

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 : Proposed Findings of Fact and
Conclusions of Law

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 THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

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

Plaintiffs,

vs.

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

Defendants.

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Civil No. 5557

The above entitled matter came on for trial without a jury, on January 14, 1980, before the above entitled Court, the Honorable James S. Sawaya, District Court Judge, presiding. Plaintiffs were represented by their counsel, Kent B. Linebaugh; defendants Unionamerica, Inc., Ramshire, and William R. Stevenson were represented by their counsel F. S. Prince, Jr.; and defendants Park City Reservations, dba Skyline Realty, Harry F. Reed, and Gary Cole were represented by their counsel, Stephen G. Crockett.

The Court having heard and considered the evidence, together with the arguments of counsel, and being fully advised in the premises, hereby makes and enters its Findings of Fact and Conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, Hal Taylor Associates (HTA) is a Utah corporation and has its principal place of business in Summit County, Utah.
2. Plaintiff Harold W. Taylor (Taylor) is a resident

Appendix A

of Summit County, State of Utah. Harold W. Taylor is the sole owner of Hal Taylor Associates and is a real estate broker licensed to do business in the State of Utah.

3. Defendant Unionamerica, Inc. (Unionamerica) is a foreign corporation qualified to transact business in the State of Utah, and having its principal place of business in the State of Utah in Summit County.

4. Defendant Ramshire, Inc. (Ramshire) is a wholly owned subsidiary of Unionamerica and is a foreign corporation qualified to transact business in the State of Utah, having its principal place of business in the State of Utah in Summit County.

5. Defendant Park City Reservations, 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.

6. Defendant William R. Stevenson (Stevenson) is a resident of the State of California. Defendant Stevenson acted as Vice President of defendant Ramshire during the period of time material to the allegations contained in plaintiffs' complaint.

7. Defendant Harry F. Reed (Reed) is a resident of and has his principal place of business in Summit County, State of Utah. Defendant Reed is the owner of Skyline and at all times relevant to this action, was a real estate broker licensed to do business in the State of Utah.

8. Defendant Gary Cole (Cole) is a resident of and has his principal place of business in Summit County, State of Utah. Defendant Cole at all times relevant to this action was a real estate salesman licensed by the State of Utah in the office of Skyline.

9. On February 17, 1977, plaintiffs Hal Taylor and Hal Taylor Associates entered into a written agreement ("the Settlement Agreement") to settle a lawsuit then pending by them against Greater Park City Company (GPCC) and defendant Unionamerica. Pursuant to the Settlement Agreement, defendant Unionamerica agreed to enter into an exclusive listing agreement with HTA for any property that it might wish to sell over a period of five years. The Settlement Agreement provided that HTA would be required to perform the usual real estate broker activities and "(Taylor) will be entitled to a commission rate, of six percent, and Taylor will further agree to a fee splitting arrangement giving sixty percent (60%) to the selling broker and forty percent (40%) to the listing broker."

10. Also on February 17, 1977, HTA entered into a Vacant Property Listing Agreement for the sale of approximately 10.5 acres of property (the "Village" property) in Park City, Utah, owned by defendant Ramshire, Inc.

11. The entire agreement between plaintiffs Hal Taylor and Hal Taylor Associates and defendants Unionamerica, Inc., and Ramshire, Inc., is contained in the Settlement Agreement and the Vacant Property Listing Agreement. These agreements were not altered or added to by any oral agreements between the parties, now was there any fraud on the part of one or more defendants nor any mutual mistake involved in the formation of these agreements.

12. None of the parties to the foregoing Agreement disclosed the terms thereof to Skyline Realty or any of its officers or agents. Shortly after entering into the February 17, 1977, Agreement, the plaintiffs contacted Skyline Realty and requested the assistance of Skyline Realty in selling the property. Each of the parties understood that should Skyline sell

the property, it would be entitled to receive sixty percent (60%) of the commission from any such sale.

13. On or prior to October 1, 1977, Mr. Jack Davis (Davis), the eventual purchaser of the "Village" property, had a telephone conversation with Mr. Robert Volk, the President of Unionamerica, Inc. This conversation was arranged by a mutual acquaintance. Davis indicated he was interested in purchasing property in a resort area, to wit, the "Village" property in Park City, Utah. Davis and Volk agreed, either in this initial conversation or in a subsequent one, to meet in Park City, Utah, so that Davis could see the property.

