

1977

Piero G. Ruffinengo v. Robert F. And Nancy H. Miller The Art Company, J. Blair Jones , John Does 1 Through 20 : Brief of Respondent-Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PIERO G. RUFFINENGO,)	
)	
Plaintiff and Appellant,)	
)	
vs.)	Case No. 15348
)	
ROBERT F. AND NANCY H. MILLER,)	
THE ART COMPANY,)	
J. BLAIR JONES,)	
JOHN DOES 1 THROUGH 20,)	
)	
Defendants and Respondents.)	

BRIEF OF RESPONDENTS-DEFENDANTS

Appeal from a Judgment
Of the Third Judicial District Court
Of Salt Lake County, Utah
Honorable Dean E. Conder, Judge.

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STATEMENT OF THE NATURE OF THE CASE

This is an action alleging violation of a restrictive covenant applicable to real property and seeking alternatively injunctive relief and damages.

DISPOSITION IN LOWER COURT

This appeal is taken from a decision of the Third Judicial District Court of Salt Lake County, the Honorable Dean E. Conder presiding, granting Defendants-Respondents' motion for summary judgment on the separate and individually sufficient grounds that (1) Plaintiff-Appellant lacks standing to sue for the enforcement of the subject restrictive covenant, and (2) Plaintiff-Appellant is barred from suing to enforce the subject restrictive covenant by the doctrine of collateral estoppel.

STATEMENT OF FACTS

In July of 1976 defendants Robert and Nancy Miller (hereinafter "Millers") purchased a lot upon which they intended to build their home. The lot is located at 925 Little Valley Road which is located in the upper "Avenues" area of Salt Lake City---at approximately the 18th Avenue level. Shortly thereafter the Millers contracted with the defendant The Art Company, and its owner and president J. Blair Jones (hereinafter collectively "Jones"), to construct a home on the lot.

During the latter part of 1976, and after construction of the home had been commenced, the Millers were confronted by

three future neighbors, Gerald F. Carvalho, Shirley B. Herzberg and Plaintiff-Appellant Piero G. Ruffinengo (hereinafter "Appellant"), who contended that the Millers' home, as described and being constructed, would violate restrictive covenants applicable to the lot. (R. 72, 76). After reviewing alternatives to the planned construction in an attempt to allay stated concerns of these neighbors, it was decided by the Millers that the planned construction did not violate the restrictive covenants and that construction would proceed as planned with the exception of the removal of a balcony and change of a bedroom window in consideration of privacy concerns of the Herzbergs. (R. 78). This decision was communicated in writing by letter addressed jointly to Dr. and Mrs. Herzberg, Dr. and Mrs. Carvalho and Appellant and dated January 10, 1977. (R. 77, 78).

On January 14, 1977, Dr. Carvalho and Dr. Herzberg filed an action against defendants in the Third Judicial District Court, Civil No. 239493 (hereinafter "Suit 1"), alleging a violation of the applicable restrictive covenants dealing with height limitations (R. 20-25, 77), and specifically claiming that construction would impair their privacy, view, access to light and air and property value (R. 22). Plaintiffs in Suit 1 prayed for a temporary restraining order and for preliminary and permanent injunctions (R. 22).

On January 18, 1977, Millers were served with a copy of the complaint and summons, together with a temporary

restraining order enjoining further construction of their home.

On January 26, 1977, a hearing on the Suit 1 motion for preliminary injunction was held before the Honorable James Sawaya (R. 26, 29). During the course of this hearing, and due to the extensive evidence which was being introduced, it was suggested by the court, and stipulated to by the parties, that this hearing would constitute a final hearing and trial on the merits. (R. 26, 29). (It should be noted that at the time of trial in Suit 1 the external frame of the Millers' home was fully in place. (R. 74).) Following a day-long trial the matter was taken under advisement by Judge Sawaya.

On January 31, Judge Sawaya, by minute entry, found in favor of the defendants and against the plaintiffs. (R. 85).

