

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 : Reply Brief of Appellant

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 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,

Defendants-Respondents.

Case No. 17359

REPLY BRIEF OF APPELLANT

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

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# TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	4
POINT I	
EVIDENCE OF WHAT PCR DID AFTER THE BUYER HAD BEEN FOUND, THE TRANSACTION NEGOTIATED AND THE PURCHASE AGREEMENT SIGNED, DOES NOT ALTER THE CONCLUSION THAT UNIONAMERICA WAS THE PROCURING CAUSE OF THE SUBJECT SALE . . . . .	4
POINT II	
APPELLANT'S OFFER AND THE TRIAL COURT'S ADMISSION OF EVIDENCE OF THE FAILURE OF PARK CITY RESERVATIONS, INC. TO OBTAIN A REAL ESTATE LICENSE AND FILE A CERTI- FICATE OF ASSUMED NAME WAS NOT IMPROPER . .	6
POINT III	
THERE IS NO EVIDENCE IN THE RECORD THAT EXCUSES PCR, INC. FROM NOT BEING LICENSED .	9
POINT IV	
APPELLANT DOES NOT CONTEND ON APPEAL THAT THERE WAS ANY ORAL AGREEMENT OR REFORMED WRITTEN AGREEMENT BETWEEN APPELLANT AND UNIONAMERICA THAT UNIONAMERICA WOULD REFER WALKINS TO APPELLANT . . . . .	10
CONCLUSION . . . . .	10

## AUTHORITIES CITED

### CASES

<u>Curtis v. Mortensen</u> , 1 U.2d 354, 267 P.2d 237 (1954) . . . . .	5
<u>Little &amp; Little v. Fleishman</u> , 35 Utah 566, 101 P. 984 (1909) . . . . .	5
<u>Morris v. John Price Associates, Inc.</u> , Utah, 590 P.2d 315 (1979) . . . . .	8

### STATUTES

Utah Code Ann. 1953, as amended, Section 61-2-18(b) . . . . .	8
Utah Code Ann. 1953, as amended, Section 61-2-10 . . . . .	8

### SECONDARY AUTHORITIES

24 A. L. R. 3d 1160 Section 10 . . . . .	6
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corporation dba SKYLINE REALTY;  
HARRY F. REED and GARY COLE,

Defendants-Respondents.

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Case No. 17359

REPLY BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant incorporates by reference the Statement of  
the Nature of the Case contained in Appellant's original Brief.

DISPOSITION IN LOWER COURT

Appellant incorporates by reference the recitation of  
the Disposition in Lower Court contained in Appellant's  
original Brief.

RELIEF SOUGHT ON APPEAL

Appellant incorporates by reference the Relief Sought  
on Appeal as contained in Appellant's original Brief.

## STATEMENT OF FACTS

Appellant answers Respondents' Statements of Facts in the following particulars:

1. In paragraph 9 on page 5 of the Brief of Respondents Park City Reservations, Inc. ("PCR, Inc."), Reed and Cole (collectively "PCR"), counsel for PCR states:

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.)

While the Transcript at pages 650-653 indicates that counsel for PCA proffered proof to show that Reed acted in good faith in thinking there was a DBA Certificate on file for PCR, Inc., there was no proffer to prove that there was a DBA Certificate enabling PCR, Inc. to do business under any assumed name. Furthermore, nothing in Appendix B of PCR's Brief (which Appendix B contains documentary evidence outside the record for this case) changes the fact that there never was any Certificate of Assumed Name filed with the Utah Secretary of State pursuant to which PCR, Inc., as opposed to Reed personally, was authorized to use the assumed name under which PCR, Inc. prosecuted its counterclaim in the case at bar.

2. In paragraph 30 in the first complete sentence on page 22 of PCR's Brief, counsel for PCR states:

However, Stevenson denied that in fact Volk called and told him that Davis had agreed to the purchase.

The Transcript at page 343 indicates that Stevenson testified he didn't recall such statement being made and that when Stevenson was pressed he said he doubted that such statement had been made, but that he did not categorically deny that the statement had been made to him. On the other hand, Volk, who was Stevenson's boss, is very definite in his recollection of the conversation. See paragraph 42 t. on page 24 of Appellant's original Brief.

3. In the last sentence of the paragraph ending in the middle of page 10 of the Brief of Respondents Unionamerica, Ramshire, Inc. and Stevenson (collectively "Unionamerica"), counsel for Unionamerica states:

A subsequent letter from HTA's counsel indicated acquiescence in an escrow agreement (Ex. D-19).

