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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 Defendants-Respondents Park
City Reservations, Inc., dba Skyline Realty, Harry F.
Reed, and Gary Cole

Utah Supreme Court

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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 corpor-
ation, aka WESTMOR; RAMSHIRE,
INC., a corporation; WILLIAM
R. STEVENSON; PARK CITY
RESERVATIONS, INC., a corpor-
ation, dba SKYLINE REALTY;
HARRY F. REED; and GARY COLE,

Defendants-Respondents.

Case No. 17359

BRIEF OF DEFENDANTS-RESPONDENTS
PARK CITY RESERVATIONS, INC., dba SKYLINE REALTY,
HARRY F. REED, AND GARY COLE

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

Stephen G. Crockett, Esq.
MARTINEAU, ROOKER, LARSEN & KIMBALL
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Respondents
Park City Reservations, Inc., dba
Skyline Realty, Harry F. Reed, and
Gary Cole

Kent B. Linebaugh, Esq.
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 401
Salt Lake City, Utah 84111
Attorneys for Appellant

F. S. Prince, Jr., Esq.
James A. Boevers, Esq.
PRINCE, YEATES & GELDZAHLER
424 East 5th South, Third Floor
Salt Lake City, Utah 84111
Attorneys for Respondents Unionamerica,
Inc., Ramshire, Inc., and William R. Stevenson

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1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Respondents
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Skyline Realty, Harry F. Reed, and
Gary Cole

Kent B. Linebaugh, Esq.
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 401
Salt Lake City, Utah 84111
Attorneys for Appellant

F. S. Prince, Jr., Esq.
James A. Boevers, Esq.
PRINCE, YEATES & GELDZAHLER
424 East 5th South, Third Floor
Salt Lake City, Utah 84111
Attorneys for Respondents Unionamerica,
Inc., Ramshire, Inc., and William R. Stevenson

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Appendix A - The Trial Court's Findings of Fact and Conclusions of Law.

Appendix B - The Affidavit of Douglas S. Foxley and Attachments thereto.

IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No. 17359

BRIEF OF DEFENDANTS-RESPONDENTS
PARK CITY RESERVATIONS, INC., dba SKYLINE REALTY,
HARRY F. REED, AND GARY COLE

STATEMENT OF THE NATURE OF THE CASE

This action involves a dispute as to whether or not respondent Park City Reservations, Inc., a real estate office, is entitled to receive a portion of a real estate commission which relates to the sale of certain properties in Park City, or whether the entire real estate commission should go to appellant, another real estate office located in Park City.

DISPOSITION IN THE LOWER COURT

After a trial, Judge Sawaya of the Third District Court decided against appellant on all of the claims asserted against Park City

Reservations, Inc., Reed, and Cole (for purposes of this brief these appellees where appropriate will be collectively referred to as "PCR"). The Trial Court ruled in favor of Park City Reservations, Inc., on the counterclaim which was awarded sixty percent (60%) of a real estate commission.

RELIEF SOUGHT ON APPEAL

PCR, Reed, and Cole, request that the Trial Court judgment be affirmed in all respects.

STATEMENT OF FACTS

The facts set forth below do not encompass all of the factual assertions made by appellant. Many of the factual assertions made by appellant relate only to Unionamerica and not to these respondents. Therefore, these respondents set forth only the factual contentions which are relevant to claims by and against PCR.

1. Appellant is a Utah corporation whose chief executive officer had a valid broker's license under the laws of the State of Utah.

2. Unionamerica and its wholly owned subsidiary Ramshire were foreign corporations who did business within the State of Utah. For purposes of this brief these defendants will also treat Unionamerica and Ramshire as one and the same.

3. PCR was a Utah corporation with its principal place of business in Summit County and whose shares were owned by Harry F.

Reed. PCR, doing business as Skyline, was both a defendant and counterclaimant in the Trial Court.

4. Harry Reed was a duly licensed real estate broker who was employed by Skyline Realty in Park City. At all times relevant to this action Skyline Realty was a branch brokerage of Skyline Real Estate located in Salt Lake City and as such was registered with the Utah Department of Business Regulations. Harry Reed was the registered broker/branch manager of Skyline Realty (Record on Appeal p. 773-Exhibit 43). Harry Reed established Skyline Realty some time in 1973. The exact date Skyline Realty was established as a sole proprietorship is not part of the record except insofar as it is included in an affidavit submitted from the Secretary of State's office which will be discussed in subsequent pages of this brief. Mr. Ladd Christensen was the real estate broker for Skyline Real Estate and Investment Company out of Salt Lake City. Although Skyline Realty was a branch brokerage for Skyline Real Estate and Investment Company, it was owned by Harry Reed. On December 11, 1974, Harry Reed incorporated the branch brokerage and took as its name Park City Reservations, Inc., d/b/a Skyline Realty. Mr. Reed testified that it was his understanding that PCR was entitled to do business in the name of Skyline Realty. (T. 428.) PCR d/b/a Skyline Realty, continued to do business at all times relevant herein as a branch brokerage of Skyline Real Estate and Investment Company.

5. As set forth above, PCR does not agree that Ladd Christensen's company was a different company than PCR during the periods in question. PCR was a separate corporation from Ladd Christensen's company but was also a branch office. PCR is aware of no rule or regulation precluding a branch brokerage from being separately incorporated. Reed and the Utah Department of Business Regulations treated Skyline Realty as a branch brokerage of Ladd Christensen. Harry Reed was listed as the official Real Estate Broker for Skyline. (Record on Appeal p. 783 - Ex. 46.)

6. PCR disagrees with appellant's factual assertions claiming Reed was never a broker for PCR nor that PCR was licensed by the state. Skyline Realty was a branch brokerage with Harry Reed as the licensed broker. (Record on Appeal p. 773 - Ex. 43; Record on Appeal pp. 782-783 - Ex. 46.) Skyline Realty was the assumed name for PCR as will be established in subsequent discussions.

7. PCR does not know the dates on which appellant's counsel first inquired of the office of the Secretary of State to ascertain if a certificate to conduct business under the assumed name of Skyline Realty had been filed by PCR. PCR contends it was not advised until late in the trial that appellant was going to challenge capacity. (T. 586-587.) Further, PCR contends the factual investigation by appellant's counsel missed certain documents in the office of the Secretary of State which indicated that in fact PCR did file an assumed name certificate for Skyline

Realty. These factual circumstances will be discussed in greater detail in subsequent portions of this brief. Similarly, PCR will analyze the claim that PCR was not a licensed corporate real estate broker. PCR contends that under its assumed name of Skyline Realty with its broker/branch manager Harry Reed, PCR was entitled to act as a real estate brokerage.

8. Reed testified that for purposes of this lawsuit PCR, Skyline Realty and Investment Company, and Skyline Realty, Inc., were different names utilized by the same corporate entity.

9. PCR disagrees with appellant that there was no evidence proffered or presented that any assumed name certificate had been filed. PCR specifically asserts that a proffer was made that in fact the assumed name certificate had been filed. (T. 651, 653.)

10. Appellant is in error in claiming respondents first claimed appellant had waived any capacity defense only during the final argument. PCR objected to the evidence relating to capacity on the grounds that there was no defense in the pleadings claiming Reed was not a broker and such a defense would have to be raised affirmatively. (T. 587.) Further, PCR objected to the exhibits which related to the lack of filing of an assumed name certificate. There is a significant discussion on the record concerning the objection. (T. 638-641.) The argument concerning the objection relates specifically to the issue of surprise and to the issue of capacity. The Trial Court ruled that respondents' counsel was not

surprised and that respondents in fact had the same opportunity to look at the records as appellant. The section of this brief that deals with the filing of the assumed name certificate demonstrates that respondents were in fact surprised and could have met the evidence given adequate notice. Therefore the ruling was in error.

11. Gary Cole has a real estate sales license issued by the State of Utah. PCR does not know what appellant means wherein it claims that Cole was licensed under Christensen as a "primary broker" and under Reed as a "broker/branch manager". PCR is unable to find any statute or regulation defining the terms primary broker and therefore is unable to understand the nature of the characterization asserted by appellant. Exhibit P. 46, cited by appellant as authority for the proposition, does not list Ladd Christensen as a primary broker over Gary Cole. Exhibit P. 46 indicates on the second page that Harry Reed is the official broker under whom Gary Cole was operating.

12. There was a prior lawsuit between Taylor and Unionamerica and there was a listing agreement and a settlement agreement that arose out of that lawsuit. PCR did not know the specific terms of the agreement nor did it participate in the prior litigation. The settlement agreement required appellant to perform the usual real estate broker activities encumbant upon a listing broker. The Trial Court found that appellant in fact discharged all obligations to be performed pursuant to the settlement agreement.

13. The settlement agreement provided that Taylor was to obtain the listing on properties sold by Unionamerica in Park City. It further provided there would be a 6% commission on sales of properties which would be split 60% to the selling broker and 40% to the listing broker. The settlement agreement does not require that the payment would first be made to the listing broker who would then split the commissions with the selling broker.