On February 14, 1977, Judge Sawaya entered judgment for defendants, denying plaintiffs' motion for preliminary injunction, dismissing plaintiffs' complaint with prejudice, specifically finding that "both the proposed construction as reflected by the building plans and the actual construction of the dwelling being constructed by defendants are in conformity with the applicable restrictive covenants" and ruling as a matter of law that "there is no material violation of existing restrictive covenants or building codes by either the proposed construction as reflected by the building plans or the actual construction" of the Millers' home. (R. 26-29).

On February 15, 1977, Appellant filed a complaint

against Millers in the instant action (hereinafter "Suit 1") and again in the Third Judicial District Court, and again as a violation of the same restrictive covenant and claiming inter alia decrease in property value, invasion of privacy, and of access to light, air and view and seeking injunctive relief or, in the alternative, damages. (R. 2-11).

On the same day (February 15), plaintiffs in Suit 1 filed a motion for new trial, which motion was argued on February 25 and denied by Judge Sawaya on March 4.

On March 11, 1977, defendants herein filed their answer setting forth their defenses to the allegations contained within the Suit 2 complaint and raising the affirmative defenses of collateral estoppel and res judicata, attaching thereto certified copies of the Suit 1 complaint, the court's Findings and Conclusions and the Order and Judgment. (R. 15-29).

On May 16, defendants filed a motion for summary judgment on the grounds that Appellant is barred from relitigating the issue of the Millers' home's compliance with the restrictive covenant by the doctrine of res judicata and because Appellant has no standing to enforce the restrictive covenant in question. (R. 40). This motion was argued before the Honorable Dean E. Conder on June 3. (R. 81). Defendants' motion was granted, and the Order and Judgment dismissing Appellant's complaint with prejudice was entered on June 6. (R. 87).

On June 16, Appellant petitioned the Third Judicial District Court for rehearing of defendants' motion for summary judgment. (R. 95, 96). Such rehearing was granted and argued to Judge Conder on June 22, following which Judge Conder again granted defendants' motion for summary judgment on the bases that (1) Appellant has no standing to enforce the restrictive covenant, and (2) that Appellant is barred from relitigating the issue of the compliance of the Millers' home with the applicable restrictive covenant by the doctrine of collateral estoppel (R. 120). An Order and Judgment to this effect was entered by Judge Conder on June 27. (R. 120). It is from this Order and Judgment that Appellant now appeals.

. Since the entry of the Order and Judgment the Millers' home has been completed and the Millers are now occupying it as their residence.

The restrictive covenant in question unquestionably applies to the lot upon which the Millers have built their home (R. 10, 11, 23, 24). The pertinent portion of this covenant deals with height limitations, and states:

"USE OF LAND" Each lot in said subdivision is hereby designated as a residential lot, and none of the said lots shall be improved, used or occupied for other than private, single family residence purposes, and no flat or apartment house shall be erected thereon, and no structure shall be erected or placed on any of said lots other than a one, two or three car garage not exceeding one story in height, and one single family dwelling not to exceed one

story in height; except, that on those lots where the finished ground elevation is at least one story lower on one side of the dwelling than on the opposite side, the dwelling may extend two stories above the finished ground elevation on such lower surface." (emphasis added) (R. 10, 23).

Alleged violations by the Millers' home of the above quoted height restrictions have formed the basis for plaintiffs' complaint in Suit 1 (R. 20-25) and for Appellant's multifarious causes of action in Suit 2, (R. 2-11), and it was with these height limitations that Judge Sawaya specifically found that the Millers' home complied. (R. 26-29).^{*}/ This height restriction is contained within the terms of a document entitled "Restrictive Agreement" and which was attached to Appellant's (as well as Suit 1 plaintiffs') complaint (R. 11, 24, 25). Examination of this document reveals that it was recorded by the Northcrest Investment Corporation, Jane:

^{*}/While the issue of the compliance of the Millers' home with this covenant is not before the Court on this appeal, it should be noted that Appellant's brief in several instances states that the Millers' home is three stories high. See e.g. Appellant's Brief at 1, 3. This is a total misrepresentation. Since such statements are irrelevant to any issue before the Court on appeal, it is assumed that they are injected to influence the Court's sense of equity. The Court should be aware, however, that the Millers' home as completed is not "three stories" at any point. Only if you include the basement, which is totally below ground level with no exposure of outer walls, can you come up with three levels. Certainly the covenant did not intend that the basement be included in determining number of stories since it is a height limitation, not a space limitation. That was the apparent conclusion of the plaintiffs in Suit 1 who alleged that the Millers' home called for "the construction of a structure two stories high" (R. 21), and of Judge Sawaya who found that the Millers' home did not violate the two story restriction. (R. 27).

