>7. October 3, 1977. More pronounced interest in acquiring the Village Land as Davis and his wife travel from San Diego, California to meet with representatives of Unionamerica to discuss the subject transaction and physically inspect the Village Land.</p> | <p>Both Volk and Stevenson travel to Salt Lake City, but only Stevenson travels to Park City to meet with Davis and his wife. ¶ 42 h, Statement of Facts.</p> | <p>Not present and involved.</p> |
| <p>8. October 3, 1977. Initial meeting in Park City between representatives of Unionamerica and the Buyer.</p> | <p>Stevenson spends 2 to 3 hours discussing the subject transaction with Davis including discussing the merits of Park City in general, and the Feasibility Study and the uses of the Village Land in particular. ¶ 42 p, Statement of Facts.</p> | <p>Not present and not involved.</p> |
| <p>9. Sometime Prior to October 4, 1977. Davis read the Feasibility Study. ¶ 42 q, Statement of Facts.</p> | <p>Not present and not involved.</p> | <p>Not present and involved.</p> |

10. Morning of October 4, 1977. Breakfast meeting in Park City between representatives of Unionamerica, the Buyer and PCR.

Stevenson, who had authority to sell, negotiate terms, price etc. was present representing Unionamerica. ¶ 42 p, q, Statement of Facts.

Both Reed and Cole were present and that was their first involvement. According to Reed, Davis already knew a lot about the Village Land. ¶ 42, p, q, Statement of Facts.

11. October 4, 1977. Representatives of Unionamerica, the Buyer and PCR tour Park City and physically inspect the Village Land.

Stevenson present the entire time. ¶ 42 r, Statement of Facts.

Reed and Cole present the entire time. ¶ 42 4, Statement of Facts.

12. Later afternoon of October 4, 1977. Meeting between representative of Unionamerica and the Buyer following the physical inspection of the Village Land.

Stevenson and Davis discussed the subject transaction alone, at which time Davis indicated his definite interest in acquiring the property because by this time he was committed to such acquisition and as to him it was a very easy sale to make. ¶ 42 s, Statement of Facts.

Not present and not involved.

13. Sometime between October 4, and October 17, 1977. Oral confirmation to Unionamerica by the Buyer of the Buyer's desire to purchase the Village Land.

Davis telephonically advised Volk that he wished to purchase the Village Land at Unionamerica's asking price of \$1,600,000, leading Volk to later say that Volk "solicited Davis into this company." ¶ 42 t, Statement of Facts.

Not present and not involved.

14. Between October 8, and October 17, 1977. Representatives of PCR and the Buyer arrange to meet in San Diego.

Not present and not involved.

Reed, Cole and Davis telephonically arrange the meeting ¶ 42 w, Statement of Facts.

15. Morning of October 17, 1977. Drafting and the Buyer's signing of the Earnest Money Agreement.

Stevenson telephonically discussed with Reed for 5 minutes the details of the Earnest Money Agreement. ¶ 42 x, Statement of Facts.

Reed, Cole and Davis drafted the Earnest Money Agreement. ¶ 42 x, Statement of Facts.

16. Afternoon of October 17, 1977. Signing of the Earnest Money Agreement by Union-America.

Stevenson signed the Earnest Money Agreement on behalf of Unionamerica. ¶ 42 y, Statement of Facts.

Reed and Cole carried the Earnest Money Agreement from San Diego to Los Angeles and presented same to Stevenson. ¶ 42 y, Statement of Facts.

17. On or about October 22 through October 24, 1977. Representatives of Unionamerica, the Buyer and PCR meeting in Salt Lake City to prepare the Real Estate Agreement, which Unionamerica and the Buyer execute on October 24, 1977.

Stevenson represented and signed the Real Estate Agreement on behalf of Unionamerica. ¶ 43, Statement of Facts.

Reed and Cole were involved through ¶¶ 42 bb, 43, Statement of Facts.

Of the 17 chronological events listed in the foregoing table, note that PCR was involved on only 6 occasions, and on only 1 of those occasions was PCR involved without Unionamerica also being involved. Note also that any such involvement on the part of PCR came very late in the history of the transaction, AFTER Unionamerica had both found and initiated substantial negotiations. It is also telling that even after Cole and Reed first became involved with the Buyer on the morning of October 4, 1977, Davis didn't tell them he intended to buy the property until after he had told Stevenson he wanted to buy and told Volk that he would buy at Unionamerica's asking price.

Since Judge Croft's Order listed the appropriate tests for determining procuring cause in terms of the conjunctive "find" and "negotiate;" and since Judge Croft's Order with respect to those tests is consistent with the authorities cited herein; and since Judge Croft's Order expressly stated that it was the law of the case; and since the Trial Court considered itself bound and expressly decided that

follow Judge Croft's Order; and in light of Unionamerica's admission that Unionamerica found the Buyer, which admission is entirely consistent with the facts as recited above; and in light of PCR's admission that PCR was involved in the transaction to represent the interests of the Buyer, which admission is entirely consistent with the facts as recited above; we submit there is no evidence in the record to support the Trial Court's determination that PCR was the procuring cause of the subject sale.

B. PCR WAS NOT A LICENSED BROKER, THEREFORE LACKED CAPACITY TO SUE, AND THEREFORE PCR'S COUNTERCLAIM SHOULD HAVE BEEN DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

1. The Trial Court's determination.

The Trial Court's determination on the issue of whether PCR was a licensed real estate broker is most broadly stated in ¶ 5, Trial Court Findings, which reads as follows:

Defendant PCR, Inc. dba Skyline Realty (Skyline) is a Utah corporation having its principal place of business in Summit County and was a licensed real estate broker at all times material to the issues of this case. (emphasis added)

The Trial Court made two other related specific determinations. At ¶ 28, Trial Court Findings it provides:

The court finds that any defense as to the lack of capacity by the defendant Park City Reservations, Inc. to maintain this action should have been pleaded in plaintiffs' answer to the counterclaim asserted by Park City Reservations, Inc., or, at the very least, prior to trial. Although the plaintiffs had knowledge of the facts upon which they based the defense as to lack of capacity, such defense was not raised until trial was almost complete.

At ¶ 10, Trial Court Conclusions, the Trial Court held:

By virtue of plaintiffs' failure to timely raise the defense of lack of capacity to maintain this action, the court finds that any such defense was waived by the plaintiffs. The court further finds that any such defense must fail because at all times pertinent to this action the defendant Harry F. Reed was a broker licensed by the State of Utah and was operating on behalf of Park City Reservations, Inc. dba Skyline Realty.

There is nothing in the Memorandum Decision on the subject of ¶ 28, Trial Court Findings or ¶ 10, Trial Court Conclusions.