14. There was no written multiple listing agreement in Park City. Harry Reed testified that generally brokers would split commissions with 60% going to the selling broker and 40% going to the listing broker. PCR disagrees with appellant that in fact the arrangement in Park City would qualify as a multiple listing service. Reed testified that although brokers would generally split commissions on the 60/40 basis, Hal Taylor as the broker for Hal Taylor Associates had not entered into that agreement. (T. 480.) Reed indicated there was an informal listing arrangement between certain brokers (not Hal Taylor) in Park City. Reed testified it was a simple understanding between brokers concerning the 60/40 split rather than a signed agreement. (T. 491.) Harry Reed attempted to abide by the customs and practices of realtors in Park City. PCR affirmatively alleges that although Taylor had not participated generally in the Park City oral agreement that fact is not relevant to this inquiry since there were two occasions that Reed and Taylor specifically agreed to the 60/40 split should the village land be

sold. One of those agreements occurred prior to the time Davis ever came on the scene and one after. (T. 56-57, 117-119, 150.)

15. Stevenson, a vice-president of Unionamerica, had a general understanding that the brokers in Park City would split a listing on a 60/40 basis. Further, Stevenson testified that the reason he put the 60/40 requirement in the settlement agreement with Taylor (Exhibit 2) was to make certain there would be no question in anyone's mind that they could get a commission if they could sell the property. (T. 292.)

16. At the time the settlement agreement was entered into, Unionamerica signed the listing agreement with appellant relating to the village land.

17. PCR absolutely disagrees with the characterization of appellant in paragraph 25 that the evidence demonstrated Unionamerica was unwilling to sell the village land for the listing price. The pages referred to in appellant's brief (T. 382, 383), simply do not say what appellant contends. Reading the pages in question the only thing that can accurately be taken from testimony is that Unionamerica did not know whether they wanted to sell the village land at \$1,685,000.00. Stevenson never said he was not willing to sell the village land for that amount of money. Stevenson did not testify that he had any hidden price that he kept from Hal Taylor. Stevenson stated he didn't know whether he wanted to sell it for \$1,685,000.00 and he never told Taylor he would not

sell for that amount of money. Stevenson did not say that in fact he would not sell for that amount of money if an offer were received. Ultimately Stevenson sold the village land for less than \$1,685,000.00.

18. Stevenson did testify that Dempsey indicated a definite interest in purchasing the village land. (T. 306.) Stevenson did not testify that he did not properly respond to Dempsey's overtures. Stevenson merely said that he did not want to come off his asking price by giving a counter offer back to Dempsey. Further, Stevenson did not testify that he was severely reprimanded by his boss at Unionamerica. Stevenson merely said that he considered he received a "chewing out" when Stevenson's boss told Stevenson to take care of the Dempsey situation and respond to the offer. (T. 310.) PCR cannot find any indication of a "severe reprimand".

19. Judge Croft ruled 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 therefore, and that neither agreement contains any express or implied provisions 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."

The ruling was made pursuant to a motion for summary judgment or in the alternative partial summary judgment.

20. Judge Sawaya properly indicated it was not his function to overrule Judge Croft. Paragraph 27 of the Findings of Fact made a further determination that Skyline Realty fully performed all of the obligations required of a selling broker under the fee splitting agreement reached between Skyline and appellant. (Appendix , Finding of Fact 27.) This finding is independent of Judge Croft's finding and in and of itself would operate as an independent basis for recovery by Skyline.

21. The definition of a "walk-in," for purposes of this case is a potential buyer who comes to the owner unsolicited and is not referred to the owner by a licensed real estate agent.

22. The evidence is disputed regarding custom and practice as applied to the listing arrangement in Park City and appellant's part of the arrangement. However, regardless of the custom of practice, in this action Skyline became eligible to become a selling broker and participate in the commission because: (a) Appellant and Unionamerica entered into the settlement agreement specifically providing that a selling broker would be entitled to receive 60% of the commission (Exhibit 2); and (b) Hal Taylor made a specific agreement with each of the brokers in Park City right after signing the listing agreement that he would split the commission 60/40 should any of those realtors be able to sell the property. (T. 56-57, 117-119, 150.)

31. The settlement agreement (Exhibit 2) did not specify the details of any listing required. PCR disagrees with appellant that there was credible testimony disclosing customs and practices in the State of Utah which defining differences between an exclusive right to sell or an exclusive agency listing. Each listing is nothing more than a contract which sets out its own terms and conditions. Hal Taylor is the only witness called by appellant who had experience in Park City who attempted to explain the differences between the two different types of listings. Hal Taylor specifically testified that he had never had any experience with an agreement known as an exclusive agency contract. (T. 137.) Hal Taylor testified that his understanding as to the differentiation came from reading it in a book rather than gaining such an understanding from customs and practices in the industry. (T. 138.) The only other witness called by appellant in an attempt to establish such customs and practices was Edward J. Conry, an Assistant Professor of Business Administration at Utah State University. Although Mr. Conry was initially questioned concerning customs and practices regarding the difference between an exclusive agency contract and an exclusive right to sell contract, Mr. Conry subsequently testified in fact he did not have the background enabling him to comment on a comparison. Mr. Conry specifically stated that any distinctions he knew of between an

exclusive right to sell and an exclusive agency listing were pure speculation. (T. 580.) Conry specifically stated that he had had very little experience with exclusive agency contracts and was guessing as to their characteristics. (T. 580-581.) To quote Conry: "I am incompetent to articulate clearly what industry practices are with regard to the exclusive agency." (T. 581.)

24. Reed testified that one of the standard forms in his office was the same form that was signed by Unionamerica with regard to the listing on the village land involved herein. However, Reed also testified that he did not know which listing form Taylor had with Unionamerica. (T. 448.) Reed also testified that generally with a special piece of property such as the village land more often than not there was a specially created listing contract rather than a standard form. (T. 448.)

25. PCR agrees with some of the statements made in paragraph 34 of appellant's Statement of Facts. However, appellant casts them in a light in which they were not received at trial. Stevenson did not couch his desire that other brokers be able to sell the village land in terms of whether or not such a desire was consistent or inconsistent with an exclusive right to sell. Therefore, in order to fairly analyze the factual statements contained in paragraph 34 of

appellant's brief, PCR will go through each fact and give its understanding as to what was introduced and received at trial.

(a) (b) (c) Stevenson had not listed the village land prior to entering into the settlement agreement with Taylor because Stevenson thought there would be more inducement for realtors to sell the land if they could receive the full commission. When Stevenson executed the settlement agreement with Taylor (Exhibit 2), Stevenson required the 60/40 split commission so that other realtors in Park City would have the incentive to make a sale. Neither the settlement agreement (Exhibit 2) nor the listing agreement (Exhibit 3) sets forth any obligation of Unionamerica with regard to a "walk-in" purchaser.

(d) Mr. Ray Johnson, the representative of Greater Park City Company, testified that there was an oral agreement between Greater Park City Company and appellant wherein Greater Park City Company would refer walk-in purchasers to Hal Taylor Associates. (T. 203.) It should be noted that Greater Park City Company and Unionamerica were different companies who both entered into an agreement to settle pending litigation with Hal Taylor when the listing agreements were signed. Stevenson testified that although Greater Park City Company may

have entered into a separate oral agreement to refer walk-in's to appellant, Unionamerica did not make such an oral agreement. (T. 295-297.) The Trial Court in its fact finding function determined that Stevenson told the truth and entered a specific finding that no oral agreement existed which modified the settlement agreement and which, therefore, would have required Unionamerica to refer walk-in's to Hal Taylor. (Appendix A, Finding 11.) It should further be noted that Stevenson's version of the conversation between Taylor and Johnson is different than that presented by appellant in its brief. Stevenson testified that at the time of the settlement, Hal Taylor indicated to Greater Park City Company that Greater Park City Company was not listing all of its properties with Hal Taylor. Since GPCC was not listing all of its properties, Hal Taylor wanted to be protected in the event a person came along during a subsequent period and requested that GPCC sell a particular piece of property that was not listed. According to Stevenson, Ray Johnson agreed that should a purchaser approach GPCC about an unlisted property, Hal Taylor would receive a commission in the event a sale occurred. Stevenson did not believe that the agreement between GPCC and Taylor referred to the type of walk-in involved wherein a property was already

listed and a potential purchaser merely wanted to be put in touch with a real estate agent. (T. 295-297.) Appellant has apparently confused the two together.

(e) PCR agrees that the oral understanding between Taylor and GPCC occurred because GPCC was not listing all of its properties. PCR disagrees with appellant's contention that the only reason the oral agreement between appellant and Unionamerica was not reached relating to a walk-in was because there were no properties to be listed. Stevenson specifically indicated that appellant's counsel was confusing the term walk-in as used in this case with the term walk-in referred to in the agreement between GPCC and Hal Taylor. Stevenson specifically indicated that there was no agreement to refer a walk-in such as Mr. Davis to Hal Taylor. The Trial Court believed Mr. Stevenson. (T. 294-302.)