14. On the morning of October 3rd, Volk directed Stevenson to fly from Los Angeles to Salt Lake City for the purpose of meeting him and Jack Davis, and showing Davis the "Village" property. Stevenson had previously been informed that there was someone in San Diego expressing interest in the property, although he had not yet heard of the Davis name.

15. Volk was unable to meet in Park City and instructed Stevenson to go to Park City to meet Davis.

16. Davis and his wife went to Park City, Utah, on or about October 3, 1977. They either talked to or met briefly with Stevenson on the night of October 3rd.

17. On October 3rd, after being told to go to Park City to meet Davis, Stevenson called Taylor's office to see if he would be available. He was told that Taylor was out of town and would not be back until later in the week.

18. After he arrived at the Salt Lake City Airport, and after trying to contact Taylor, Stevenson called Cole and asked if he could meet with Cole and Reed at Cole's house in Park City. He told Cole that there was a person interested in the

"Village" land and inquired as to whether Cole and Reed would be available the next day to meet with Stevenson and the interested party (Davis).

19. Stevenson, Reed, Cole, and Mr. and Mrs. Davis met on the morning of October 4th at the Eating Establishment in Park City for breakfast. After breakfast the five people went in Reed's car to acquaint the Davis' with the City of Park City in general and the "Village" property in particular.

20. Stevenson did not see Jack Davis again between the time they parted on October 4th and the time the Earnest Money Agreement was signed on October 17th.

21. Subsequent to the meeting on October 4th, and at Davis' invitation, Reed and Cole went to San Diego and met with Davis in the latter's office. At that time Davis executed the Earnest Money Receipt and Offer to Purchase, and delivered to Reed and Cole the earnest money required by the offer. Later the same day, Stevenson and Cole, representing Mr. Davis, went to Los Angeles and presented the offer to Stevenson who accepted on behalf of Ramshire.

22. Mr. Davis testified and the Court so finds that Mr. Davis after meeting Reed and Cole decided that he wanted Reed and Cole to represent his interests in Park City, Utah.

23. Prior to obtaining the Earnest Money Receipt and Offer to Purchase, defendant Reed confirmed with plaintiff Taylor that Taylor had a listing relating to the property and that Taylor would be willing to split the commission on any sale in accordance with the usual custom in the community, vis forty percent (40%) to the listing broker and sixty percent (60%) to the selling broker. At the time Reed disclosed that he had a possible buyer for the property, Reed did not disclose that the

client had been referred to Skyline by defendant Stevenson, an officer of defendant Ramshire, Inc.

24. On October 26, 1977, Ramshire, Inc., and Davis executed the Real Estate Agreement, and Davis paid the \$25,000.00, due at that time, to the escrow agent.

25. Since the date of the Real Estate Agreement, Davis has paid for and obtained conveyance of two of the parcels of property described in the Real Estate Agreement, and has constructed, or is in the process of constructing, approximately 144 condominium units.

26. At the time of the first of the multiple closings called for in the Real Estate Agreement, Unionamerica, pursuant to the provisions of paragraph 13 of the Agreement, deposited the \$96,000.00 in an interest bearing escrow account pending settlement or resolution of the dispute between the brokers. None of the defendants have at any time since that closing had the use or benefit of the \$96,000.00 so deposited. Unionamerica acted reasonably in so depositing these funds in an escrow account in light of the dispute.

27. Skyline Realty by and through its agents, Reed and Cole, fully performed the obligations required of a selling broker under the fee splitting agreement reached between plaintiffs and Skyline Realty.

28. 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 the trial was

almost complete.

29. During 1979, Unionamerica or one of its subsidiaries sold a condominium apartment to Mr. Jack Davis for the sum of \$42,500.00. The parties negotiated directly and concluded the sale without assistance of a real estate broker.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. Plaintiffs Hal Taylor and HTA performed all services and discharged all obligations required of them by the Settlement Agreement and the Vacant Property Listing Agreement.

2. The Settlement Agreement and the Vacant Property Listing Agreement were not altered, added to or modified by oral agreement of the parties, nor will these agreements be reformed on the grounds of mutual mistake or fraud.