2. The uncontroverted facts establishing that PCR was unlicensed.

It is Appellant's contention that the evidence in the record precludes all reasonable basis in fact which can reasonably support the Trial Court's finding that PCR was a licensed real estate broker. Such contention is supported by ¶¶ 4 - 7, Statement of Facts, which indisputable facts are summarized here as follows:

a. Exhibits P-45, P-46, P-47, P-48 and P-49 clearly indicate that Ladd E. Christensen as an individual doing business under the name Skyline Realty and Investment Company was the broker under whom Reed was licensed as a broker/branch manager between December 1976 and July 1978. Further, on or about July 1978 Reed as an individual doing business as Skyline Land Company became his own broker and was no longer a licensed real estate salesman under Christensen. Accordingly between the time the Settlement Agreement and Listing were entered into and the subject sales transaction closed and the Commission was earned, Reed was not the primary real estate broker for any individual or entity but at most was a broker/branch manager for his broker Christensen.

b. At trial, Reed himself testified that he knew of no document whatsoever that would establish that he at anytime was ever a broker for PCR.

c. It is no wonder then that PCR is not even mentioned in any of the records maintained by the Real Estate Division of the Utah State Department of Business Regulations. Based upon a diligent search of such records, Steven J. Francis, the Director of said division certified to the Trial Court that:

. . . [N]o record or entry is found to exist in the records of said office showing that Park City Reservations, Inc., whether as a corporation, partnership, association, sole proprietorship or any other entity is or ever has been a licensed real estate broker or broker company in the State of Utah, and that . . . no record of entry is found to exist in the records showing that Harry F. Reed is or ever has been a licensed real estate broker authorized to act as such broker for any corporation, partnership, association, sole proprietorship or any other entity known and designated as Park City Reservations, Inc. Ex. P-34.
(emphasis added)

d. Please note that no where in the record is there any indication that Reed ever acted as a broker for any corporation. He acted as a broker/branch manager under Christensen doing business in Christensen's individual capacity, and thereafter Reed acted as his own broker doing business in Reed's own individual capacity as Skyline Land Company. This is entirely consistent with the fact that about the same time Reed began acting as his own broker, in his individual capacity he filed an assumed name certificate with the Secretary of State of the State of Utah to transact his business under the assumed name Skyline Land Company, which is the same name in which he was doing business as an individual as a real estate broker beginning in

July of 1978. This was after the subject transaction was completed.
Ex. P. 51.

3. The law and its application to the foregoing facts.

According to subsection 61-2-18(a) of the License Law:

No . . . corporation shall bring or maintain an action in any court of this state for the recovery of commission, a fee, or compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this act other than licensed real estate brokers unless such person was duly licensed hereunder as a real estate broker at the time of the doing of such act or the rendering of such service.
(emphasis added)

Pursuant to the provisions of Sections 61-2-1, 61-2-2 and 61-2-9(c) of the License Law, the corporation, PCR, was clearly acting as a "real estate broker" within the meaning of Section 61-2-2 and had to have a license as required by Section 61-2-1.

The authorities are in complete accord with the proposition that subsection 61-1-18(a) quoted above means exactly what it says. Under such legislative prohibition, as a general proposition "it goes almost without saying . . . a broker is without right to recover compensation for his services performed while he was unlicensed." 12 Am Jur.2d Brokers § 178. See also the cases collected in 169 A.L.R. 761 at page 775. More specifically the same proposition holds true with respect to situations where one broker sues another broker as in the case at bar. In Stanson v. McDonald, 147 Oh. 191, 70 N.E.2d 359, 169 A.L.R. 760 (1946) the court applied a statute similar to our own to a situation where the plaintiff was licensed when negotiations began, but was unlicensed when the real estate commission was earned. The Ohio court held that there could be no recovery against a co-broker.

a fee splitting contract because of the plaintiff's unlicensed status. In so holding, the court stated that when the legislature "has said there is no right of action, courts are without authority to create one and thus defy the law of the state." 169 A.L.R. 764. More recently in Wheaton v. Ramsey, 92 Idaho 33, 436 P.2d 248 (1968) the Idaho Supreme Court construing the Montana real estate licensing statute held that "no matter what hardships it may work or how strong equities appear, a fee splitting agreement between brokers is unenforceable by an unlicensed broker."

Our own court has also ruled that a claimant seeking to recover for services tantamount to the services of a real estate broker cannot maintain an action to collect a commission if the claimant is unlicensed. Diversified General Corp. v. White Barn Golf Course, Inc., Utah, 584 P.2d 848 (1978).

It is important to note that there is no inconsistency between the conclusions reached by the foregoing authorities and this court's 1980 decision in Global Recreation, Inc. v. Cedar Hills Development Co., Utah, 614 P.2d 155 (1980). In that case the unlicensed corporate plaintiff had an exclusive right to sell defendant's properties pursuant to a marketing agreement. However, the individual plaintiff Hendricks was a licensed real estate broker and the individual plaintiff Snarr was a licensed real estate salesman under the defendant licensed corporate broker, albeit Snarr was paid by the unlicensed corporate plaintiff. The court held that plaintiffs could recover the contested commission because Snarr could sue his own corporate broker with whom Snarr was "connected" and with whom Snarr had a "valid broker-salesman relationship," and also because the

exclusive sales contract entitled the unlicensed corporate plaintiff to a "commission on a sale consummated by a licensed salesman." In the case at bar the situation is different because we don't have a licensed salesman suing his own broker as permitted by Subsection 61-2-18(b) of the License Law. This is not a Subsection 18(b) case. Instead, because there is no licensed claimant in the present case, we have under consideration a situation where Subsection 18(a) applies. Here, pursuant to the only counterclaim pled, the unlicensed corporation, PCR, is the only claimant. Reed and Cole are not even parties to the counterclaim. Accordingly, based upon the plain language of Subsection 61-2-18(a), since PCR was not licensed, PCR may not "bring or maintain" its counterclaim.

The legal disability incurred by PCR as a result of its unlicensed status is commonly referred to as a "lack of capacity to sue" which disability deprives a party of the right to come into court. The legal capacity to sue is essential to being a proper party plaintiff which status in turn is essential to confer jurisdiction on the court. 59 Am. Jur.2d Parties §§ 20, 31.

The foregoing propositions are consistent with Art. 8, § 7 of the Utah State Constitution and Section 78-3-4 Utah Code Annotated (1953) both of which provide:

The district court shall have original jurisdiction in all matters civil and criminal not excepted in the Constitution and not prohibited by law; (emphasis added)

In light of the quoted language, as soon as it becomes apparent that an unlicensed claimant is seeking to recover for services as a real

estate broker then the court no longer has jurisdiction over the subject matter of the claim. Such a conclusion is no different than those reached in the numerous federal court cases in which claims have been dismissed for want of subject matter jurisdiction when, during the course of the proceedings, it becomes apparent that there is little likelihood that the claimant can recover the federal jurisdictional amount. See the cases collected in Moore's Federal Practice, Volume 2A, § 1207 [2] fn 8 at page 2254.

4. The Trial Court erred in determining that Appellant had waived its rights predicated upon PCR's lack of capacity to sue.

As noted above, although the Memorandum Decision was silent on the issue of waiver being discussed here, ¶ 10, Trial Court Conclusions determined there was such a waiver. Of course, such conclusion is inconsistent with the Trial Court's express determination in said ¶ 10 that PCR was in fact a licensed corporate real estate broker through Reed, and the very fact that opposing counsel and the Trial Court found it necessary to adopt such a conclusion casts fatal aspersions on the Trial Court's decision that PCR was licensed. Nonetheless, the Trial Court's determination as to waiver is equally erroneous as appears from the following discussion.

In reliance on Crockett's and Reed's direct representations to the contrary, as established by the facts recited in ¶¶ 11, 12, 16, Statement of Facts, Appellant's counsel did not discover PCR's lack of capacity to sue until just prior to trial at which time said counsel was precluded from using further pre-trial motions by District Court Rule 10. Then, when the issue was raised at trial, the court expressly held that Respondents had not been unduly surprised by

Appellant's evidence of lack of capacity. Thereafter, it was not until the conclusion of Appellant's opening argument that any contention was made that Appellant had waived the effect of PCR's lack of capacity.

It seems unbelievable that Crockett and Reed could mislead counsel for Appellant, as was done in this case, and then claim that Appellant waived the effect of the true facts because they were not brought out until the time of trial, when the reason they were not brought out until the time of trial was because of District Court Rule 10.