B. Cunningham, President, and was to encumber all lots of the Northcrest Subdivision, Plat "F". The lot which the Millers purchased is lot 5 of this Northcrest Subdivision, Plat "F". (R. 27).

Appellant's home is situated below and to the southwest of the Millers' home, and the two lots share a boundary which is to the rear of both homes. Appellant's home is not in Plat "F", but rather is in Plat "E" (R. 2).

The Northcrest Subdivision Plat "E" was developed by Northcrest Manor, Inc. (hereinafter "Northcrest Manor"). The Northcrest Subdivision Plat "F" was developed by the Northcrest Investment Corporation (hereinafter "Northcrest Investment"). Subsequent to the development of Plat "E", all of the outstanding shares of stock in Northcrest Manor were purchased by James B. Cunningham and Phenix Investment, Inc. (hereinafter "Phenix"), a corporation partially owned by Mr. Cunningham. (R. 89). Prior to this time Mr. Cunningham had had no involvement with Northcrest Manor and had not personally participated in and/or owned an interest in the development of Plat "E". (R. 79). Immediately upon acquisition by Phenix of Northcrest Manor stock, Northcrest Manor was dissolved and transferred all of its land holdings to Cunningham and Phenix. Apparently because the document of conveyance (which is not part of the record) recited "\$10 and other good and valuable consideration," Appellant assumes that

this was the actual amount of consideration given for the shares of stock in Northcrest Manor. Of course, far more was in fact given (some \$500,000).

On March 5, 1965, Phenix conveyed by warranty deed (a certified copy of which was submitted to the court at the time of the rehearing on defendants' motion for summary judgment and which is now attached hereto as Exhibit "A") that real property now constituting Plat "F" to Northcrest Investment Corporation. Again Appellant argues that this sale was made for \$10 and again this conclusion is absurd (in fact for some \$130,000).

At the time of this transfer from Phenix to Northcrest Investment, title to Plat "F" was not encumbered by a restrictive covenant. (R. 79 and Exhibit A). It was not until August 21, 1967, that Mr. Cunningham, as president of Northcrest Investment, and in conjunction with the recording of the Plat "F" Subdivision plat, recorded the Restrictive Agreement in the office of the Salt Lake County Recorder, thereby subjecting each lot thereafter sold in Plat "F" to reciprocal restrictive covenants. (R. 79). The stated purpose and intent of the covenant regarding height limitations was to protect the view of the Salt Lake Valley for those lots in Plat "F" on the uphill side of the property. (R. 79, 80).

POINT I

PLAINTIFF-APPELLANT LACKS STANDING TO SUE FOR THE ENFORCEMENT OF A RESTRICTIVE COVENANT TO WHICH NEITHER HE NOR HIS PREDECESSORS IN INTEREST WERE PARTIES AND WHICH WAS NOT INTENDED TO BENEFIT HIS LOT

Appellant founds the various aspects of his basic claim upon the language of a contract denominated "Restrictive Agreement." By its terms, this contract is between the Northcrest Investment Corporation, by its president James B. Cunningham, and the purchasers and their successors of the lots located within the Northcrest Subdivision Plat "F". In its introductory paragraph the contract provides:

"THAT, WHEREAS, NORTHCREST INVESTMENT CORPORATION, is the owner of Northcrest Subdivision, Plat "F", situated in Salt Lake County, State of Utah, and it desires and intends to sell and convey the same to purchasers for the purposes herein contemplated, and in order to restrict the use of said property and thereby enhance the value thereof, it hereby agrees with all who shall purchase said property, or any part thereof, that in consideration of such purchase and use thereof, said property shall be and is restricted in the following respects..." (emphasis added)

(R. 10, 24).