26. A listing broker may put signs on the property with the listing broker's name, address and telephone number and that generally the listing broker has a better access than the owner. PCR disagrees with appellant's contention that under an exclusive right to sell listing, the broker is entitled to any referral the owner might make. The portions of the transcript cited by appellant simply do not support appellant in that contention.

27. With regard to the factual assertions by appellant relating to the nature of the legal arrangement between brokers, there is substantial disagreement. Appellant's assertions are mainly argument and are not indicative of evidence received at trial. In order to focus this issue, PCR must set forth its belief as to the legal relationships existing between the parties involved in this case.

(a) PCR disagrees with appellant that the selling broker becomes an agent of the listing broker and a sub-agent of the owner. There is no custom or practice evidence before the Court establishing such a finding. With regard to distributing money from a sale, there is no evidence indicating a selling broker only has access to the money through the listing broker. In fact, evidence received indicates in Park City that the selling broker is the entity who generally collecting and distributing the money. (T. 602-605.) Reed testified that with regard to Skyline's transactions with Taylor, prior to the sale of the village land, the selling broker received and disbursed the money in ten out of ten instances. (T. 604.)

(b) PCR disagrees with several of the factual contentions made by appellant that there was evidence of a custom and practice in the real estate industry requiring

an owner to refer a "walk-in" to a listing broker. There was no credible testimony whatsoever relating to that specific issue which established such a custom and practice in Park City. The only possible evidence appellant could be referring to would be the testimony of appellant's purported expert who gave a legal opinion as to the obligation for referring a walk-in. Clearly the legal opinion was not binding on the Court. Appellant has not cited nor can appellant cite to any credible evidence relating to a custom and practice involving walk-ins since appellants introduced no such evidence. Even had appellant introduced such evidence, it is extremely doubtful whether Unionamerica could be held as a contractual obligation to a custom and practice.

28. On May 15, 1978, a portion of the village land was conveyed by Unionamerica to Jack W. Davis, Inc. Pursuant to the findings of the Trial Court, appellant was entitled to 40% of the \$96,000 and PCR to the remaining 60%. (Appendix A, paragraph 6, Conclusions of Law.)

29. PCR concedes that Reed and Cole acted as agents for Davis regarding portions of this transaction.

30. Paragraph 42 of appellant's brief is nothing more than argument completely ignoring portions of the record. Since the facts contained in paragraph 42 directly relate to PCR's

involvement in the sale, appellees find it necessary to go into great detail to accurately reflect the Trial Court record.

The appellant attempts to take the position that PCR is not entitled to the commission because PCR was not the "procuring cause" of the sale. In support of this position appellant has drawn a chart in its brief of several events which is supposed to demonstrate the minimum nature of PCR's involvement in the sale. (Appellant's brief pp. 37-40.) An analysis of all of the facts indicates that the chart is neither complete nor accurate. Further, appellant totally misunderstands the efforts made by PCR to insure that the transaction would go through.

Davis heard of the village land from a Mr. Luce who is on the Board of Directors of Unionamerica. However, Davis was merely told by Luce that there was some property in Park City that Davis might be interested in. (Davis Depo. pp. 14, 17-18. Davis testified through deposition which by stipulation was not transcribed as a part of the trial transcript. Therefore, references to the Davis testimony will be to his deposition.) At no time did Davis indicate he was going to purchase the land prior to seeing it or prior to having communications with Unionamerica concerning his purchase price. There is no testimony in the record indicating Davis decided to purchase the property prior to visiting it. Indeed, it would be absurd

to believe Mr. Davis would spend 1.6 million dollars for a piece of property he had never seen nor discussed with the owner in any depth whatsoever. All of the communications prior to Davis' seeing the property merely amounted to Davis' expressing an interest, a meeting being arranged for Davis to look at the property, and the sending of a feasibility study to Davis which set forth a possible use of the land. Davis then went to Park City to look at the land. On the night before his visit, Stevenson, one of the officers of Unionamerica and a resident of California, was advised by his superior Volk that Volk would not be able to meet with Davis. At about that time Mr. Stevenson learned that Hal Taylor was in the State of California and was not available in Utah. Mr. Stevenson, after learning that Mr. Volk would not be able to participate with Davis in looking at the property then called Gary Cole, a licensed real estate salesman and resident of Park City. Stevenson met with Reed and Cole for approximately ten or fifteen minutes on the evening of October 3 and inquired if Reed and Cole would be available if Davis required assistance. Reed and Cole indicated they would make themselves available. (T. 339.) Later that evening Mr. Stevenson met Mr. Davis and his wife at a restaurant in Park City where they discussed for several hours various items including the kind of business the Davis' had, their preferred method of doing business, Davis'

questions concerning Park City in general and the feasibility study. (T. 341.) As a result of the meeting with the Davis', Stevenson called either Reed or Cole and requested a breakfast meeting the next morning. (T. 342.) At breakfast the following morning all five of the individuals met (Reed, Cole, Stevenson, and Mr. and Mrs. Davis). The individuals then left in Reed's car and the Davis', for the first time, saw the village land. Reed testified that at the meeting on the morning of the 4th at the Eating Establishment Davis asked several questions, which Reed and Cole were able to answer concerning what was happening in Park City, where things were going, and what types of things the planning people might do. (T. 457-458.) Reed testified that they talked about the village land, industry in Park City, revenue bonds, and methods available for financing property purchases. Reed also explained prices of condominiums in the area, what other projects were being built, and in fact showed Mr. Davis other projects. (T. 458-459.) Reed testified that they did a "pretty thorough job of presenting the real estate industry in Park City to Mr. Davis." (T. 459.) Reed indicated that his involvement was much greater than Stevenson's concerning what was occurring in Park City, development, financing, and revenue bonds. (T. .)

Mr. Davis' recollection of the meeting coincides with that of Reed and Stevenson. Davis testified that within a few minutes of the meeting with Reed and Cole, Davis decided he wanted Reed and Cole to represent him regarding Park City activities (Davis Depo. p. 35.) Davis further testified that his manner of doing business was that he always wanted local people to participate in such transactions. Davis decided after meeting with Reed and Cole a very short time that these people were knowledgeable, and met his needs with regard to Park City. (Davis Depo. p. 35.)

After seeing the property and receiving an explanation from Reed regarding the general nature of industry in Park City, Davis returned to California. Subsequently, Reed testified that he received a telephone call from Davis requesting Reed and Cole were asked to travel to San Diego to discuss preparing an earnest money offer to purchase. It is apparently appellant's contention that a few days after Davis visited the property, Davis called Volk and orally agreed to purchase the land at Unionamerica's asking price prior to Reed and Cole making the trip to prepare and present an earnest money offer. Appellant also contends that the communication between Davis and Volk resulted in Volk's ordering Stevenson to ensure consummation of the village land sale. The attempts to establish is that Reed and Cole needed to do nothing further in

order to cause the sale to go through. However, Stevenson denied that in fact Volk called and told him that Davis had agreed to the purchase. (T. 343.) Davis also denied making such a call (Davis Depo. p. 33). Reed testified that prior to going to California to discuss drafting an earnest money agreement with Davis, Reed was never advised that an agreement had already been made and Reed need only work out its terms. (T. 466.) The Trial Court was entitled in its fact finding function to believe Stevenson and Davis rather than Volk. In fact, it is difficult to believe Davis would commit to a 1.6 million dollar purchase without the dickering that subsequently occurred. However, it is irrelevant whether the Trial Court believed Stevenson and Davis or Volk. The truth of the matter is appellant cannot contend there was any kind of binding offer and acceptance prior to the submission and acceptance of the earnest money offer, which was completely handled by Reed and Cole.

Subsequent to the meeting in Park City, Reed and Cole contacted Davis and made an appointment to go to San Diego. (T. 410.) On the 16th of October they went to San Diego, California and spent the evening with Mr. and Mrs. Davis at their home. During that evening they talked about Park City. (T. 411.) Further, Reed and Cole took to San Diego an earnest money blank on a Utah form. (T. 411.) On the morning of October 17th,

Reed, Cole, and Davis went to Davis' office to discuss the terms of the offer which were eventually memorialized in Exhibit "9". As a result of those discussions a somewhat complicated earnest money was drafted. The buyer under the earnest money was required to deposit \$5,000 with Skyline. (T. 414.) The offer was presented by Reed and Cole and after some further discussions was accepted by Unionamerica.