Note that Ex. D-19 is dated April 17, 1978, which date is just prior to the Commission being disbursed upon the closing of the subject sale. The correspondence from Appellant's counsel as evidenced by Ex. D-19 simply confirmed the understanding that all of the Commission would either be paid to Appellant or escrowed in lieu of any portion of the Commission being disbursed to PCR. Such correspondence did not constitute an acquiescence in Unionamerica's conversion of the Commission, but was only a memorialization of the fact that money would at least not be paid over to PCR. See Ex. P-10, paragraph 13 of Ex. P-12, (which agreement Appellant refused to sign) and Ex. D-19.



## ARGUMENT

Appellant answers Respondents' arguments in the following particulars, confining any such answers to new matters set forth in Respondents' Briefs:

### POINT I

EVIDENCE OF WHAT PCR DID AFTER THE BUYER HAD BEEN FOUND, THE TRANSACTION NEGOTIATED AND THE PURCHASE AGREEMENT SIGNED, DOES NOT ALTER THE CONCLUSION THAT UNIONAMERICA WAS THE PROCURING CAUSE OF THE SUBJECT SALE.

Appellant contends that Unionamerica was the procuring cause of the subject sale, and that pursuant to Appellant's rights as the listing broker under the exclusive right to sell listing (Ex. P-3, Appendix F), Appellant is entitled to 100% of the subject Commission. On the other hand, PCR and Unionamerica contend that PCR, Inc. was the procuring cause of such sale and is therefore entitled to a selling broker's 60% share of the Commission. Nearly all of PCR's involvement in the transaction occurred after the Buyer had been found, the transaction negotiated and the Purchase Agreement signed. This is amply substantiated by the fact that nearly 11 pages of PCR's Brief are devoted to trying to convince us that PCR, Inc. was the procuring cause of the sale because of what PCR did after the Purchase Agreement was signed. See PCR's Brief from the first full paragraph on page

23 to the end of paragraph 30 on page 28, and the first full paragraph on page 34 to the end of the last full paragraph on page 39. See also Unionamerica's Brief in the last paragraph on page 17 where it is stated that PCR's most important effort came after the Purchase Agreement was signed.

Unfortunately for Respondents, what happened after the Purchase Agreement was signed is of no consequence on the issue of who was the procuring cause of the sale. According to Utah case law, the subject Commission was earned by bringing Unionamerica and the Buyer together -- not the consummation of the sale. In Little & Little v. Fleishman, 35 Utah 566, 101 P. 984 (1909) the Utah Supreme Court had before it a case in which the broker had an exclusive right-to-sell listing, a purchase agreement had been signed, the owner of the property contended the agreement was merely an option, and the sale didn't go through because of the owner's inability to furnish a sufficient abstract of title. In that case our Court held:

The substantial features of the agreement between plaintiffs (brokers) and the defendant (owner) are that the plaintiffs were employed to effect, not consummate, a sale, and were entitled to a commission in the event of a sale at any price agreed upon.

In 1954, in Curtis v. Mortensen, 1 U.2d 354, 267 P.2d 237 (1954), the foregoing language was quoted with approval and said to apply even if the seller and buyer had not entered into a written agreement so long as the broker had produced a

ready, willing and able buyer. See also the cases collected in section 10 of 24 A.L.R. 3d 1160 at page 1179.

The foregoing legal proposition is entirely consistent with Unionamerica's understanding of the transaction as is clear from Stevenson's statement to Taylor in October 1977 -- seven months before consummation of the sale -- "There is no doubt about it, we owe the \$96,000.00, but we just -- we feel that we should just give you your 40 and give Skyline their 60." See T.94.

## POINT II

### APPELLANT'S OFFER AND THE TRIAL COURT'S ADMISSION OF EVIDENCE OF THE FAILURE OF PARK CITY RESERVATIONS, INC. TO OBTAIN A REAL ESTATE LICENSE AND FILE A CERTIFICATE OF ASSUMED NAME WAS NOT IMPROPER.

Beginning with the last two sentences of the first paragraph on page 49 through the first full paragraph on page 51 of PCR's Brief, PCR contends that it was improper for Appellant to present evidence of PCR, Inc.'s failure to file a Certificate of Assumed Name and failure to obtain a real estate license. In making such argument the PCR Brief reads as follows beginning at line 8, page 49:

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.

That argument completely overlooks the fact that Appellant did not introduce the evidence of PCR, Inc.'s failure to file a

Certificate of Assumed Name until Reed testified that Reed had filed such a Certificate for PCR, Inc. See lines 29 and 30 of page 637 and lines 1 through 26 of page 638 of the Transcript. Accordingly, such evidence was entirely proper for impeachment of Reed, because the records of the Office of the Utah Secretary of State show that Reed never did make any such filing for PCR, Inc., as opposed to himself personally. Further, as was explained by counsel for Appellant, the issue of PCR, Inc. failing to file a Certificate of Assumed Name was not brought up until after Reed testified under oath that he had done something that he in fact did not do. See T. 640 at lines 27 and 28.