3. Park City Reservations, Inc., was a licensed real estate broker at all times material to the issues of this case.

4. The Settlement Agreement and the Vacant Property Listing Agreement contemplate that, in addition to HTA, other brokers might find buyers for the listed properties and negotiate sales therefore. Neither agreement contains any express or implied provisions that Unionamerica or Ramshire would direct to HTA persons making inquiries about the listed properties.

5. Unionamerica acted reasonably in paying the \$96,000.00 commission into an interest bearing escrow account pending settlement or resolution of the dispute between the brokers, and Unionamerica's failure to pay HTA strictly in accordance with the terms of the listing agreement is excused.

6. HTA is entitled to receive forty percent (40%) of the \$96,000.00 held in the escrow account, together with the

interest thereon accrued, and Park City Reservations, Inc., is entitled to receive the remaining sixty percent (60%) of the \$96,000.00 held in such account, together with interest accrued thereon.

7. HTA is entitled to judgment against Unionamerica and Ramshire in the amount of six percent (6%) of \$42,500.00, or \$2,550.00, together with interest thereon at the rate of six percent (6%) per annum from the date of sale of the condominium apartment to Jack Davis to the date of judgment, and together with interest at the rate of eight percent (8%) per annum from the date of judgment until paid.

8. The Court finds there is no factual basis for a finding of a conspiracy, conversion, wrongful creation of a liability, breach of a duty to act in good faith, breach of a fiduciary duty, or intentional infliction of mental distress, and the Court concludes that none of the foregoing torts occurred in this case.

9. 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 there is no basis for plaintiff's claim for punitive damages.

10. 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.

MADE AND ENTERED this 15th day of August, 1980.

BY THE COURT:

/S/
James S. Sawaya, Judge

AFFIDAVIT

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I DOUGLAS S. FOXLEY, being first duly sworn, depose and say:

1. I am a Deputy Lieutenant Governor for the State of Utah.

2. Part of my responsibilities include a knowledge of the transactions in the Secretary of State's office including transactions that relate to the filing of certificates for assumed names.

3. Pursuant to a request by Stephen G. Crockett, Esq., on the 25th day of March, 1981, I caused a search to be made to determine whether Harry Reed, Park City Reservations, Inc., or any other entity ever filed an assumed name certificate for the use of the name Skyline Realty. In my search I discovered the following:

(a) On June 14, 1973, Harry F. Reed filed a certificate of assumed name using the name Skyline Realty of Park City. That certificate is attached to this Affidavit as Attachment "1".

(b) In the Park City Reservations, Inc., file this office maintains, I found the original of a letter dated November 27, 1974 to Mr. John H. Williamson from Mr. D. Kendall Perkins which is Attachment "2" to this Affidavit. The letter relates to the use of the name Skyline Realty. The letter does not mention Park City Reservations, Inc., which is our file in which the letter was found.

(c) I have been shown a copy of a letter dated November 18, 1974 which is attached to this Affidavit as Attachment "3". That letter is the type of form letter we would have sent during the period of time referred to therein if there was a question whether or not an entity which filed for an assumed name could in fact utilize such name. In order for this office to send out

Appendix B

Attachment "3", it would have been necessary that this office would have received on or about the date indicated a request by the corporation concerned for the use of the name "Skyline Realty".

(d) I have been shown a copy of Attachment "4" to this Affidavit which appears to be a transmittal letter from Mr. D. Kendall Perkins containing the release which is Attachment "1". Attachment "4" requests that the Articles of Incorporation be filed.

(e) On December 11, 1974, one day after Attachment "4" is dated, this office filed the Articles of Incorporation on Park City Reservations, Inc., which were submitted by Mr. D. Kendall Perkins which would indicate we did receive attachment "4". Normally, under the procedures of this office, had Park City Reservations, Inc. filed for an assumed name of Skyline Realty, the transmittal letter which is Attachment "4" would have been connected to the assumed name certificate. We have made a search of our files and have determined we can find no assumed name certificate for the use of Skyline Realty between November and December of 1974 nor the transmittal letter. Knowing the procedures of this office, it appears to me that the only logical explanation is that Mr. Perkins filed for the use of the name "Skyline Realty" along with the submission of the Articles of Incorporation of Park City Reservations, Inc. This office has apparently lost the assumed name application which was filed by Mr. Perkins with Attachment "4".

FURTHER AFFIANT SAYETH NOT.

DATED this 31st day of March, 1981.


DOUGLAS S. FOXLEY

SUBSCRIBED AND SWORN TO before me this 31st day of March,
1981.