Even if it can be said that the defense of lack of capacity to sue was waived as belatedly contended by PCR, such lack of capacity was not waived as to Appellant's cause of action for a declaratory judgment determining that PCR was not entitled to recover from Appellant any part of the Commission. See Count XIII of Appellant's Fourth Amended Complaint. Further, according to Section 61-2-1 of the License Law, it was unlawful for PCR to act as a real estate broker as was done in this case "without first obtaining a license." Since Appellant pled "illegality" as an affirmative defense to PCR's counterclaim, PCR's lack of capacity to sue based on PCR's unlicensed and therefore illegal conduct, was not waived but rather was expressly preserved as a justiciable issue. See Appellant's replies to each counterclaim pled by PCR.

Further, with respect to the issue of waiver, it is elementary that subject matter jurisdiction may be contested at any time, even on appeal.

C. PCR CONDUCTED ITS BUSINESS AND PROSECUTED ITS COUNTERCLAIM UNDER AN ASSUMED NAME WITHOUT HAVING FILED A CERTIFICATE OF ASSUMED NAME, THEREFORE PCR LACKED CAPACITY TO SUE, AND THEREFORE PCR'S COUNTERCLAIM SHOULD HAVE BEEN DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

1. The Trial Court's determination.

The Trial Court made no determination on this issue except as implied by ¶ 28, Trial Court Findings, and ¶ 10, Trial Court Conclusions as quoted above with respect to Point I B. Conspicuous by their absence are any findings or conclusions with respect to whether PCR was required to file an assumed name certificate or whether such certificate was in fact filed.

2. The uncontroverted facts.

As discussed in Point I B 4 above, the facts recited in ¶¶ 8 - 16, Statement of Facts, clearly establish that PCR did not file the required assumed name certificate to do business under the assumed name of Skyline Realty or any other assumed name. Notwithstanding such failure, in its Answer to Appellant's Fourth Amended Complaint, PCR incorporated its Counterclaim as pled in its Answer to the First Amended Complaint. The introductory paragraph in that Counterclaim establishes without question that PCR was suing Appellant and prosecuting the Counterclaim in an assumed name. Such paragraph reads in pertinent part as follows:

The defendant-counterclaimant Park City Reservations, Inc., dba Skyline Realty (hereinafter "Skyline") complains . . . as follows
(emphasis added)

3. The law and its application to the facts.

According to Section 42-2-5 of the Assumed Name Law, every corporation conducting its business in this state under an assumed

name must file an assumed name certificate with the office of the Secretary of State. If a corporation fails to file such certificate that corporation "shall not sue, prosecute or maintain any action, suit, counterclaim, cross-complaint or proceeding in any of the courts of this state until the provisions of this chapter have been complied with." (emphasis added) Section 42-2-10, Assumed Name Law.

We can find no cases that have considered the effect of our Section 42-2-10. There are three cases that considered Utah's assumed name statutory provisions prior to 1963 when Utah first enacted the language of Section 42-2-10 quoted above. Christenson v. Johnson, 11 Utah 273, 61 P.2d 593 (1936); Oakason v. Lisbon Valley Uranium Co., 154 F. Supp. 692 (D.C. Ut. 1957); and Platt v. Locke, 11 Utah 2d 273 358 P.2d 95 (1961). However, with respect to our specific statutory prohibition against suing, prosecuting, or maintaining any counterclaim in any of the courts of this state without first filing an assumed name certificate, the courts that have considered similar provisions in other states are unanimous in holding that such a statute means precisely what it says, viz: no suit without compliance. 42 A.L.R. 2d 516, 533, Section 7.

While it has been uniformly held that a claimant can remove such legal disability and acquire the capacity to sue simply by filing the required certificate at any time before completion of the taking of evidence at trial, in the instant case at no time did PCR seek to present any evidence that it had in fact filed such a certificate, nor did PCR seek a continuance of trial for a time long enough to enable PCR to file the required certificate. Instead PCR rested its case. Thereafter, following a noon recess, PCR sought to reopen its case,

but then only proffered evidence that Reed had acted in good faith with respect to PCR doing business under the assumed name of Skyline Realty. The Trial Court refused to permit the case to be reopened. One day later, following the conclusion of counsel for Appellant's opening argument, PCR expanded its proffer of proof of the previous day to include evidence that prior counsel for PCR thought he had filed or had intended to file the required certificate for PCR, but that such certificate was not of record. See ¶¶ 15, 16, Statement of Facts. The point is that none of the evidence proffered can change in the least the conclusion that at all times pertinent hereto, PCR was burdened by a legal disability constituting PCR's lack of capacity to seek redress in the courts of this state.

Note that Section 42-2-10 of the Assumed Name Law states "shall not sue, prosecute or maintain," while Section 61-2-18(a) of the License Law discussed in Point I B above states "Shall [not] bring or maintain an action in any court of this state." Clearly then, what has been said earlier in Point I B above with respect to the courts lack of subject matter jurisdiction applies persuasively here, and the lack of capacity to sue encountered by PCR as a result of the legal disability created by Section 42-2-10 also constitutes a lack of subject matter jurisdiction entitling Appellant to dismissal of PCR's Counterclaim.

Further, what has been said in Point I B above with respect to Respondent's contention that Appellant had waived the issue of lack of capacity applies equally here.

D. THE TRIAL COURT ERRED IN NOT AWARDING APPELLANT COMPENSATORY DAMAGES RESULTING FROM PCR'S BREACH OF FIDUCIARY DUTY OR ITS DUTY TO ACT IN GOOD FAITH, AND SUCH DAMAGES ARE A TOTAL OFFSET TO PCR'S CLAIM AGAINST APPELLANT.

1. The Trial Court's determination.

The only Trial Court finding or conclusion on this issue is found in ¶ 8, Trial Court Conclusions, which paragraph reads in pertinent part as follows:

The court finds that there is no factual basis for a finding of . . . breach of a duty to act in good faith, breach of a fiduciary duty . . . and the court concludes that none of the foregoing torts occurred in this case.

Notwithstanding Appellant's request that the court make specific findings as to whether Respondents had any duties to deal fairly and in good faith with Appellant and whether each of the Respondents stood in a fiduciary relationship with Appellant and therefore owed any fiduciary duties to Appellant, and in spite of the fact that such issues had been raised by the pleadings and evidence had been presented with respect thereto, the court refused to make any findings as to whether such duties were in fact owed or whether any of the Respondents stood in a fiduciary relationship with Appellant. The Trial Court only addressed the issue of whether such duties had been breached. See ¶¶ 82 through 87 of the Findings of Fact and ¶¶ 31 through 38 of the Conclusions of Law attached to Plaintiff's Objection to Form of Defendants' Proposed Findings of Fact and Conclusions of Law and Judgment dated June 23, 1980.

2. The uncontroverted facts.

After reviewing the facts recited in ¶¶ 22, 31-33, 35-37, j - p, u, v, z, aa, Statement of Facts, can there be any question

this case but what Taylor acting on behalf of the Appellant innocently reposed confidence in Reed acting on behalf of PCR with whom Taylor had enjoyed a mutually satisfactory broker to broker relationship for many years, and that Taylor justifiably assumed Reed would not take any action inconsistent with Appellant's rights under the Listing. On the other hand can there be any doubt that Reed was in a position of superiority and influence as to Taylor because Reed knew what Taylor did not know, namely that Appellant's principal, Unionamerica, had found and already negotiated with the Buyer before Reed and Cole had ever been involved.