In point of fact, Appellant is neither a party to this contract nor a successor in interest to a party to this contract. Under these circumstances Appellant has no standing to sue to enforce the restrictions upon Millers' lot which are contained within the contract.

The contract in question is generally termed a restrictive covenant (or negative easement) and was placed upon and made applicable to all lots within Plat "F" by the plat's

developer, Northcrest Investment Corporation, as part of a general plan of subdivision and development of Plat "F". In other words, as part of the sale and purchase of the lots of Plat "F", the Northcrest Investment Corporation exacted a promise from all purchasers of these lots that they would be bound by the terms of the restrictive agreement. These promises are reciprocal in nature in that both the burdens and the benefits arising therefrom run to and from all purchasers of Plat "F" lots. These promises not only bind original lot owners, but also "their heirs, successors and assigns" (R. 11)---those in privity of estate with the original purchasers.

The threshold issue raised by Appellant in this appeal is the question of who may sue to enforce the height limitations of this restrictive covenant which unquestionably burdens as well as benefits Millers' Lot 5 of Plat "F". The general rule was set forth by the court in the leading case of Korn v. Campbell, 192 N.Y. 490, 85 N.E. 687 (1908), wherein the court was considering a general scheme for the improvement of real property under which an owner of a large plot or tract of land divided it into building lots to be sold to different purchasers for separate occupancy, by deed containing uniform covenants restricting the use which the several grantees could make of their property. Regarding the question of who may sue for the enforcement of such uniform covenants the court stated:

"In such case the covenant is enforceable by any grantee as against any other, upon the theory that there is a mutuality of covenant and consideration, which binds each, and gives to each the appropriate remedy. Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enforcement in its value due to similar restrictions upon all the other lots in the same tract."

This same approach toward enforcement was adopted by this Court in the case of Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (1946) wherein the Court, citing Korn v. Campbell with approval, held that:

"The cases appear to be unanimous in supporting the proposition that if a general scheme for building or development is intended by the original grantor, subsequent grantees may bring action against each other to enforce the restrictive covenant."

Appellant relies primarily upon Hayes v. Gibbs for his argument that he has standing claiming that both he and the Millers are grantees. However, such reliance is misplaced due to the fact that, while both Appellant and Millers own lots which are encumbered by similar restrictive covenants, the promises which run up and down their respective chains of title emanate from different grantors.

Hayes v. Gibbs, supra, involved a factual situation very similar to the instant action except for a very critical distinction. Hayes sued Gibbs to enforce a restrictive covenant which prohibited the use of lots within the subdivision for

business purposes. Both Hayes and Gibbs had purchased properties through a chain of title going back to a Hubbard Investment Company which in turn had acquired the property from the original subdivider, Douglas Heights Land and Investment Company. All conveyances in this chain of title contained restrictive covenants applying to the lots ultimately owned by Hayes and Gibbs, including the conveyance from Douglas Heights to Hubbard Investment.

As a precondition to the enforcement of the covenant by Hayes as against Gibbs the court reviewed the chain of title to assure that the particular covenant was applicable to the property of both parties, that is, that the parties were both successors in interest to or in privity of estate with a common grantor who made the properties subject to the same covenant. The court noted:

"The title to the specific property in issue...comes from the Douglas Heights Land and Improvement Company to Hubbard Investment Company via a conveyance containing restrictive covenants applying to both Hayes and Gibbs."

The primary consideration, the court reasoned, was the intent of the common grantor as manifested by the application by this common grantor of the restrictive covenant to the land eventually acquired by both the party seeking to enforce the covenant and the party against whom enforcement was sought.

In Hayes v. Gibbs, both parties were successors in interest to a common grantor which intended that both of them

properties be subject to the restrictive covenant and which had manifested this intent by exacting promises from the original grantee, thereby binding all successive grantees to reciprocal rights and duties. Herein lies the critical distinction which reveals the error of Appellant's reliance upon Hayes v. Gibbs.