Victor S. Jackson
NOTARY PUBLIC
Residing in Salt Lake County, UT

My Commission Expires:

1/12/85

ATTACHMENT "1"

Filing Fee: \$1.00

CERTIFICATE

(Regarding transacting of business under an assumed name)

STATE OF UTAH

County of Summit } ss.

The undersigned, who are (is) carrying on, conducting or transacting business under an assumed name, certify that the assumed name is

Complete Address: SKYLINE REALTY co Park City
PO Box 452 (City Block 5A)
Park City, Utah 84301

And that the full true name or names, of the person or persons owning, and the person or persons carrying on, conducting or transacting such business with their post office addresses are as follows:

Names	Addresses
<u>Harry F. Reed</u>	<u>PO Box 452 Park City, Utah 84301</u>
_____	_____
_____	_____
_____	_____
_____	_____

Harry F. Reed
 Signatures of persons named above

Subscribed and sworn to before me this 8 day of June 19 73

G. Madeline Smith
 Notary Public, residing in

Park City Summit County
 State of Utah

Commission Expires
May 18, 1977

JUN-20-73 DECECE

ACB-1

1.00

ATTACHMENT "2"

D. KENDALL PERKINS
Attorney at Law
700 West 200 Building
Salt Lake City, Utah
84 (80) 350-7756

November 27, 1974

Mr. John H. Williamson
2238 Blaine Avenue
Salt Lake City, Utah

Re: Name of Skyline Realty

Dear Mr. Williamson:

Please be advised that I represent Mr. Harry Reed who, I believe, has contacted you earlier about your use of the name Skyline Realty. Mr. Reed has represented to me that he contacted you and determined that that name had not in fact been used by you as of late and I would therefore request, if this is true, that you kindly send me a letter authorizing the release of that name in that Mr. Reed wishes to use that name for a corporation which will be soon registered with the Secretary of State. I would appreciate very much your sending me a letter consenting to our use of that name as soon as is convenient for you.

I thank you for your attention and cooperation in this matter. If there are any questions you may have, please feel free to contact me.

Very truly yours,

D. Kendall Perkins
D. KENDALL PERKINS

DKP:h

To Whom It May Concern:

I hereby release any interest or intended use of the name Skyline Realty that I might of had or do have.

*John H. Williamson
2238 Blaine Ave*

ATTACHMENT "3"



STATE OF UTAH
OFFICE OF THE SECRETARY OF STATE
SALT LAKE CITY

CEYDE L. MILLER
SECRETARY OF STATE
GRANT M. PRINDLEY
DEPUTY SECRETARY OF STATE

November 18, 1974

D. Kendall Perkins
716 Newhouse Building
Salt Lake City, Utah 84111

TO WHOM IT MAY CONCERN:

We are returning the attached document to you for the following reason:

Document not properly signed. Please sign where indicated by "X".

Signature has not been properly notarized.

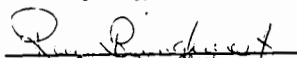
Proper fee not received. Amount of fee due is \$ _____.

The enclosed statement form must be filed when changing either registered agent or registered office or both. There is a \$5.00 Filing fee for the Statement of Change.

XXXXXX Other The name you have chosen for your corporation is not available,
We have a trade mark filed under the name of Skyline Realty, you would
have to contact John H. Williamson 2238 Blaine Ave. SIC, Utah for a letter
of consent to use the name.
Will you please take the necessary action and return the document to this
office for processing.

Your early attention to this matter will be appreciated.

Yours very truly,


Corporation Clerk



ATTACHMENT "4"

D. KENDALL PERKINS
ATTORNEY AT LAW

716 NEWHOUSE BUILDING • SALT LAKE CITY, UTAH 84111 • PHONE 359-7756

MESSAGE	REPLY
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TO Utah Secretary of State's Corporation DATE
 Box 203 State Capital Bldg.
 S. L. C. Utah 84114

DATE 12-10-74

Gentlemen:

Please find enclosed my letter requesting the release of the name "Skyline Road," and the attached consent and release of John H. Williams.

Please now file the enclosed Articles of Incorporation.

Thank You

BY

Form M-8728 (Rev. 6-1-64) Using Board No. 303 Extra Issues

D. Kendall Perkins

SIGNED

DETACH AND FILE FOR FOLLOW-UP