A very essential portion of this transaction that appellant completely ignores in its brief concerns the period of time subsequent to the signing of the earnest money agreement. According to appellant's brief, the transaction was completed when the real estate agreement was executed by Unionamerica and Davis on October 24, 1977. That simply is not the case. A close reading of the earnest money agreement and the real estate agreement (Ex. 12) both of which were executed in October of 1977 demonstrates that the buyer did not simply agree to pay the purchase price to Unionamerica. The buyer, a developer out of California, kept his options open by allowing himself a period of time wherein he could withdraw from the subject transaction. Exhibit "9", the Earnest Money Offer, made the sale contingent on numerous conditions set forth on an attachment "B" which was part of the earnest money agreement. Further, the sale was contingent upon buyer's acceptance of the preliminary title report. Attachment "B" to the earnest money

agreement provided that there would be a final escrow agreement which would have to be prepared. It was contemplated that in fact for a transaction this complex, the parties would immediately meet in Utah to draft a contract. The earnest money further provided that the closing for the sale would be held within 160 days after the final agreement was signed. The final agreement was the real estate agreement which was negotiated and executed approximately one week after the earnest money on October 24, 1977. A close reading of the exhibit demonstrates that the transaction was far from complete.

Jack W. Davis, Inc., the buyer, made certain that an escape clause was included wherein Davis could analyze whether or not the property was suitable for development. For example, within 60 days of the signing of the real estate agreement buyer was entitled to terminate the contract and receive the entire down payment back. If the transaction were terminated by Davis between 60 and 100 days, various penalty provisions applied. For example, between 60 and 90 days, the buyer would receive \$20,000 and the seller would receive \$10,000. More than 90 days the seller would receive \$20,000 and the buyer would receive \$10,000. More than 120 days the buyer would receive nothing back and the seller would receive \$30,000. In other words, Davis knew there would be substantial work to be

done prior to determining if the purchase was feasible. The parties further agreed that no commission would be due until after the initial closing which would occur on or before April 1, 1978, allowing time for the withdrawal periods by Davis to expire. Harry Reed testified that most of the work in putting the sale together actually occurred after the signing of Exhibit "12". In other words, for the commission to be due, Davis would have to decide that he was not going to withdraw from the contract and would press forward.

Reed testified that in the approximate seven month period between the time the real estate sales agreement was signed and the closing occurred, he spent an extensive amount of time working on the project and Gary Cole spent almost full time working on the project. (T. 597-598.) Reed testified that he was well aware the transaction was not final until after the interim periods had passed and Davis decided the project made economic sense. (T. 598.) Reed testified that to ensure the property would be viable and the sale would occur his office did the following:

(a) Worked with Davis and his architect to come up with ideas of types of things to put on the village land. For example, Reed testified that although the feasibility study provided for only 44 units, the work Reed and Cole did with the architect ultimately resulted in 82 units

being placed on the village land. That significantly reduced the cost of the land per unit. (T. 598-599.)

(b) Reed testified that he and Cole worked with architects and engineers in order to have the plans approved by various governmental bodies. (T. 599.) Reed testified they went to planning commission meetings and also discussed their proposed plan for the village land individually with members of the planning commission. Reed testified they worked closely with the Snyderville Sewer Basin Board and expended an extensive amount of time with the Fire Board, a separate governmental entity. Reed testified he and Cole attended 15 to 20 meetings with governmental bodies alone in an attempt to gain approval of their proposed plan for the village land. (T. 600.) Reed testified they obtained a conditional use permit within existing zoning requirements due to the novel approach of using a hotel exception which enabled them to build more units on the village land. All of this activity took place prior to the final closing and during the time Mr. Davis could have withdrawn. (T. 600.) Reed further testified that Taylor was not present at any of those meetings nor did he assist in preparing for the meetings.

In addition to the foregoing, Reed testified that Reed and Cole worked extensively with possible lenders and/or friends of Jack Davis who would assist or encourage people to purchase units proposed for construction on the village land. These efforts strengthened Davis' commitments to purchase the village land. (T. 601.) Reed indicated that Davis brought key financial people to Park City and Reed and Cole spent substantial amounts of time selling the town and selling the project in order to get them excited about Park City. Reed indicated they dealt with approximately 20 people just meeting acquaintances sent up from various financial institutions. Reed testified that he and Cole even went to Los Angeles and located the first limited partner to purchase a portion of the limited partnership which was to own the village land. Reed indicated that people Reed obtained invested \$100,000 in the limited partnership. These were people Reed had worked with before. (T. 602.)

It is a complete misstatement of the evidence to indicate the sale was completed merely by signing the earnest money agreement or the real estate agreement. The appellant Taylor, did not even believe that the signing of the October agreements consummated the sale. Taylor objected to the earnest money because it was nothing more than an option. Taylor did not think it was a very good offer because Davis was tying up the

property for a substantial amount of time by only paying \$25,000. (T. 86, 131.) Taylor recognized that most of the work on this kind of transaction is often done after the initial documents are signed but prior to the closing. (T. 159-160.)

31. At the closing wherein the monies were to be disbursed, Reed and Cole appeared with Davis and Stevenson to finalize the transaction. Taylor appeared at that meeting and contended that Reed and Cole were not entitled to any of the commission. (T. 90.) It was and apparently is Taylor's position that because Unionamerica had first encountered the buyer, PCR was not entitled to the commission from the sale.

32. When the dispute about the monies became apparent, Unionamerica decided to deposit the funds in an escrow account until the matter could be agreed upon by the various parties or determined by a court of competent jurisdiction. There is no evidence that Reed or Cole ever had control over the monies.

33. Reed and Cole contended that Taylor had lost his right to the commission by virtue of Taylor's breaching the settlement agreement. It is PCR's position that when Taylor refused to give 60% of the commission to Skyline he breached his contract with Unionamerica.

34. PCR agrees that the Trial Court refused to admit into evidence the Spring, 1979 issue of volume III issue of "Utah Real Estate News". PCR asserts that the Trial Court was

correct in that it did not admit the article and further, even if the Trial Court was incorrect, there was no possible prejudicial effect on appellant. Appellant is attempting to claim PCR was a sub-agent of Taylor by virtue of the article contained in the Real Estate News. There is nothing in the evidence that would establish custom or practice that would make PCR a sub-agent of Taylor and the article merely states a legal conclusion.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN AWARDING A SELLING BROKER'S COMMISSION TO PCR.

A. JUDGE CROFT'S ORDER DOES NOT PRECLUDE PCR FROM RECEIVING THE COMMISSION.

Appellant's position with regard to Judge Croft's Order granting partial summary judgment is not a reasonable interpretation of the Order itself. The only way appellant can contend the Order is contradictory is by stretching the language out of proportion from its obvious meaning. Judge Croft merely looked at the two agreements between Hal Taylor and Unionamerica and determined that based upon those agreements there was no requirement that Unionamerica refer any walk-in purchasers to Taylor. Judge Croft did not hold, as appellant contends, that for another realtor to gain a part of the commission that realtor must (1) encounter the purchaser in a manner other than

Davis was encountered - as a walk-in; and (2) negotiate the transaction. Judge Croft specifically held that since Unionamerica was not obligated to refer walk-ins to Taylor, other realtors could find and negotiate for the sale of the land. Since the motion for summary judgment came up in the context of whether or not under these facts Unionamerica was obligated to refer Davis to Taylor and Judge Croft found Unionamerica was not so obligated, it is inconceivable that Judge Croft could mean what appellant contends he did mean. Rather than further burdening the record by repeating the arguments made by Unionamerica in its brief, PCR hereby adopts such arguments. In any event, the totality of the order clearly indicates Judge Croft did not rule that PCR was not entitled to the commission because they did not first encounter Davis. If Judge Croft had meant to say that he would have done so.

B. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD ESTABLISHING PCR AS THE PROCURING CAUSE OF THE SUBJECT SALE.

THE LISTING AND THE SETTLEMENT AGREEMENT

Appellant contends that the agreement between Taylor and Unionamerica was an "exclusive right to sell" agreement rather than what has been categorized an "exclusive agency" agreement. Unionamerica has contradicted appellant's position by pointing out that the settlement agreement modified the listing agreement in a very substantial manner. Normally, a listing realtor has the option of deciding whether he wants to split his commission and allow

another listing realtor to sell property or to try to sell it himself. In this instance Hal Taylor was not given that option but was required by virtue of the settlement agreement to split the commission on a 60/40 basis with any other realtor who was able to sell the property. Unionamerica, in its brief, argues the import of the settlement agreement as it related to the listing agreement. PCR will not repeat the arguments made by Unionamerica. However, it is PCR's position that it doesn't matter whether the agreement is categorized as an exclusive right to sell or an exclusive agency or an exclusive right to sell that was modified by the listing agreement. There is no question under the agreement that another realtor was entitled to sell the property and receive 60% of the 6% commission from such sale. The only issue created by this litigation is whether or not Unionamerica was obligated to refer a walk-in purchaser such as Davis to Hal Taylor rather than referring the walk-in to another relator who might become entitled to the 60% portion of the commission. Judge Croft specifically found that the agreements did not expressly nor impliedly create an obligation on the part of Unionamerica to refer walk-ins to Hal Taylor. Appellant has not cited a single case wherein language similar to that in the listing agreement was interpreted to require the owner to refer a walk-in to the listing realtor. PCR believes that no such case was cited because none exists.