When Stevenson first involved Reed and Cole in the transaction and Reed and Cole did nothing to investigate Appellant's rights under the Settlement Agreement and the Listing, Appellant's soft underbelly was exposed, but Appellant didn't even suspect the danger because Taylor trusted his fellow broker, Reed. After Stevenson first involved Reed and Cole in the transaction on October 8, 1977, Cole sent the registration letter to Appellant without disclosing the fact that Unionamerica had found and negotiated with the Buyer without the assistance of Reed or Cole. The danger to Appellant was magnified because Reed and Cole were further solidifying PCR's position by telling the world that the Buyer was PCR's client for purposes of the subject sale. Later on October 15, 1977, when Reed personally approached Taylor to confirm that the multiple listing arrangement was in effect between them with respect to the subject transaction, Reed attempted to dig a deeper hole for Appellant by not revealing to Appellant that Unionamerica had found and negotiated with the Buyer without the assistance of Reed or Cole. Still later, on October 19,

1977, Reed perpetuated the previous concealments by attempting to keep the truth. This Reed did by simply telling Taylor a lie as to the source of the Buyer. We are talking about real estate agents, trust fiduciaries, dealing with each other. Can such conduct on the part of a fiduciary in this state be condoned. Not only condoned, but rewarded to the extent of \$57,600.

3. The law and its application to the facts.

Appellant contends that the law of the State of Utah permits Appellant to recover compensatory damages from PCR under the circumstances of this case, especially in light of Appellant's "considerably diminished" burden of proof with respect to the pertinent facts.

While the Trial Court refused to rule one way or the other as to whether Appellant and PCR and their respective representatives were in a fiduciary relationship and therefore owed fiduciary duties to each other, it is elementary that such was the case.

As discussed previously in Point I A, in the relationship between Appellant and PCR, Appellant was the principal and PCR was the agent. Hence, they were parties to a fiduciary relationship which brought with it the special duties that must be observed by parties in such relationships. As was said in 37 Am. Jur.2d Fraud and Deceit 16:

The cases of parent and child, guardian and ward, trustee and cestui que trust, principal and agent and attorney and client are familiar instances in which the principal of fiduciary relationship applies in its strictest sense. . . .
(emphasis added)

3 Am. Jur.2d Agency § 199 elaborates on the agent's fiduciary duty as follows:

An agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has imposed some trust or confidence in the agent and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer. (emphasis added)

See also Tatsuno v. Kasai, 70 Utah 203, 259 P. 318, 62 A.L.R. 54 (1927).

More specifically, according to Reese v. Harper, 80 Utah 2d 119, 329 P.2d 410 (1958) a real estate broker is a party to a fiduciary relationship and has the responsibility of honestly and fairly representing those who engage his services.

According to the foregoing authorities, the fiduciary relationship between Appellant and PCR imposed on PCR the duty to exercise "good faith" toward Appellant. What does that mean?

Black's Law Dictionary, Fifth Ed. (1979) defines "good faith"

as:

Honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscious advantage of another even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render the transaction unconscientious. (emphasis added)

In point is the decision of Ammerman v. Farmer's Insurance Exchange, 19 Utah 2d 261, 430 P.2d 576 (1967) wherein our court held that a cause of action predicated on bad faith can be properly regarded as a cause of action for a wrong done by violating a fiduciary duty owed. Thus our court equated the duty to act in good faith with the duty incurred in a fiduciary relationship.

The fiduciary relationship between Appellant and PCR also brought with it the duty of avoiding any misrepresentations and making full disclosure on the part of PCR. As was said in 12 Am. Jur.2d Brokers § 84 a broker:

. . . cannot put himself in the position rightfully belonging to his principal. He cannot put himself in a position antagonistic to his principal's interest by fraudulent conduct, acting adversely to his client's interest, or by failing to communicate information he may possess or require which is or may be material to his employer's advantage or otherwise. Standing in the place of and representing his employer, a broker is bound to disregard every feeling of friendship, to know no self interest, and to act as he judges the interest of his employer would induce the latter to act if he were present." (emphasis added)

With respect to describing the duty of disclosure, our own Utah court has stated that such duty requires "good faith and the disclosure of all pertinent fact." Reich v. Christopolos, 123 Utah 132, 256 P.2d 238 (1952), and requires "honesty, fair representation and the making of all disclosures necessary." Shaw v. Abraham, 12 Utah 2d 150, 364 P.2d 70 (1961). See also Reese v. Harper, *supra*.

As has been said before, PCR committed a serious breach of confidence when it failed to make full disclosure to its principal that Reed and Cole had been approached on October 3, 1977 by Appellant's principal, Unionamerica; when the registration letter was mailed on October 8, 1977; when Reed met with Taylor on October 15, 1977 and asked him to confirm their understanding as to splitting Commission; and on October 19 when Reed intentionally misled Taylor as to the source of the Buyer. According to recent Utah authority

such conduct has been labeled not only as a breach of fiduciary duty, but also constructive fraud.

In Blodgett v. Martsch, Utah, 590 P.2d 298 (1978) in holding that the trustee named in a trust deed was a party to a fiduciary relationship with the trustor named in the same trust deed, our court held that in cases involving a "confidential relationship" the "plaintiff's burden is considerably diminished." The court further held that the breach of fiduciary duty may be regarded as constructive fraud for the purpose of enabling the court to rectify any injury resulting from the breach of the obligations implicit in the relationship. Here, the rectification sought is simply to reverse the Trial Court's \$57,600 reward to PCR for breaching its fiduciary duty to Appellant. In Blodgett the court also quoted with approval 37 Am. Jur.2d 38 Fraud and Deceit § 15 which provides:

. . . fraud is often presumed or inferred where a confidential or fiduciary relationship exists between the parties to a transaction or contract.

Constructive fraud often exists where the parties to a transaction of a special confidential or fiduciary relation which affords the power and means to take undue advantage, or exercise undue influence over, the other. A course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party. No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between parties standing in such a relationship of confidence to each other

Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction, to make full and truthful disclosures of all material facts and to refrain from abusing such confidence by obtaining

any advantage to himself at the expense of the confiding party. Should he obtain such advantage he will not be permitted to retain the benefit and the transaction will be set aside even though it could not have been impeached and no such relation existed, whether the unconscionable advantage was obtained by misrepresentations, concealment or suppression of material facts, artifice or undue influence. (emphasis added)

As Reed himself said, his misleading of Taylor was a "dumb and "ridiculous" thing to do. However, by such admission, Reed ratifies the conclusion that there is nothing in the record reasonably precluding the conclusion that PCR breached its fiduciary duty to Appellant and that Appellant is entitled to recover from PCR compensatory damages as an offset against any judgment awarded to PCR.

There is another reason, perhaps peculiar to Utah, why in this case it must be said that PCR breached its fiduciary duty to Appellant. According to Subsection 61-2-6(a) and (b) of the License Law, the qualities of "honesty," "integrity," "truthfulness" and "trustworthiness" are prerequisites for all Utah licensed real estate salesmen and brokers. Further, on November 11, 1973 pursuant to the rule making power conferred by Subsection 61-2-5(b) of the License Law, the State Securities Commission adopted the State of Utah Real Estate Licensing Laws Rules and Regulations, Rule 19 of which provides in pertinent part as follows: "Brokers are required to treat salesmen and other brokers ethically and in accordance with good business practices." (emphasis added)

It is Appellant's contention that Reed and Cole acting for PCR breached the duties imposed upon them by Rule 19. Note that Rule 19 talks in terms of ethics and good business practices. According to Black's Law Dictionary, Fifth Ed. (1979) ethics has to do with

"moral" duties, beliefs, character, actions and that conduct which is "professionally right or befitting; conforming to professional standards of conduct." On the other hand, from the same source conduct is said to be moral if it consistent with the "general principals of right conduct" and "cognizable and enforceable only by the conscience or by the principals of right conduct, as distinguished from positive law."