It should also be noted that the evidence of PCR, Inc.'s failure to obtain a real estate broker's license was offered and admitted by the Trial Court on January 17, 1980, and the case was in recess until January 30, 1980, during which 13 day period counsel for Respondents had ample opportunity to rebut such evidence if in fact it could be rebutted. See T. 585-589. Is it any wonder then, that the Trial Court affirmatively ruled:

"Well, the rule, of course, indicates that the Judge may permit it, and I find that you have not been unduly surprised. I suppose these records were at least as available to you as they were to Plaintiff's counsel, and since they spoke to the capacity of the Defendant, whom you represent, I suppose that you were in as great or good of position to determine what his capacity is with regard to these corporations and DBAs as the Plaintiff is. I don't think you have been unduly

surprised by this, so I will admit the exhibits."  
T. 641.

In light of the foregoing evidentiary rulings, and faced with the uncontroverted fact that PCR, Inc., the sole counter-claimant herein, was not a licensed real estate broker, at page 55 of PCR's Brief it is argued that the Trial Court should have granted PCR's motion to substitute Reed as an additional claimant in such counterclaim. That would have helped PCR not at all. The counterclaim in this case could only have been brought by Ladd Christensen "the broker with whom the salesman is connected." See Section 61-2-18(b) of the License Law. As a matter of fact, it would have been unlawful for Reed to accept any commission in this instance from anyone other than Ladd Christensen for such is prohibited by Section 61-2-10 of the License Law which reads:

It shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the performance of any of the acts herein specified from any person, except his employer, who must be a licensed real estate broker.

See also both the majority and dissenting opinions in Morris v. John Price Associates, Inc., Utah, 590 P.2d 315 (1979).

According to Exhibits P-45, P-46, P-47, P-48, P-49 and P-50, and T. 630, 631, Ladd Christensen, a sole proprietorship, was the only person that could sue appellant for the Commission and at the time did any of the respondents move to make Ladd Christensen a party to the suit. According to the foregoing authorities, if any portion of the commission is to be awarded to PCR, Inc., Reed

and/or Cole, such portion would first have to be awarded to Ladd Christensen and he is not even a party to the action.

### POINT III

THERE IS NO EVIDENCE IN THE RECORD THAT EXCUSES PCR, INC. FROM NOT BEING LICENSED.

At lines 8 through 11 on page 53 of PCR's Brief, it is asserted:

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 a license in the names of persons employed by the corporations who are brokers.

That is a pure gratuity. There is nothing in the record to substantiate that statement even though counsel for PCR had 13 days in which to submit such evidence after the time said counsel first learned that PCR, Inc. was not a licensed real estate broker as required by Utah law. However, even if the statement is taken at face value, it does not excuse PCR, Inc. from the licensing requirement, because the statement describes a situation that does not apply to PCR, Inc. In the case of PCR, Inc., there was nothing in the records of the Real Estate Division of the Department of Business Regulations of the State of Utah to establish that PCR, Inc. was licensed in its own name or in the name of Reed or any one else. During the time in question PCR, Inc. was not named in any of the records of the Real Estate Division. See Ex. P-34 and T.586.

#### POINT IV

APPELLANT DOES NOT CONTEND ON APPEAL THAT THERE WAS ANY ORAL AGREEMENT OR REFORMED WRITTEN AGREEMENT BETWEEN APPELLANT AND UNIONAMERICA THAT UNIONAMERICA WOULD REFER WALK-INS TO APPELLANT.

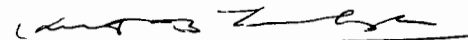
Beginning at page 21 through the last full paragraph on page 23 of Unionamerica'a Brief, Unionamerica argues that there was no oral agreement or reformed written agreement between Unionamerica and Appellant to the effect that Unionamerica would refer walk-ins to Appellant. In order to save the time of the Court and counsel, please be advised that while that was an issue before the Trial Court, Appellant has not prosecuted any appeal on that issue.

#### CONCLUSION

Appellant incorporates by reference its conclusions as contained in Appellant's original Brief.

Respectfully submitted

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# CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December 1981, I delivered two copies of the foregoing Reply Brief of Appellant to F. S. Prince, Jr., Esq. of Prince, Yeates & Geldzhaler at 425 East 5th South, Third Floor, Salt Lake City, Utah 84111, and Stephen G. Crockett, Esq. of Rooker, Larsen & Kimball at 36 South State Street, No. 1800, Salt Lake City, Utah 84111, or served same upon said persons by leaving the same at their offices with their clerks or other persons in charge thereof.

JARDINE, LINEBAUGH, BROWN & DUNN

By: 