The closest analogous case PCR was able to find to the facts in this situation is Whitney Investment Company v. Westview Development Company, (1969) 273 Cal.App.2d 594, 602-603, 78 Cal.Rptr. 302. In Whitney the Court of Appeals in California faced a fact situation similar to that involved in this case. Whitney was a broker who sued an owner to recover a commission due under an exclusive listing agreement for sale of property wherein the owner had sold the property through another broker. At trial the president of plaintiff indicated that although the agreement was an exclusive listing agreement which provided the owner had to pay commissions to the plaintiff if the sale was made by either the owner, another broker, or the listing broker, there was a side agreement that implied there might be sales by other brokers. In that side agreement there was a provision that the listing realtor was to get 50% and the selling broker was to get 50%. The defendant sold 55 properties through another broker. The plaintiff's claims for a commission based on those facts was denied because, in the words of the Court:

"While the words "hereby lists * * * exclusively and irrevocably" denote an exclusive agency prohibiting the owner from selling through another agency (E. A. Strout, Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585), the provision of the agreement requiring payment of commissions to plaintiffs if a sale is made by another broker, as explained by parol evidence, indicated that the parties intended to reserve to Westview the right to sell through another broker. Mr. Whitney, president of plaintiff Whitney Investment Company, conceded that this was the understanding of the parties./2

"Thus, the sale through the other broker constituted neither a breach by Westview nor justification for plaintiffs' nonperformance."

The fact situation in Whitney is somewhat similar to the fact situation in the present case in that in both cases all of the parties understood that the owner might sell through a different broker. Unfortunately, it is impossible to tell from the facts as are set forth in Whitney whether or not the purchaser was a "walk-in". Whitney may be identical to the facts in this case but it is impossible to tell from the opinion.

Appellant would apparently like the Court to make a determination that the first encounter with any purchaser is in fact the procuring cause. This Court has never so held nor have respondents been able to find any court which holds the mere encounter of the ultimate purchaser is sufficient to establish the procuring cause. The courts that have analyzed what would constitute "procuring cause" have utilized a variety of tests to determine whether or not a broker is a procuring cause of a sale. Most of the cases in this context arise out of a dispute between an owner and a broker as to whether or not a real estate commission is even due. This case differs from the normal case in that in this action the owner does not contest that a commission is in fact due and owing. The only question is whether or not Skyline Realty was the selling broker within the meaning of the settlement agreement entered into between Hal Taylor and Unionamerica and/or whether or

not Skyline Realty was the selling broker within the meaning of the agreement between Hal Taylor and Skyline Realty which occurred substantially prior to Davis' becoming interested in the property. (T. 117-118.)

PCR agrees that one of the elements a court might look to in order to determine whether or not a broker was the procuring cause of a sale would involve the first encounter with a purchaser. For example, it is easy to conceive that in the sale of a home where a broker takes a purchaser and shows the house and based upon such showing the purchaser executes an earnest money, the broker was probably the procuring cause of the sale. However, it does not follow as appellant would apparently contend that the first encounter with a purchaser always determines what constitutes the procuring cause of the sale. In this instance the sale was not made by merely telling the purchaser about the village property. There were numerous events which caused the sale to go through. In the Statement of Facts, those events are set forth in detail in paragraph 30. An analysis of those facts reveals that most of the work that caused the sale to go through actually occurred after the October real estate contract was signed. (Exhibit "12") Reed testified that Cole worked full time to put the deal together and Reed spent a substantial portion of his time from October until May. Appellant has constructed a chart in its brief attempting to show the various events that related to the sale. (Appellant's brief,

pp. 37-40.) That chart is extremely misleading and is in fact inaccurate in that it excludes events which are obviously relevant to the determination. Basically, all that occurred prior to Reed and Cole getting involved was that Luce mentioned to Davis that he knew of some property Davis might be interested in. Luce caused a communication between Volk and Davis to occur wherein they agreed they would meet in Park City and look at the land. In the meantime Volk, president of Unionamerica, caused a feasibility study to be sent to Davis so that Davis would have some familiarity with the land. That is the sum total of the occurrences prior to Davis coming to Salt Lake City. Appellant has attempted to take those out and categorize them as constituting major events in the sale of the land. That is simply not the case. The testimony fairly read, as is set forth in paragraph 30 of PCR's Statement of Facts, would indicate that almost all of the work which caused the sale of the land to go through occurred after Reed and Cole became involved and in fact was spearheaded by Reed and Cole. Appellant does not even mention that the seven month period that Cole spent full time and Reed spent a substantial part of his time subsequent to the signing of the agreement creating the conditions that made it close even though Hal Taylor admitted at trial that most of the work on this type of transaction was done after the signing of the initial documents but prior to the closing. (T. 159-160.) It is difficult to understand, given these facts, appellant's conclusion that the

Trial Judge could not make a factual determination that PCR was the procuring cause of this sale. Such a determination simply ignores the bulk of the evidence presented and places a total reliance on who first encounters the buyer.

Although it is apparently appellant's contention that respondents could not be the procuring cause because they didn't introduce the buyer to the property, that theory has been expressly rejected by the Supreme Court of the State of Colorado. In Kern v. Lewis, 472 P.2d 713 (Colo. 1970), the Supreme Court of the State of Colorado held that a broker did not establish his right to a commission where he merely introduced the eventual buyer to the seller. The Court held that the broker must play an active role in concluding the sale in order to qualify as the predominating or effective cause of the sale. Mere introduction is not enough to cause the broker to become a procuring cause just as mere introduction of Davis to the property was not the procuring cause. It is necessary to look at the entire transaction as was done by the Trial Court.

In Curtis v. Mortensen, 267 P.2d 237 (Utah 1954), this Court held that a broker was entitled to a commission because he produced a buyer who filed a lawsuit in order to require a seller to specifically perform a contract to sell real estate. This Court held that when the buyer filed a lawsuit, he put himself in the category that a broker is entitled to a commission when he has

procured a written binding offer or agreement signed by a ready, willing and able purchaser. Garff Realty Co. v. Better Buildings, Inc., 234 P.2d 842 (Utah 1951); Reich v. Christopoulos, 256 P.2d 238 (Utah 1953); Sproul v. Parks, 210 P.2d 436 (Utah 1949); Ogden Savings Bank & Trust Co. v. Blakely, 241 P. 221 (Utah 1925); and Lewis v. Dahl, 161 P.2d 362 (Utah 1945). In the instant case Reed and Cole showed the property, went to San Diego and obtained a signed earnest money agreement which was accepted by Unionamerica from the purchaser; and in fact presented that document to Unionamerica. Reed and Cole participated in the drafting and the signing of the real estate agreement as well as all of the actions that lead to the final closing. There was substantial evidence from which the Trial Court could find PCR the procuring cause.

In Marks v. Walter G. McCarty Corporation, 205 P.2d 1025 (Cal. 1949), the Supreme Court of the State of California held that although a broker had not introduced the purchaser and the owner and although the broker was not the first person to tell the ultimate purchaser about the real estate, the Trial Court's finding that the broker was the efficient cause of the sale could be supported by the evidence which demonstrated that only through the efforts of the broker over a period of many months were the parties ultimately brought together. That case is similar to the instant case in that the fact the broker had not first encountered the buyer did not preclude the broker from being the procuring cause of the sale.

Similarly, in Webster v. Parra, 237 P. 804 (Ct.App. 1925), the Court of Appeals in California held that a broker was the efficient agent or procuring cause of the sale and was entitled to the commission even though the broker was not the first to bring the attention of the purchaser to the property nor mention the price thereof. The Court held that a broker who has brought the minds of the parties together resulting in a contract of purchase and sale is entitled to the compensation.

Other courts have reached the same result. In Warrington v. Empey, 590 P.2d 1162 (Nev. 1979), the Supreme Court of the State of Nevada reaffirmed an earlier determination and stated as follows:

"It is impossible to measure in quantitative units the efforts necessary to constitute "procuring cause." Suffice that on the one hand it is "conduct that is more than merely trifling." (Citation omitted.) Thus in non-exclusive situations, merely introducing the eventual purchaser is not necessarily enough. (Citation omitted.) The first broker still may be shown to have abandoned efforts or been helplessly ineffective. (Citations omitted.)"

In Vahlberg v. Callaway, 215 P.2d 543 (Okla. 1950), the Supreme Court of the State of Oklahoma rejected the proposition that in order to be a procuring cause, a broker must call the prospective buyer's attention to the property and start the negotiations which culminate in a sale. The Court took the more reasonable approach and held that a broker was considered the procuring cause if the broker's efforts were the foundation upon which the negotiations which result in a

sale are based. Even though in Vahlberg the broker had not first introduced the party to the property, the Supreme Court held that the Trial Court was able under the facts to determine that the broker was the procuring cause of the sale.

None of these findings are controdicted by the case cited in appellant's brief of Frederick May v. Dunn, 368 P.2d 266 (Utah 1962). In that case this Court made an analysis of the terms "moving cause," "proximate cause," "actuating cause," and "procuring cause". This Court held that:

"the extent to which the broker's efforts must induce the sale depends on the terms used on 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 is the procuring cause of the sale." (Emphasis added.)