Although we are dealing here with relatively abstract notions, it is clear from the foregoing statutory provisions and Rule 19, that real estate practioners in this state should be held to a very high standard of professional conduct, such that they be required to avoid the very appearance of impropriety. We can find no case that construes or applies Rule 19, but as a practical matter Rule 19 is probably just another way of saying that Reed and Cole, as agents, were required to act as fiduciaries with respect to Appellant and consequently discharge all obligations owed to Appellant implicit in that designation. One thing appears certain. Rule 19 does not diminish PCR's duties or excuse its conduct.

Based upon the foregoing discussion it appears obvious that in this case Appellant had the right to repose special trust and confidence in Reed and Cole, and had the right to expect them to treat Appellant fairly, without misrepresentations, with full disclosure, with utmost loyalty, without betrayal, in good faith, ethically and in accordance with good business practices.

E. RELIEF REQUESTED WITH RESPECT TO POINT I

For all the reasons discussed in this Point I, Appellant respectfully requests an order of the court reversing the judgment of the court in favor of PCR and against Appellant and the PCR's Counterclaim in favor of PCR and against Appellant and the of judgment thereon in favor of Appellant and against PCR, no cause of action.

POINT II

ASSUMING THAT THE TRIAL COURT WAS CORRECT IN HOLDING THAT PCR WAS ENTITLED TO RECOVER A SELLING BROKER'S COMMISSION FROM APPELLANT, THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT APPELLANT WAS NOT ENTITLED TO COMPENSATORY DAMAGES FROM UNIONAMERICA AND STEVENSON IN AN AMOUNT EQUAL TO THE AMOUNT AWARDED PCR.

A. APPELLANT IS ENTITLED TO RECOVER COMPENSATORY DAMAGES FROM UNIONAMERICA AND STEVENSON AS A RESULT OF THEIR BREACH OF FIDUCIARY DUTY.

Like PCR, Unionamerica was a party to a fiduciary relationship with Appellant. However, in the case of the Unionamerica - Appellant relationship, Unionamerica was the principal acting through Stevenson while Appellant was the agent acting through Taylor. Nonetheless, Unionamerica still owed a fiduciary duty to Appellant. As was said in 12 Am. Jur.2d Brokers § 167:

It is a rule of universal recognition that the principal must act in good faith toward the broker, and in the event of his failure to do so, the broker will not be deprived of his commissions solely by reason of his employer's breach of duty. If the broker performs his part of the contract by doing all that he is required to do and is prevented from or deprived of the opportunity of consummating the sale by the act of the principal, he is still entitled to his commission

. . . moreover, the principal cannot deprive his agent of the compensation stipulated for either by fraudulently making a sale himself at the same or different price, or by switching the buyer from one agent to another. (emphasis added)

More specifically in 12 Am. Jur.2d Brokers § 226, where an exclusive right to sell form of listing is the predicate for the agreement between the owner and the broker, the rule is "there is an implied promise on the part of the owner to do nothing to hinder or obstruct performance by the broker." (emphasis added)

Again, in 3 Am. Jur.2d Agency § 239, the rule is expressed as follows:

The principal is subject to a duty to his agent to perform the contract which is made with the agent and a duty not to repudiate or terminate the employment in violation of the contract. The principal must conduct himself in such a way as not to interfere with the consummation of the agency and the agency contract carries with it an implied obligation on the part of the principal to do nothing that would thwart the effectiveness of the agency. (emphasis added)

When Stevenson called Appellant's office on the morning of October 3, 1977 and failed to involve any of Appellant's licensed personnel in the subject transaction; when Stevenson arrived in Park City the evening of October 3, 1977, and before even meeting with Davis, Stevenson involved Reed and Cole in the subject transaction instead of Appellant's licensed personnel; when, on October 4, 1977, after meeting with Davis the evening of October 3, 1977 and negotiating the transaction with Davis for a period of 2 to 3 hours, Stevenson involved Reed and Cole in the subject transaction instead of Appellant's licensed personnel; and when Stevenson at no time thereafter took the initiative in disclosing to Appellant that he had

directed the Buyer to Reed and Cole, both Unionamerica through Stevenson, and Stevenson himself, breached their fiduciary duties to Appellant and the implied promises inherent in the fiduciary relationship. See ¶ 42 g, i, n, p, Statement of Facts.

According to Blodgett v. Martsch, supra, such conduct is tantamount to constructive fraud and according to the numerous authorities cited above, Unionamerica and Stevenson are liable to Appellant for the damages sustained by Appellant as a result of such constructive fraud and/or breach of fiduciary duty. Of course, if the Trial Court's judgment in favor of PCR is not affirmed, Appellant concedes that it would not be entitled to any such damages inasmuch as the Trial Court awarded the full amount of the Commission to Appellant subject to Appellant's obligation to split the Commission with PCR.

B. THE TRIAL COURT RELIED ON JUDGE CROFT'S ORDER, SUCH ORDER IS PARTIALLY IN ERROR IN HOLDING THAT THERE WAS NO IMPLIED AGREEMENT TO DIRECT ANY WALK-IN TO APPELLANT, AND THEREFORE ANY LIABILITY FROM APPELLANT TO PCR WAS WRONGFULLY CREATED BY UNIONAMERICA AND STEVENSON.

With respect to Judge Croft's Order the Trial Court stated in its opinion: "I am not here to say that he is wrong, and I can't say he is wrong." T. 567. That acknowledgment together with ¶ 3, Memorandum Decision, Appendix B, and ¶ 4, Trial Court Conclusions, Appendix C, make it clear that the Trial Court considered itself bound by Judge Croft's Order. While Judge Croft's Order was correct in holding that PCR had to both find and negotiate the subject sale in order to recover its selling broker's commission, it is Appellant's contention that a portion of Judge Croft's Order was erroneous as a matter of law. We

believe Appellant's position is apparent from a careful examination of the language of the Order itself. Judge Croft held:

The court finds that the Settlement Agreement and the Listing Agreement contemplate that other parties not involved in the lawsuit might find buyers for the listed properties and negotiate a sale therefor, and that neither agreement contains any express or implied provision that Unionamerica or Ramshire would direct any "walk in buyer" to plaintiffs. Such issues are thus now resolved for all future proceedings in this case.

With the phrase "or implied" in the Order, the Order doesn't make sense. By stating that "other parties not involved in the lawsuit might find buyers for the listed properties and negotiate a sale therefor," while at the same time stating that there is no implication that "Unionamerica or Ramshire would direct any 'walk in buyer' to plaintiffs" is to state two directly contrary propositions. There is simply no way that a party not included in the previous lawsuit that spawned the Settlement Agreement could have a walk-in buyer directed to such party by Unionamerica and still have such party be the finder of such buyer. In such a situation, Unionamerica, which was involved in the previous lawsuit, would be the finder of such buyer. More specifically, PCR, which was not a party to the previous lawsuit, can't be the finder of the Buyer if the Buyer was found by Unionamerica and directed to PCR. PCR can't be both the finder and Unionamerica's referee. Accordingly, the Settlement Agreement and Listing taken together clearly constitute an implied contract that Unionamerica would direct any walk-in buyer to Appellant, which is consistent with the authorities cited in Point II A above.