As set forth in our Statement of Facts, Appellant's lot is in Plat "E" of the Northcrest Subdivision. This Plat, along with Plats "A", "B", "C" and "D," were developed, subdivided and sold by Northcrest Manor, Inc. Following the completion of Plat "E", all of the outstanding shares of stock in Northcrest Manor, and thereby all its real property assets, were acquired by James B. Cunningham and Phenix Investment, Inc. Neither Mr. Cunningham nor Phenix had participated and/or owned any interest in the development of Plat "E". Northcrest Manor was then immediately dissolved, its real property assets passing to Mr. Cunningham and Phenix as if directly acquired. A portion of this real property (including that which was to become Plat "F") was then conveyed to Northcrest Investment Corporation, this last transfer occurring in March of 1965. None of the documents of conveyance from Northcrest Manor to Cunningham and Phenix and then to Northcrest Investment contained any restrictive covenants and in fact there were no such encumbrances on the title eventually held by Northcrest Investment. It was not until August 21, 1967,

the date upon which Mr. Cunningham recorded his proposed Plat "F", that the restrictive covenant sought to be enforced herein was spawned. This covenant, by its terms, applies to Plat "F" and runs between Northcrest Investment and all purchasers of lots within Plat "F", including the Millers' Lot 5. It does not run to Plat "E".

In contrast to Hayes and Gibbs, Appellant and Millers are not successors in interest to a common grantor which made the restrictive covenant applicable to both of their lots. The restrictive covenant applicable to Appellant's lot can be traced back to Northcrest Manor, the developer of Plat "E" in which Appellant owns Lot 14. The restrictive covenant applicable to Millers' lot can be traced back only to Northcrest Investment Corporation which developed Plat "F" and had no interest in the development of Plat "E". Therefore, while both Appellant and Millers can trace title back to a common grantor, they cannot trace their respective restrictive covenants back to a common grantor. Under the prerequisites set forth in Hayes v. Gibbs, this defect is fatal to Appellant's argument.

Appellant attempts to evade this obstacle by contending that the transfers of title to the property which eventually became Plat "F" were for "nominal consideration" and "occurred for tax reasons", suggesting that only the name of the entity holding title changed. This argument not only does not

a scintilla of evidentiary support in the record, but is patently absurd. To begin with, there is no question but that neither Mr. Cunningham, Phenix nor Northcrest Investment owned any interest in Northcrest Manor during the period while it was developing Plat "E", or for that matter Plats "A", "B", "C" or "D". To then suggest that, because recorded documents of conveyance recite "\$10 and other good and valuable consideration," only nominal consideration was paid to acquire considerable acreage in the upper Avenues area in 1965 is nonsense. Lastly, to state that "Northcrest Investment de facto stepped into the shoes of Northcrest Manor and retained all of its duties and obligations" (Appellant's Brief at 36) has no basis in fact or in law. The only way that Northcrest Manor could bind any successors in title to covenants restricting the use of the property conveyed would be to make the conveyances of title subject to such restrictions. See Hayes v. Gibbs, supra. This did not occur.

Appellant also argues that the language of the restrictive covenant expressly gives him the right to sue to enforce it. However, juxtaposing the two pertinent provisions of the agreement reveals a different result.

"THAT, WHEREAS, NORTHCREST INVESTMENT CORPORATION, is the owner of Northcrest Subdivision, Plat "F", situated in Salt Lake County, State of Utah, and it desires and intends to sell and convey the same to purchasers for the purposes herein contemplated, and in order to restrict the use of said

property and thereby enhance the value thereof, it hereby agrees with all who shall purchase said property, or any part thereof, that in consideration of such purchase and use thereof, said property shall be and is restricted in the following respects... and the owner or owners of any of the lots in said subdivision shall have the right to sue for and obtain an injunction prohibitive or mandatory to prevent the breach of or to enforce the observance of the restrictions above set forth..."