Appellant attempts to read that as requiring that the broker in fact introduce the property to the buyer. PCR does not believe that is the meaning of the ruling. PCR believes that Frederick May requires a district court to look at the facts of each case and determine whether a broker caused the sale to occur.

One further factor the Court ought to consider in determining whether or not PCR is entitled to a seller's commission would involve the meaning of the agreement between appellant and Unionamerica which resulted in the settlement of the earlier

litigation. In that agreement (Ex. 2) the following statement is made: "On all property listed with Taylor, he will be required to perform the usual real estate broker activities and will be entitled to a commission rate, of six percent (6%), 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." At trial Stevenson who was one of the participants who negotiated and signed Exhibit 2 testified that his understanding of what was meant by a selling realtor in the settlement agreement would be one who brought a signed earnest money offer which could be and was ultimately accepted by Unionamerica. (T. 378.) The Trial Court also made such a finding. (Appendix A, Finding 27.) PCR asserts that given the evidence received by the Trial Court, it was completely and properly within the prerogative of Judge Sawaya to make a finding that PCR was the selling broker within the meaning of the settlement agreement. That finding alone under a third party beneficiary theory of contracts would justify PCR's receipt of the percentage of the commission required by the agreement.

POINT II

PCR IS NOT BARRED FROM RECOVERY BECAUSE IT LACKS CAPACITY AND/OR STANDING TO MAINTAIN THIS ACTION.

PCR will address the issues of standing and capacity jointly since they are related. It is apparently appellant's contention that PCR is precluded from obtaining a real estate commission

because: (1) PCR was not a licensed broker and therefore lacked capacity to sue; (2) PCR conducted its business and prosecuted its counterclaim under an assumed name without having filed a certificate of assumed name - that assumed name being Skyline Realty. PCR is treating these as one issue since Skyline Realty was clearly a licensed brokerage branch office under the laws of the State of Utah. (Exhibits 43, 44, 45.) If PCR was properly acting under the assumed name of Skyline Realty, then the argument would automatically fail that PCR was not a licensed real estate broker.

Appellant's capacity argument was predicated upon the following assertions:

1. PCR never filed a certificate of doing business in the name of Skyline Realty.

2. The Department of Business Regulations did not have a Park City Reservations, Inc. listed as a broker during the relevant period involved in this action. Since Park City Reservations, Inc. was never licensed according to the Secretary of State to do business in the name of Skyline Realty, any recognition by the Department of Business Regulations as to Skyline Realty would not grant capacity to PCR.

The evidence relating to whether or not PCR had filed an assumed name certificate in the name of Skyline Realty was presented on January 30, 1980, the last day of trial that testimony was

received. On January 30, for the first time in this action after Mr. Linebaugh had rested on behalf of the appellant and after respondents had commenced presentation of their defense, appellant introduced Exhibit 52 which was a certificate from the Secretary of State which would indicate that a search had been made and no record existed that Reed, Cole or PCR had ever filed to use the name Skyline Realty. At the time this document was introduced, counsel for PCR objected on the grounds that the document was hearsay. Rule 63 (17) allows certain hearsay evidence to prove the absence of a record in a specified official office. That rule is subject to the requirement of Rule 64 which states that a party offering such a writing must have delivered a copy of it to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy. Counsel for respondents objected to the admissibility of the Exhibit based upon Rule 64. (T. 638-641.) The Court overruled the objection and admitted the evidence.

Over night, counsel for Reed, Cole and Skyline attempted to determine why no certificate had been filed which would have permitted PCR to use the name Skyline Realty. Trial counsel contacted the attorney who represented PCR in 1974 when its Articles of Incorporation were filed. Counsel was advised that there was some serious mistake because the former counsel, Mr. D. Kendall Perkins, (the name is misspelled in the transcript in that he is

called "Mr. Perkinson") indicated he in fact had filed an assumed name certificate which would have allowed PCR to operate in the name of Skyline Realty. When counsel learned that the certificate had in fact been filed and that there was probably an error in the Secretary of State's office, both sides had already rested. At that time, prior to the closing arguments being made, counsel for PCR moved that the Court allow reopening of evidence so that PCR could call Mr. Perkins to testify concerning the filing of the assumed name certificate. (T. 651.) The motion was denied and counsel made a proffer of evidence. (T. 653.) The proffer indicates that Mr. Perkins would testify if allowed that he sent to the Secretary of State the Articles of Incorporation for Park City Reservations, Inc., including a certificate which would have allowed PCR to do business in the name of Skyline Realty. The proffer further included the statement that the Secretary of State sent a document back to Mr. Perkins requiring a release from an individual who had a trade mark in the name Skyline Realty. Mr. Perkins indicated he obtained the release and resent the materials to the Secretary of State in a letter dated December 10, 1974. On December 11, 1974 the Articles of Incorporation of PCR were accepted by the Secretary of State and a certificate of incorporation was issued.

Subsequent to the final argument, PCR's counsel determined that certain facts exist which demonstrate how PCR was prejudiced and the Trial Court was inadvertently misled by appellant's

counsel. Exhibit 52 is an affidavit from the Secretary of State which indicates that neither Harry Reed, Gary Cole, nor PCR ever filed an assumed name certificate in the name of Skyline Realty. Since Exhibit 52 was introduced right at the end of trial and was never given to respondents prior to that time, PCR did not have a chance to check the underlying facts with the Secretary of State. Subsequent to the trial PCR has had that opportunity and attached to this brief as Appendix B is an affidavit from Mr. Douglas S. Foxley, an attorney with the Secretary of State's office, that indicates that the information on Exhibit 52 was in fact erroneous. Harry Reed, in 1973, filed personally for the use of the name "Skyline Realty of Park City". The affidavit of Mr. Foxley indicates that apparently when Exhibit 52 was prepared a computer search was made wherein the information on Exhibit 52 was extracted. However, a hand search through the file located Attachment 1 to Appendix B which was missed initially. Therefore evidence could have been presented that Harry Reed filed for the use of the name Skyline Realty in 1973.

Additionally, a search of the records at the Secretary of State's office and an analysis of the correspondence that went back and forth between the attorney for PCR and the Secretary of State revealed that very probably PCR filed an assumed name certificate to be allowed to use the name "Skyline Realty". Although the Secretary of State's office is unable to find the application for the d/b/a in

the name of Skyline Realty, there are enough documents in the file to indicate that in fact such a document was filed and was probably lost by the Secretary of State's office. Attachment 3 to the Foxley Affidavit (Appendix B) is a letter dated November 18, 1974, to D. Kendall Perkins from the office of the Secretary of State. It should be noted that Mr. Perkins is the attorney who PCR attempted to call after evidence was closed who would have testified he did file for a d/b/a in the name of Skyline Realty on behalf of PCR. Attachment 3 indicates that Mr. Perkins was told the name Skyline Realty was not available unless Mr. Perkins obtained the consent of one Mr. Williamson to use the name. Clearly, the Secretary of State must have had on file the application by PCR to use the name Skyline Realty in order to cause the November 18th letter to be generated. Mr. Perkins on November 27 sent a letter to Mr. Williamson and obtained his release for the name "Skyline Realty". That letter is attachment 2 to the Foxley Affidavit. The affidavit of Mr. Foxley indicates that in the file of Park City Reservations, Inc., Attachment 2 referring to Skyline Realty was found. Attachment 4 to the Foxley Affidavit, a letter dated December 10, 1974, from Mr. Perkins to the Secretary of State's office indicates that Mr. Perkins forwarded the release by Mr. Williamson so that Mr. Perkins' client could use the name "Skyline Realty". One day after Mr. Perkins sent Attachment 4 to the Secretary of State, PCR's Articles of Incorporation were filed and accepted by the Secretary of State.

At that time it would appear that the assumed name filing for Skyline Realty was lost by the Secretary of State. In any event, it is absolutely clear that PCR's Articles of Incorporation were filed jointly with a document that requested the use of the name Skyline Realty. In addition thereto, it is absolutely clear that PCR, through its attorney, did all that was necessary to obtain the rights to the use of the name. If there was any error it would appear that the Secretary of State's office lost the application for the assumed name after it had been filed. Certainly the Secretary of State had some piece of paper before it when it generated the November 18, 1974 letter (Attachment 3 to Appendix B) relating to the use of the name Skyline Realty (which was found in the Park City Reservations, Inc. file).

All of the information set forth above would have been available at the trial if appellant had complied with Rule 64 of the Utah Rules of Evidence and had given respondents notice of the official documents they sought to introduce. That the surprise was potentially prejudicial is clear from the records of the Secretary of State after a more thorough search was made. PCR did in fact make the requisite filings and is not barred by any statute from maintaining this action.