When Unionamerica through Stevenson referred Davis and the Buyer to Reed, Cole and PCR, Unionamerica breached its implied covenant to direct any walk-in to Appellant. Appellant's compensatory damages for such breach are equal to the amount, if any, which PCR is entitled to recover from Appellant pursuant to PCR's counterclaim. For the reasons discussed above in Point I, we don't believe PCR is entitled to any such recovery, but in the event any such award is affirmed, then such liability on the part of Appellant to PCR was wrongfully and intentionally created by Unionamerica and Stevenson when Unionamerica breached its implied contract as aforesaid.

The right to recover damages for the wrongful and intentional creation of a liability has been recognized in Section 871a of the Restatement of Torts 2d. The rule reads as follows:

One who intentionally creates civil or criminal liability against another is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

As the official comment to Section 871a indicates, the Section applies to the established torts but also to wrongful action that does not fall within one of the established torts. Further, by reference to Section 871 Restatement of Torts 2d. and the official comment thereon it is clear that the tort recognized by Section 871a is intended to accentuate the various tortious means by which harmful invasions of property interests are intentionally achieved, and to state a generalization comparable to the generalizations on negligence in other sections of the Restatement. We gather from these official comments that Section 871a is intended to be authority for the prosecution of intentional torts that do not fit within any of the more traditional

catagorizations. We think Appellant is entitled to recover pursuant to such authority in the instant case.

As pointed out previously, Stevenson, acting on behalf of Unionamerica, affirmatively and intentionally sought out Reed and Cole and through them PCR, to act as real estate agents with respect to the subject transaction. At the time Stevenson directed a walk-in buyer to Reed, Cole and PCR, Stevenson knew that he would be exposing Appellant to the possibility of having to split its commission with the new real estate agents, and he did this at a time when he had caused Unionamerica to grant an exclusive right to sell listing to Appellant, and the aforesaid implied covenant to direct a walk-in buyer to Appellant. See ¶ 42 i, Statement of Facts. Stevenson thus wrongfully and intentionall caused Unionamerica to breach its implied covenant to direct walk-in buyers to Appellant.

We can find nothing in the record which controverts the facts presented which are pertinent to the elements of Section 871a as aforesaid.

Again, if the Trial Court judgment in favor of PCR is reversed, Appellant concedes that it would not be entitled to any compensatory damages resulting from a violation of Section 871a as aforesaid inasmuch as the Trial Court awarded the full amount of the Commission to Appellant subject to Appellant's obligation to split the Commission with PCR.

C. RELIEF REQUESTED WITH RESPECT TO POINT II

For all the reasons discussed in this Point II, Appellant respectfully requests this court to enter its judgment in favor of Appellant and against Unionamerica, Inc., Ramshire, Inc., and Stevenson for compensatory damages in an amount equal to the amount, if any, awarded to PCR.

POINT III

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST ALL RESPONDENTS

A. THE TRIAL COURT ERRED IN FINDING THAT UNIONAMERICA ACTED REASONABLY IN DEPOSITING ALL OF THE COMMISSION WITH THE ESCROW HOLDER, AND CONCLUDING THAT THERE WAS NO BASIS FOR APPELLANT'S CLAIM AGAINST UNIONAMERICA FOR PUNITIVE DAMAGES

¶ 26, Trial Court Findings, provides: "Unionamerica acted reasonably in . . . depositing these funds in an escrow account in light of the dispute." ¶ 9, Trial Court Conclusions, provides:

The court having concluded that defendants were not guilty of tortious acts against the plaintiffs, and that none of the parties breached the applicable contracts, hereby concludes that there is no basis for plaintiff's claim for punitive damages.

Appellant concedes that "in light of the dispute" it may have been reasonable for Unionamerica to deposit 60% of the Commission with the Escrow Holder, but we can find no evidence in the record, let alone any evidence about which reasonable minds could differ, that would justify Unionamerica placing the remaining 40% of the Commission with the Escrow Holder.

As ¶¶ 42 cc, 47 - 53, Statement of Facts establishes, at no time prior to suit being instituted did Unionamerica even suggest that Appellant was not entitled to 40% of the Commission. As a matter of fact, Unionamerica through its counsel conceded: (1) that the withholding of any of the Commission would constitute a breach of contract on the part of Unionamerica; and (2) there was no basis for Unionamerica withholding from Appellant more than 60% of the Commission. Indeed, the judgment of the Trial Court awarding Appellant 100% of the Commission, but requiring that 60% thereof be shared, confirms what Unionamerica conceded all along. How can it be said then that Unionamerica could justifiably have withheld 40% of the Commission from Appellant.

Other events, both before and after suit was instituted, establish Unionamerica's cavalier, malicious and total disregard of Appellant's rights. See ¶¶ 25, 26, 55, 56, 58, 59, Statement of Facts. It should be noted that under Utah law an act is malicious if done "entirely without authority and in disregard of the rights" of others. Sproul v. Sparks, 116 Utah 368, 210 P.2d 436 (1949).

In addition to its entitlement to compensatory damages resulting from breach of contract as discussed in Point II above, Appellant contends that Unionamerica is liable to Appellant for compensatory damages resulting from Unionamerica's intentional torts in diverting the Commission from Appellant. Appellant also contends that punitive damages are recoverable for both reasons. Under present Utah law it apparently makes no difference whether Unionamerica's liability for punitive damages is bottomed on breach of contract, conversion, breach of fiduciary duty, constructive fraud or any other

reprehensible conduct deserving of punishment. In Nash v. Craig Co. Inc., Utah, 585 P.2d 775 (1978) in holding that punitive damages may be awarded regardless of whether compensatory damages are awarded, it was stated:

The question of whether or not punitive damages can be given and the amount thereof shall be determined from the nature and type of the wrongful conduct rather than on the amount of money awarded as actual damages since the purpose of the award is to teach the defendant to not repeat the wrong and to be a warning to others that such conduct is not to be tolerated.

In his concurring opinion in that case, Judge Crockett wrote:

There is another aspect of the law of this state which gives support to the ruling of the main opinion. Our constitution, Section 19 of VIII provides that "there shall be but one form of civil action and law and equity may be administered in the same action." Pursuant to that provision and the adjudication of this court thereunder the trend of our law is and has been toward the abolition of distinctions between law and equity. This is particularly true since the adoption of our new rules of civil procedure to the effect that the court shall grant whatever relief the evidence shows a party is entitled to.