Appellant argues that the phrases "said property" and "said subdivision" include all plats within the area generally described as the Northcrest Subdivision. However, in view of the fact that Northcrest Investment owned only Plat "F", never had any interest or participation in the development of other plats in the Northcrest Subdivision, and could only sell to purchasers of Plat "F" lots, and could only exact covenants from purchasers of Plat "F" lots, it is clear that "said property" refers only to Plat "F" and that only the owner or owners of any of the lots in Plat "F" have the right to sue to enforce the covenants. Appellant is not one of those owners.

POINT II

THE DOCTRINE OF EQUITABLE ESTOPPEL CANNOT AND DOES NOT APPLY TO DEFENDANTS-RESPONDENTS

Appellant, apparently recognizing the weakness of the "simple name change" theory (See Point I, supra), argues that Respondents should be barred from claiming that Northcrest Manor and Northcrest Investment are not the same entity by the doctrine of equitable estoppel, citing Kelly v. Richards,

95 Utah 560, 83 P.2d 731 (1938). As set forth by Appellant, this doctrine requires concealment of material facts, with knowledge of the facts, with the intention to mislead, which does in fact mislead. However, here is where Respondents' concurrence ends.

First there is no evidence in the record which would support this claim. Secondly, since Appellant purchased his lot in a chain of title from Northcrest Manor, and not from Northcrest Investment, it is difficult if not impossible to see how Northcrest Investment could be in a position wherein Appellant was relying upon anything it did or said, let alone how the Millers could be involved in such a conspiracy.

POINT III

THE LOWER COURT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-RESPONDENTS IN THIS CASE

In the fall of 1976, the defendants Robert and Nancy Miller began constructing their new home at 925 Little Valley Road. By December the Millers had received some complaints about the plans from three neighbors who lived in close proximity to the house. On January 14, 1977, two of the three neighbors brought suit to enjoin the construction of the Millers' house on the ground, inter alia, that it violated the restrictive covenant's height provisions. On January 26, 1977, the parties had a full trial of the issues, and on February 14, 1977, Judge Sawaya entered judgment for the defendants, finding

"[t]hat the evidence shows that both the proposed construction as reflected by the building plans and the actual construction of the dwelling being constructed by defendants are in conformity with the applicable restrictive covenants and building code."

Findings of Fact and Conclusions of Law, Civil No. 239493 (attached to Answer). The very day after judgment was entered in Suit 1, the third complaining neighbor filed this action alleging the same breaches of the same restrictive covenants by the same defendants.

The doctrine of collateral estoppel bars parties and their privies from relitigating issues which have been determined in a prior suit where the issues were actually litigated and necessary to the judgment in the prior suit. In re Town of West Jordan, 7 Utah 2d 391, 326 P.2d 105 (1958). There is no question that Appellant in this case seeks to relitigate the issue of the compliance of the Milers' house with the restrictive covenant. There is no question that Appellant's complaint states no cause of action unless that issue is allowed to be relitigated. The issue on appeal is whether Appellant should be collaterally estopped by the decision in Suit 1 that the house complies with the restrictive covenant. That issue in turn is solely dependent on the question of whether Appellant is

one who is in privity with plaintiffs in Suit 1.*

The concept of privity, as applied to determine the binding effect of judgments, has been defined in a variety of ways. Some courts have applied the narrow notion of "privity of estate", holding that a privy is one who has a mutual or successive interest to the same property. See, e.g. National Lead Co. v. Nilsen, 131 F.2d 51 (8th Cir.), cert. denied, 318 U.S. 758 (1943). Many other courts have recognized that a broader definition of privity is appropriate in many cases. The law has been summarized as follows:

With respect to the application of the doctrine of res judicata to those in privity with parties to a suit, there is no generally prevailing definition of "privity" which can be automatically applied to all cases, and the determination of who are privies requires careful examination into the circumstances of each case as it arises. According to many decisions, privity means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights; and the term "privy" when applied to a judgment or decree refers to one whose interest has been legally represented at the trial.

*/The doctrine of res judicata bars a second suit, between parties or their privies, on the same cause of action as a former suit which was resolved on the merits. See In re Town of West Jordan, 7 Utah 2d 391, 326 P.2d 105 (1958). Since Appellant's essential cause of action in Suit 2 is the same as the plaintiffs' claim in Suit 1, the doctrine of res judicata should also apply to bar this suit if Appellant is in privity with the former plaintiffs.