Even assuming, arguendo, that appellant was correct and in fact PCR did not meet the requisite standards that it must file an assumed name certificate with the Secretary of State's office, it does not

follow that PCR is barred from maintaining this action. The Trial Court ruled that appellant was precluded from raising a defense of lack of capacity by virtue of the fact that appellant waived such defense.

A defense that a party has not filed an assumed name certificate is a "capacity" defense rather than a defense that goes to the merits. Union Trust Co. v. Quigley, 259 P. 28 (Wash. 1927). Capacity defenses under the laws of the State of Utah are governed by Rule 9 of the Utah Rules of Civil Procedure. Rule 9 specifically requires that when a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are within the pleaders' knowledge. A defense of lack of capacity clearly requires a pleading so that the opposite party can prepare to meet any claims that are involved. This Court has had occasion to determine whether or not waiver of a capacity argument would occur without such a pleading. In Tooele Meat and Storage Co. v. Fite Candy Co., 168 P. 427 (Utah 1917) this Court held that an objection of the lacking of legal capacity was waived unless raised either by answer or by demurer.

In this instance it would appear that the Trial Court properly applied the doctrine of waiver. (Appendix A, Conclusions of Law

10.) The appellant in this case had knowledge of the purported lack of capacity at least as of January 4, 1980. January 4, 1980 is the date that appellant obtained Exhibit 52 from the office of the Secretary of State. The trial of this case began January 14th. Exhibit 52 was not even introduced nor was a copy given to any of the respondents until January 30. There were at least 26 days during which the appellant could have given notice to the respondents of the capacity defense. However, appellant indicated that it did not give notice because it could not file any motion with the Court within 30 days as of the commencement of trial because of local Rule 10 of the Third District Rules. That argument totally lacks merit. The obvious purpose of the requirement that a capacity defense be pleaded is to give notice to the opposing parties so that they may make whatever preparations are necessary. Although the appellant may have been precluded from filing a motion for summary judgment or some other motion, appellant was not precluded from giving notice to opposing counsel that such a defense would be raised. It would have been a very simple matter for appellant's counsel to lift up the telephone and call counsel for respondents and indicate that appellant intended to plead such a defense. At least respondents then would have had the opportunity of analyzing the facts and determining whether or not the defense had merit. Further, Section 42-2-10 of the Utah Code Annotated (the section dealing with assumed names) provides that a party cannot go forth with a lawsuit "until

the provisions of this Chapter have been complied with." It would have been a very simple matter to notify the respondents so that the respondents could determine whether or not they had complied with the requirements of Title 42 relating to assumed names. As appellant is well aware, this matter could easily have been resolved by respondents in that proper filings could have been made to allow this case to proceed on the merits if such filings were deemed necessary. The only possible explanation for appellant's waiting until the last day of evidence is that appellant hoped to accomplish an ambush and cause this action to not be decided on the merits but upon an argument never previously raised. Such a procedure is wholly improper and the Trial Court correctly disallowed it.

Appellant's only response is the contention that appellant was lulled into its error by virtue of a communication from counsel for PCR indicating that the proper party defendants ought to be PCR. Given the facts set forth on pages 42-46 of this brief, it is still the position of PCR's counsel that the proper party was PCR and not the individuals. However, it doesn't matter. The bottom line is that plaintiff's counsel waited until the last day to introduce evidence he had knowledge of substantially prior to the date of its introduction. That evidence could have been responded to by the defendants. That evidence went to capacity which is a defense that requires advance notice. Further, the defendants could have filed whatever papers had to be filed to allow this case to proceed on the

merits. Given the facts involved, it was not error for the trial Court to determine that appellant had waived any such defense of capacity if such a defense ever existed.

Appellant's argument that defendants could have sought a Stay in order to respondents' counsel to go to the Secretary of State's office is also without merit. The burdens on the Court's calendar are such that the Court was not required nor were the defendants required to cause such a filing to occur before the action could be completed. Had appellant acted properly and advised respondents as to the proposed defense as soon as plaintiffs became aware of it, then all of the necessary actions could have been completed prior to the trial and no delay would have resulted. Given such facts it is entirely proper to find that any defense of lack of capacity was waived by virtue of the failure to bring it forth as soon as appellant had knowledge of the requisite facts.

Appellant also contends that PCR was precluded from maintaining this action because it is not a registered broker with the Department of Business Regulations. Exhibit D. 43 is an affidavit of Steven J. Francis, the director of the real estate division of the Department of Business Regulations for the State of Utah. Mr. Francis indicates that at all times relevant to this action Harry F. Reed was a properly registered real estate broker with the State of Utah and was a broker/branch manager for Skyline Realty. If PCR is correct in its contention that in fact Skyline Realty was an assumed

name of PCR, or that appellant had waived its right to challenge the assumed name, appellant's contention must automatically fail.

The facts with regard to the timing of the presentation of this defense are the same as to the assumed name defense, appellant waited until the trial was substantially completed and then raised the defense for the first time. The Trial Court ruled that if such a defense had once existed, it was waived.

Even if PCR is in error as to the assumed name issue, it does not mean that PCR must lose because it is not a registered broker. One of the issues to be determined is whether or not the corporation itself must hold a brokerage license or whether it is adequate if the corporation employs a licensed broker who is the person involved in the transaction. Section 61-2-18(a) reads as follows:

"(a) No person, partnership, association or 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 to 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.)

The statute does not require the corporation itself hold a brokerage license. The statute merely prohibits a corporation as well as other entities from maintaining an action for the recovery of a commission if the person who participated in the recovery of the commission is not a licensed real estate broker. In this instance

all of the parties agree that the communications relating to the sale of this property were between two licensed brokers, Harry Reed and Hal Taylor. Harry Reed testified he was employed by Skyline which he understood to be an assumed name of PCR. Skyline Realty was listed with the Department of Business Regulations as a brokerage. It would be a harsh application of this statute if PCR was precluded from the recovery of monies that would otherwise be due and owing because there was no brokerage license issued in the specific name of PCR even though PCR's employee was licensed as a broker.

The legislative purpose of the statute appears to be to protect the public from unscrupulous and/or untrained individuals who might be involved in selling land in order to get commissions. In this case all of the public protections were met. Reed was a duly licensed broker and Skyline was registered with the Department of Business Regulations.

Appellant has not cited to a single case which precludes the recovery of a commission that has facts such as these. Each case cited by appellant wherein the recovery of a commission was precluded involved a transaction wherein the people who participated in the transaction were not licensed brokers. In each and every case cited by appellant wherein the Court struck down the right to obtain a commission, the person who was involved in the transaction was not a licensed broker. There is no case cited by appellant analogous to this one wherein a corporation acting through

its employee (a licensed real estate broker) sought to obtain an earned commission and was refused such commission because the corporation itself was not licensed. In fact, this is another reason why the Trial Court was correct in ruling against the capacity defense raised by appellant. PCR believes that this Court is entitled to take judicial notice of the records on file with the Department of Business Regulations for companies who engage in real estate transactions. PCR has been advised that approximately one-half of the companies do not have brokerage licenses in the name of the corporations but in fact maintain the licenses in the names of persons employed by the corporations who are brokers. Indeed, this Court can take judicial notice that the Department of Business Regulations will only grant a broker's license to a corporation if there is a qualified person within the corporation with whom the license may rest. There is no telling the amount of damage that might be done to real estate transactions that are currently occurring, have occurred, and will occur if this Court adopts the construction of the statute sought by appellant. At least, that type of evidence is something that could have been developed at trial had sufficient notice of the nature of the capacity defense been given prior to the last days of the trial.

This Court has recently decided a case wherein the Court looked to the substance of the transaction and allowed a commission to be earned even though the party seeking the commission was not a

broker. In Global Recreation, Inc. v. Cedar Hills Development Company, 614 P.2d 155 (Utah 1980), this Court decided that Global Recreation was entitled to a commission even though Global was neither a broker nor a licensed real estate salesman. The Court analyzed the facts and determined that the requirements of the statute were met. The Court held that one Richardson, who was a principal of AID, had a broker's license. AID held itself out as a broker based upon Richardson's license. The Court held that the purchasers of the Cedar Hills property were fully protected as contemplated by the statute because both a licensed broker and a licensed salesman were involved in the land sales. The Court further held that the purpose of Section 61-2-1 was not to protect real estate developers who seek relief from their own contractual obligations as does appellant herein. Rather, the Court held that the purpose of the statute was for protection of members of the public who rely on licensed real estate brokers and salesmen to perform tasks that require a high degree of honesty and integrity. Clearly, if AID (which was not a broker but employed a broker just as PCR d/b/a Skyline employed a broker) qualified the transaction under the statute, then Harry Reed and Hal Taylor qualify the transaction currently before the Court.