These are additional reasons why I am in agreement with the proposition that the question, whether there should be an award of punitive damages and the amount thereof should depend on the nature of the wrong and not upon an arbitrary and what seems to me to be an artificial barrier thereto because of the nomenclature of the cause of action. (emphasis added)

The decision of the Idaho Supreme Court in Boise Dodge, Inc. v. Clark, 92 Idaho 904, 453 P.2d 551 (1969) forthrightly makes the point that the court should not be impractically concerned over whether the claim sounds in contract or tort. In that case, the plaintiff had purchased a "new" automobile from the defendant. The

automobile was, in fact, a well used demonstrator on which the odometer had been turned back. The plaintiff recovered judgment which included an award of punitive damages. On appeal, the defendant argued that punitive damages were improperly awarded inasmuch as the case was one for breach of contract. The court rejected the defendant's argument and held:

In any event, from the legal point of view from the position of punitive damages in this case, it does not matter whether respondent's counterclaim technically sounded in contract or tort. The rule . . . is that punitive damages may be assessed in contract actions where there is fraud, malice, oppression or other sufficient reason for doing so. The rule recognizes that in certain cases elements of tort, for which punitive damages have always been recoverable upon showing of malice, may be inextricably mixed with elements of contract in which punitive damages are generally not recoverable. (emphasis added)

That portion of the Idaho opinion has been favorably reviewed in Sullivan, "Punitive Damages in the Law of Contract: the Reality and the Illusion of Legal Change," 61 Minnesota Law Review 207, 239 (1977). Notwithstanding the general rule that punitive damages are not recoverable in breach of contract actions, there are well established exceptions to the rule which exceptions are applicable to the case at bar. Such exceptions appear in cases where the breaches of contract amount to breaches of fiduciary duties, breaches of duties to deal fairly and act in good faith, conversion, intentional or needless disregard of the consequences, malice, economic oppression or independent torts arising out of breaches of contract, regardless of whether such tort is pled in contract or tort. The rationale, leading supporting cases, and propriety of such exceptions is thoughtfully discussed in "The Expanding Availability of Punitive Damages in

Contract Actions," 8 Indiana Law Review 668 (1975), which considerations support the holding of our court in Nash v. Craig Co. Inc., supra.

In the case at bar Unionamerica was charged with conversion, breach of fiduciary duty, breach of the duty to act in good faith, fraud, any one of which would serve as a predicate for an award of punitive damages in addition to the malicious breach of contract described.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS NO BASIS FOR APPELLANT'S CLAIM AGAINST STEVENSON, REED, COLE & PCR FOR PUNITIVE DAMAGES

If the Appellant's positions with respect to Point I D and Point II above are sustained, then clearly the tortious conduct of Stevenson, Reed, Cole and PCR is the type of conduct for which, in the words of Nash v. Craig Co., Inc., supra, we ought to "teach the defendant not to repeat the wrong, and to be a warning to others that such conduct is not to be tolerated." Such conduct constituted a breach of fiduciary duty, breach of the duty to act in good faith, constructive fraud, and the failure to treat Appellant equitably and in accordance with good business practices in direct contravention of Rule 19.

C. RELIEF REQUESTED WITH RESPECT TO POINT III

For all the reasons discussed in this Point III, Appellant respectfully requests an order of the court remanding this matter for the purpose of taking evidence to determine the amount of punitive damages which Appellant is entitled to recover against all Respondents.

the purpose of taking evidence to determine the amount of punitive damages which Appellant is entitled to recover against all Respondents.

POINT IV

THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS AGAINST UNIONAMERICA, AND APPELLANT IS ENTITLED TO SUCH AWARD INCLUDING SUCH ATTORNEYS' FEES AND COSTS INCURRED WITH RESPECT TO THIS APPEAL

A. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS FOR PROSECUTING COUNT I OF THE FOURTH AMENDED COMPLAINT

1. The Trial Court's determination.

Count I of the Fourth Amended Complaint simply states a cause of action against Unionamerica for breach of Unionamerica's agreement to pay 100% of the Commission to Appellant. ¶ 1, Judgment, granted Appellant judgment against Unionamerica, Inc. for the full amount of the Commission, and ¶ 6, Judgment, stated that the parties should bear their own costs. However, the Memorandum Decision and the Trial Court Findings and the Trial Court Conclusions are silent on the issue of attorneys' fees and costs.

2. The uncontested facts.

Pursuant to the Listing, Unionamerica agreed "in case of the employment of an attorney to enforce this agreement or any rights arising out of the breach thereof . . . to pay a reasonable attorneys' fee and all costs of collection."

As was pointed out in Point III A above, prior to trial Unionamerica knew that its failure to pay 100% of the Commission to

Appellant was a breach of the Listing, yet Unionamerica wouldn't pay Appellant the 40% of the Commission which Unionamerica conceded all along was owed to Appellant.

3. The law and its application to the facts.

Appellant concedes that the award of attorneys' fees and costs and the amount thereof is discretionary with the Trial Court. However, Appellant contends that the Trial Court abused its discretion in this instance. If Appellant's position with respect to either Point I or Point II sustained, then certainly there would be no question but what Unionamerica's failure to pay all of the Commission to Appellant was totally unjustified and Appellant would be entitled to an award of attorneys' fees and costs. However, even if the judgment in favor of PCR and against Appellant is not reversed, Appellant contends that it is entitled to an award of its attorneys' fees and costs for the reason that Unionamerica wouldn't even pay 40% of the Commission to Appellant without this suit. Further, it was not until after suit was instituted that Unionamerica for the first time denied that it owed any part of the Commission to Appellant on the ground that Appellant had not performed its duties and discharged its obligations pursuant to the Settlement Agreement and the Listing. Accordingly, Appellant had to present substantial evidence at trial to overcome that denial. As is clear from ¶ 2, Memorandum Decision, Trial Court Conclusions and ¶ 1, Judgment, the Trial Court ruled against Unionamerica on that issue in holding that Appellant fully performed its obligations.

B. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS FOR PROSECUTING COUNT III OF THE FOURTH AMENDED COMPLAINT

1. The Trial Court's determination.

Count III of the Fourth Amended Complaint simply stated a cause of action against Unionamerica for breach of Unionamerica's agreement pursuant to the Settlement Agreement and the exclusive listing contemplated thereby to pay a 6% real estate commission to Appellant resulting from the sale of the Davis property. The prayer following Count III of the Fourth Amended Complaint read as follows:

WHEREFORE, [Appellant] demands judgment ordering Unionamerica and/or Ramshire to enter into the Davis Listing with [Appellant] and against Unionamerica and Ramshire, jointly and severally, in an amount equal to 6% of the purchase price of the Davis Property as compensatory damages, together with interest thereon as permitted by law, exemplary damages in an amount appropriate to punish and set an example of Unionamerica and Ramshire, for [Appellant's] reasonable attorneys' fee and costs incurred herein, and for such other and further relief as the court deems proper in the premises.

After obvious consideration of Count III and the prayer thereof, ¶ 5, Memorandum Decision, reads as follows: "That plaintiff is entitled to the relief demanded in Count III of its Fourth Amended Complaint and is awarded judgment as therein prayed."

Notwithstanding the foregoing specific language of the Memorandum Decision, the Trial Court Findings and the Trial Court Conclusions, as pointed out before, are silent on the issue of attorneys' fees and costs.

2. The uncontested facts.

In Paragraph 32 of the aforesaid Count III, Appellant alleges that pursuant to the provisions of the Settlement Agreement had Unionamerica acted properly, Unionamerica would have entered into a listing with respect to the Davis property, which listing would have been in the same form as the Listing, which form as noted above in Point IV 2, obligated Unionamerica to pay Appellant's attorneys' fees and costs. Said Paragraph 32 also alleged that Unionamerica intentionally failed to notify Appellant of its intention to sell the Davis property and intentionally failed to enter into a listing agreement with respect to the Davis property, all in order to avoid having to pay Appellant the commission on the sale of the Davis property. In light of ¶ 5, Memorandum Decision, as quoted above, by implication the Trial Court made findings of fact favorable to Appellant on those issues.

3. The law and Its Application to the Facts.

Notwithstanding the Trial Court's failure to treat the issue of attorneys' fees and costs in the Trial Court Findings and the Trial Court Conclusions, it is obvious from ¶ 1, Memorandum Decision, that the Trial Court granted Appellant's demand for such an award, and Appellant contends that the Trial Court's failure to take evidence into the amount of such award was an abuse of the Trial Court's discretion.