50 C.J.S. Judgments § 788, at 324-25 (emphasis added). As statement indicates privity can be found to exist, under circumstances, where an identical interest or right has been represented in litigation.

The California Supreme Court decision of Zaragoza Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949), illustrates the application of the broad definition of privity. The court, the general rule "that such privity involves a person so identified in interest with another that he represents the legal right." 202 P.2d at 75, quoting 30 Am. Jur. at 957. particular legal right in that case was the right to recover injuries to both husband and wife arising out of an automobile accident. Under California law, a recovery for the injury either would be a recovery of community property. The husband sued the defendant first and was denied recovery. The wife was barred from bringing a suit to recover for her personal injury because she was in privity with her husband. The court ruled there was but one legal right, to recover community property, that right "depend[ed] in both cases on negligence of the husband and lack of contributory negligence on the part of the husband in relation to one accident." 202 P.2d at 75. While the rule in Zaragoza is based on community property concepts, the rule is applicable in other situations where a single common legal right is being asserted. See also State Farm Mutual Auto. Ins. Co. v. Salazar, 155 Cal. App. 2d 861, 1318 P.2d 210 (1957) (insurance).

company in privity with insured where it seeks to raise only subrogated rights of insured).

California is not alone in adopting a broad concept of privity for purposes of res judicata and collateral estoppel. Many other courts and cases have recognized the broad definition of privity.*/ For example, the doctrine of representation, one form of privity, has long been recognized in courts of equity. As the Illinois Supreme Court stated in 1946:

It is unquestionably the rule that in equity the interests of parties not before the court will not be bound by the decree. This rule, however, is subject to the well-recognized exception growing out of convenience and necessity in the administration of justice, out of which what is known as the doctrine of representation arose. Under this doctrine, where it appears that parties, although not before the court in person, are so represented by others who are before the court that their interests will receive actual and efficient protection, the decree may be held to be

*/See, e.g., *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76 (D.C. Cir. 1963); *Mixon v. Barton Lumber and Brick Co.*, 226 Ark. 809, 295 S.W.2d 325 (1956); *Smith v. City of Los Angeles*, 190 Cal. App. 2d 112, 11 Cal. Rptr. 898 (1961); *Hudson v. Western Oil Fields, Inc.*, 150 Colo. 456, 374 P.2d 403 (1962); *Smith v. Wood*, 115 Ga. App. 265, 154 S.E.2d 646 (1967); *Bryntesen v. Carroll Constr. Co.*, 26 Ill. App. 2d 307, 167 N.E.2d 581 (1960); *Weinberg v. Werft*, 309 Ky. 731, 218 S.W.2d 398 (1949); *Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 200 N.W.2d 45 (1972); *Hentschel v. Smith*, 278 Minn. 86, 153 N.W.2d 199 (1967); *Drainage Dist. No. 1 v. Matthews*, 361 Mo. 286, 234 S.W.2d 567 (1950); *Hudson Transit Corp. v. Antonucci*, 137 N.J. Law 704, 61 A.2d 180 (1948); *Gable v. Raftery*, 65 N.Y.S.2d 513 (1945); *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E.2d 688 (1955); *First Nat'l Bank of Greenville v. United States Fidelity and Guarantee Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945); *Gentry v. Farruggia*, 132 W. Va. 865, 53 S.E.2d 741 (1949); See generally 50 C.J.S. Judgments § 788, at 325 nn. 62-63.

binding upon such absent parties. In such cases it must appear that the absent parties stand in the same situation as the parties before the court, and that they have a common right or interest with them, the operation and protection of which will be for the common benefit of all and cannot be to the injury of any. In order to apply this doctrine, there must be persons who are parties to the suit who, with reference to the interests in question, are equally certain to bring forward the entire merits of the questions involved in order that the object for which the presence of the actual owner is ordinarily required may be satisfied.