At the trial PCR's counsel made a motion to amend the pleadings to conform to the evidence and insert Harry Reed as a counterclaimant. (T. 625.) The evidence is clear that two real

estate brokers were involved in the transaction - Harry Reed and Hal Taylor. PCR's counsel moved that Harry Reed be substituted as an additional party on the counterclaim since he was involved with Taylor and was clearly a duly licensed broker. The Court took the motion under advisement and never made a ruling because it eventually ruled appellant had waived the right to make a capacity argument and that counterclaimant, within the meaning of the statute, was a duly licensed real estate broker. If appellant is correct and the Trial Court was wrong in its ruling, then the motion to substitute Harry Reed as a proper party in interest should have been granted. Since all of the facts are exactly identical there was no possible unfair prejudice to plaintiff. The people who caused the sale to go through, Harry Reed and Gary Cole acting on behalf of Park City Reservations, Inc., should not be denied a commission given these facts.

POINT III

THE TRIAL COURT CORRECTLY REFUSED TO AWARD DAMAGES TO TAYLOR FOR BREACH OF A PURPORTED FIDUCIARY DUTY.

1. Appellant apparently relies on the following facts in support of its theory that PCR breached a fiduciary obligation:

A. Reed and Cole did not investigate appellant's contractual relation with Stevenson when first contacted by Stevenson.

(Appellant's Brief page 53.)

B. Cole sent a registration letter setting forth PCR's having shown the property to Davis without disclosing that Unionamerica had "found and negotiated with Davis without the assistance of Reed or Cole." (Appellant's Brief page 53.)

C. When Reed approached Taylor to confirm that Taylor would split the commission on a 60/40 basis, Reed did not tell Taylor that Unionamerica had first encountered the buyer without the assistance of Reed or Cole. (Appellant's Brief page 53.)

D. Reed lied to Taylor as to the source of the buyer in that Reed told Taylor that Cole had skied with the buyer. (Appellant's Brief page 54.)

Items A through C above are all predicated upon the assumption that Reed and/or Cole had some sort of obligation to tell Taylor that Unionamerica had first encountered the buyer. If the predicate is incorrect, then any possible fault relating to items A through C above are also incorrect. It is PCR's position that Reed and Cole were not under the obligation Taylor is seeking to impose. The fact that Reed told Taylor that Cole had encountered the buyer through skiing does not give rise to a cause of action. Reed testified that when he approached Taylor to tell him they had a buyer, he was met with extreme hostility. At that point when Taylor asked where Reed had found the buyer, Reed merely stated Cole had skied with Davis. (T. 469.) It was apparent that Reed was trying to minimize any possible conflict with Taylor. (T. 468-470.) There was no conspiracy to hide from Taylor where the purchaser was first encountered. On the very same day that Reed told Taylor that Cole had skied with Davis, Taylor asked Stevenson if he knew where Davis had been found. Stevenson on that day told Taylor that he had

referred Davis to Cole. Although Reed made a mistake in telling Taylor that Cole had skied with Davis, there is no possible manner in which Taylor was injured by virtue of that statement. Taylor did absolutely nothing in reliance upon Reed's assertion. There is not one item of evidence in the record that Reed's statement to Taylor had any adverse affect upon Taylor whatsoever. There is no way appellant can claim such an adverse affect because Taylor learned immediately (on the same day) where Davis had been encountered. Therefore, the Trial Court was correct in refusing to award Taylor damages based upon Reed's statement to Taylor.

Appellant's position that PCR breached a fiduciary obligation and appellant is entitled to damages must fail for several reasons:

1. Reed and Cole were not under any duties to investigate the listing contract between Taylor and Unionamerica. Appellant has cited no case that would put one realtor under a duty to investigate a property owner's contractual relationship with another realtor. Reed and Cole were approached by Stevenson because Stevenson wanted their assistance to properly present the property to Davis. Because Stevenson had given an listing to Taylor, does not mean that Stevenson also agreed to refer every possible purchaser to Taylor. In fact, PCR is aware of no listing contract utilized in Park City nor in any other area that would require such a result. Since there was no reason for Reed or Cole to anticipate that Stevenson had some sort of special deal with Taylor that would require Stevenson to

send the purchaser to Taylor, then there was no reason to explore the contractual relationship between Stevenson and Taylor before discussing the property with Davis.

2. Even if appellant were correct that Reed and Cole had the duty to determine the underlying contractual obligation between Taylor and Unionamerica before accepting the referral, there is no possible manner in which appellant can demonstrate harm. Neither the listing agreement nor the settlement agreement (Exhibits 2 and 3) require walk-ins to be referred to Taylor. Had Reed and Cole understood the entire underlying transaction between Taylor and Unionamerica, it would not have changed the result whatsoever. Reed and Cole were entitled to accept the referrals from Unionamerica because there was nothing in the contract that precluded Unionamerica from sending the prospective purchaser to a realtor other than Taylor. Therefore, had Reed and Cole advised Taylor as to everything prior to accepting the referral, they would have still been entitled to accept such referral.

3. Appellant is in error in contending that Harry Reed is a sub-agent under appellant and therefore owes appellant a fiduciary obligation. The law relating to whether a selling broker is an agent of the owner or of the listing broker is far from clear. It is obvious the selling broker performs functions for both the buyer and the seller. What the selling broker is called appears to be a function of the facts. In Frisell v. Newman, 429 P.2d 864 (Wash.

1967), the court faced a situation where the selling broker had possibly participated in material omissions which hurt the owner. In that situation, the court determined that the selling broker should be called a sub-agent of the owner in order that the selling broker was put under a duty to let the owner know of facts and circumstances within the selling broker's knowledge. In this case there is no possible claim that PCR, Reed or Cole violated any fiduciary obligation to the owner. The owner was fully informed of the facts at all times.

In Pumphrey v. Quillen, 141 N.E. 2d 675 (Ohio App. 1955) the Ohio appellate court determined that a selling realtor was not ever an agent of the owner in a situation where the selling real estate agent had apparently misled the purchaser. The court held that the only relationship between the selling broker and the owner was the multiple listing group and that when the owner signed a contract of sale they had no knowledge of any misrepresentation made by the selling broker.

The fact that courts have characterized the relationships between owners, listing realtors, and selling realtors in several different manners demonstrates there is no one universal rule. (See 71 ALR 3rd 586 for an article analyzing different courts that have found real estate arrangements to constitute partnerships, joint ventures, agency contracts, and employment contracts. Numerous cases are cited wherein none of the relationships were found to

exist.) It is clear that an analysis of the case law leads to the proposition that the courts do not universally support the proposition that a selling broker is always a sub-agent of the listing broker. The facts of each case would have to be analyzed to determine how the relationships ought to be characterized. In this action it is apparent that for some purposes Skyline was an agent of the purchaser as well as an agent of the seller. Skyline may even have been a third party beneficiary to a contract between the listing broker and the owner in that Exhibit 2 provided that any selling broker would be entitled to 60% of the commission. In any event, given the facts of this case it would not be a fair characterization to conclude that Skyline was just Taylor's agent.

4. The Trial Court was correct in not granting any damages because there was no damage evidence introduced which rationally relates to this cause of action. Even if a fiduciary relationship existed between Taylor and Reed, there was no evidence presented how Taylor was damaged by virtue of the breach of the fiduciary obligation. The Trial Court determined that Unionamerica was entitled to refer and Skyline was entitled to accept a walk-in from an outside source. Since the parties were entitled to do what they did, it is very difficult to understand appellant's damage theory. Appellant appears to merely be saying that since PCR did not tell appellant everything it knew about the transaction, PCR ought not to be entitled to receive any commission. Appellant was under a duty to

show damages if in fact fiduciary obligations were breached and explain to the Trial Court in a rational manner the relationship between the breach of the fiduciary duty and the damages sought. That was never done because the facts simply do not support appellant's position.

PUNITIVE DAMAGES

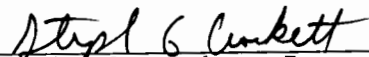
PCR will not repeat the arguments made by Unionamerica with regard to punitive damages. PCR believes that Unionamerica's position is correct and in order to avoid repetition will not restate the argument set forth therein.

CONCLUSION

Based upon the foregoing facts and argument, these respondents respectfully request that the Court deny the relief sought by appellant and affirm the Trial Court's decision.

RESPECTFULLY SUBMITTED this 30 day of April, 1981.

MARTINEAU, ROOKER, LARSEN & KIMBALL



Stephen G. Crockett, Esq.
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Attorneys for Defendants-
Respondents Park City Reservations,
Inc., dba Skyline Realty, Harry F.
Reed, and Gary Cole

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 1981, I served two copies of Defendants-Respondents, Park City Reservation, Inc., dba Skyline Realty, Harry F. Reed, and Gary Cole's Brief upon Kent B. Linebaugh, Esq. of Jardine, Linebaugh, Brown & Dunn at 370 East South Temple, Suite 401, Salt Lake City, Utah 84111 and F. S. Prince, Jr., Esq. and James A. Boevers, Esq., of Prince, Yeates & Geldzahler, at Third Floor Mony Plaza, 424 East Fifth South, Salt Lake City, Utah 84111.

MARTINEAU, ROOKER, LARSEN & KIMBALL

By: *DH Zimpfer*