C. APPELLANT IS ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS INCURRED WITH RESPECT THIS APPEAL

It is well settled that an award of attorneys fees and costs incurred in prosecuting the appeal is discretionary with the Supreme

Court. Swain v. Salt Lake Real Estate and Investment Co., 3 Utah 2d 121, 279 P.2d 709 (1955); Bates v. Bates, Utah, 560 P.2d 706 (1977) and Centurian Corp. v. Kripps, the opinion of the Utah Supreme Court in which case as filed on January 29, 1981 and for which counsel has no Pacific citation.

D. RELIEF REQUESTED WITH RESPECT TO POINT IV

For all the reasons discussed in this Point IV, Appellant respectfully requests an order of the court remanding this matter for the purpose of taking evidence to determine the amount of attorneys' fees and costs including such attorneys' fees and costs incurred with respect to prosecuting this appeal, which Appellant is entitled to recover against Unionamerica.

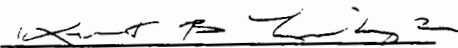
CONCLUSION

Because PCR was not the procuring cause of the subject sale, because PCR was not a licensed real estate broker, because PCR had not filed the required assumed name certificate, and because PCR breached its fiduciary duty to Appellant, with respect to PCR's Counterclaim Appellant is entitled to a judgment in its favor and against PCR, no cause of action as a matter of law. In the alternative, because Unionamerica and Stevenson breached their fiduciary duties to Appellant and wrongfully and intentionally created a liability against Appellant, Appellant is entitled to judgment in its favor against Unionamerica and Stevenson for compensatory damages in an amount equal to the amount, if any, awarded to PCR on PCR's Counterclaim. Because

of the breaches of contract and/or torts committed by Respondents, Appellant is entitled to have the matter remanded for consideration of the amount of punitive damages which Appellant is entitled to recover from all Respondents. Because of Unionamerica's breach of contract Appellant is entitled to have this matter remanded to determine the amount of attorneys' fees and costs Appellant is entitled to recover from Unionamerica. In the alternative, Appellant is entitled to a trial.

Respectfully Submitted

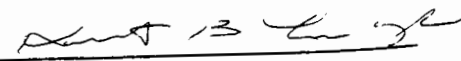
JARDINE, LINEBAUGH, BROWN & DUNN


KENT B LINEBAUGH
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 1981, I served two copies of the foregoing Brief of Appellant upon F. S. Prince, Jr. Esq. of Prince, Yeates & Geldzhaler at 425 East 5th South, Third Floor Salt Lake City, UT 84111 and Stephen G. Crockett, Esq. of Martineau, Rooker, Larsen & Kimball at 36 South State Street, No. 1800, Salt Lake City, UT 84111 or by leaving the same at his office with his clerk or other person in charge thereof.

JARDINE, LINEBAUGH, BROWN & DUNN

By: 

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FILED

JUN 5 1979

CLERK OF DISTRICT COURT

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

COUNTY OF SUMMIT, STATE OF UTAH

HAL TAYLOR ASSOCIATES, a)
 Utah corporation, and)
 HAROLD W. TAYLOR,)

Plaintiffs,)

vs.)

UNIONAMERICA, INC., a cor-)
 poration, aka WESTMOR;)
 RAMSHIRE, INC., a corpora-)
 tion; WILLIAM R. STEVENSON;)
 PARK CITY RESERVATIONS,)
 INC., a corporation dba)
 SKYLINE REALTY; HARRY F.)
 REED; and GARY COLE,)

Defendants.)

ORDER DENYING MOTION OF
 DEFENDANTS' SKYLINE, REED AND
 COLE FOR PARTIAL SUMMARY JUDGMENT

Civil No. 5557

ORDER

This matter having come on for hearing pursuant to Notice before the above entitled Court on the 2nd day of April, 1979, Plaintiffs appearing by and through their counsel of record, Kent B Linebaugh of Jardine, Linebaugh, Brown & Dunn, and Defendants Skyline, Reed and Cole appearing by and through their counsel of record, Stephen G. Crockett of Martineau & Maak, and Defendants Union-america, Ramshire and Stevenson appearing by and through their counsel of record, Donald J. Winder of Prince, Yeates & Geldzahler, the Court having heard the arguments of counsel and considered the relevant memorandum filed in behalf of Defendants Skyline, Reed and Cole, and being otherwise fully advised in the premises,

Appendix A

The Court finds that the Settlement Agreement and the Listing Agreement contemplate that other parties not involved in the lawsuit might find buyers for the listed properties and negotiate a sale therefor, and that neither Agreement contains any express or implied provision that Unionamerica or Ramshire would direct any "walk in buyer" to Plaintiffs. Such issues are thus now resolved for all future proceedings in this case.

But further issues of fact remain to be determined with respect to Counts V, VI, IX, X and XI and,

IT IS HEREBY ORDERED that the Motion of Defendants Skyline, Reed and Cole for Partial Summary Judgment of Dismissal of said Counts be and is hereby denied.

DATED this 27th day of June, 1979.

Attest: Susan L. ...

Bryant H. Croft
Bryant H. Croft
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order was served this 22nd day of May, 1979 by depositing copies of same in the United States mail, first class postage prepaid, addressed to:

Stephen G. Crockett
Martineau & Maak
Attorneys for Defendants Skyline, Reed and
36 So. State, Suite 1800
Salt Lake City, Utah 84111

Donald J. Winder
Prince, Yeates & Goldzuhler
Attorneys for Defendants Unionamerica, Ramshire
and Stevenson
424 East 5th South
Salt Lake City, Utah 84111

Kent B. Linebaugh
Kent B. Linebaugh

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HAL TAYLOR ASSOCIATES, a :
Utah corporation, and :
HAROLD W. TAYLOR, :

Plaintiffs, :

vs. :

MEMORANDUM DECISION

UNIONAMERICA, INC., a corp- :
oration, aka WESTNOR; RAM- :
SHIRE, INC., a corporation; :
PARK CITY RESERVATIONS, INC., :
a corporation, aka SKYLINE :
REALTY, HARRY F. REED; and :
GARY COLE, :

CIVIL NO. 5557

Defendants. :

The Court is of the opinion that the record of this case and the evidence supports the following findings on the issues presented.

1. That Park City Reservations, Inc. was a licensed real estate broker at all times material to the issues of this case.
2. Hal Taylor Associates did perform all services and discharged all obligations required of it by the Settlement Agreement and the Village listing.
3. The order of Judge Croft entered June 4, 1979, is a valid and binding order which resolved all issues therein together with all future proceedings of this case.
4. That the Settlement Agreement was not reformed by any oral agreement of the parties or mutual mistake of the parties.
5. That plaintiff is entitled to the relief demanded in Count III of its Fourth Amended Complaint and is awarded judgment as therein prayed.

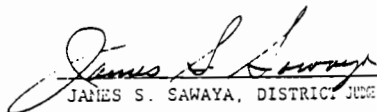
- Appendix B -

6. That the claims of plaintiffs on all other counts of their Fourth Amended Complaint are not supported by the record, the evidence and the Court finds in favor of the defendants and against the plaintiffs.

7. That the real estate commission now held in escrow together with all accumulated interest should be divided 40% to the plaintiffs and 60% to the defendant Park City Reservations, Inc.

The Court would request that both counsel for defendants join in preparing and submitting Findings of Fact, Conclusions of Law and Judgment consistent with the foregoing ruling to the Court pursuant to the rules of the Third Judicial District Court.

Dated this 7th day of May, 1930.


JAMES S. SAWAYA, DISTRICT JUDGE