State Life Ins. Co. v. Board of Education, 394 Ill. 301, 2d 525, 529 (1946). See also 1B Moore's Federal Practice ¶ 0.411[1] (1965); Restatement of Judgments §§ 83, 85-86; In Commercial Trust Co. v. Kohl, 140 N.J. Eq. 294, 54 A.2d 341 (1947), the New Jersey court applied this broad privity concept to issues determined concerning a will where the interests of unborn beneficiaries "were identical to the interests of the contingent corporate beneficiaries who presented to the court the facts and arguments in support of such interests." 54 A.2d at 477.

The broad concept of privity has been recognized and applied by courts in factual settings similar to that of the present case. In Hixson v. Kansas City, 361 Mo. 1211, 205 S.W.2d 341 (1951), the Supreme Court of Missouri found that the rights of residents of Clay and Jackson Counties were precluded by the former suit had determined the annexation to be reasonable. Some residents of Clay County had intervened to challenge

annexation. The parties challenging the annexation were not the same in the two suits, and no resident of Jackson County was involved in the former suit. Despite these technical defects in the identities of the parties, the Court applied res judicata because the interests of the parties in the two suits were identical and both groups sought to protect the common interest. Similarly in Barrett v. City of Chicago, 11 Ill. App. 2d 146, 136 N.E.2d 564 (1956), res judicata principles were applied against persons seeking to challenge a public contract who had not been parties to a former suit, which had also challenged the same contract. In Campbell v. Nassau County, 192 Misc. 821, 82 N.Y.S.2d 179, aff'd, 274 App. Div. 929, 83 N.Y.S.2d 511 (1948), res judicata barred a suit challenging government action even though some of the plaintiffs in the second suit were different. The court noted that the same interest was involved and that the named plaintiffs were indistinguishable from other potential plaintiffs. The court concluded by reasoning that if the new plaintiffs were not considered to be in privity, "litigation of this character would virtually be interminable." 82 N.Y.S.2d at 183.

The Hixson, Barrett and Campbell cases are especially instructive because they are factually comparable to this case. In those cases, as in this one, certain plaintiffs sought to litigate issues which had previously been determined against them though they had not been parties. In each case, the

particular plaintiffs were indistinguishable in interest from previous plaintiffs with respect to the issues which have been determined. In each case, it could be said that there was but one right involved, one held in common by many plaintiffs. All the prerequisites of privity which exist in those cases exist in this one.

The Utah Supreme Court also has recognized that "privity" in the context of res judicata and collateral estoppel is broader than mere "privity of estate." In Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943), the Court stated:

This court has defined the word "privity" as "a mutual or successive relationship to the same right or property. As applied to judgments or decrees of courts, the word means one whose interest has been legally represented at the time."

136 P.2d at 960, quoting Glen Allen Mining Co. v. Park City Mining Co., 77 Utah 362, 296 P. 231, 233 (1931).^{*/}

The Glen Allen opinion clarifies the approach taken in cases such as the one at bar. After defining privity the Court noted: "The ground on which persons standing in privity to the litigating party are bound by the proceeding to which they are a party is that they are identical with him in interest."

^{*/}The Appellant's own brief on appeal admits that Utah adopted a broad approach to privity. Appellant's Brief at

p. at 233 (emphasis added). The Court went on to explore the particular interests of the litigating party and the person alleged to be in privity with him with respect to the particular issues which were litigated. In Glen Allen, the interests were not co-extensive.

An application of these principles of privity to the facts of this case can only lead to the conclusion that Appellant is one who was in privity with the plaintiffs in Suit 1 with respect to the specific issue of the compliance of the Millers' house to the restrictive covenant. The restrictive covenant represents an identical promise given by each landowner to every other landowner in the applicable area.*/ The right to enforce that covenant is a single legal right held in common by all the promisee-landowners. See Quinn v. State ex rel. Leroy, 118 Ohio St. 48, 160 N.E. 453 (1928) (interest in same contract was the basis for finding privity). Enforcement of the covenant against the Millers and their contractors

*/As argued under Point I above, this area consists only of Plat F of the Northwest Subdivision, which excludes Appellant as a party who may enforce the agreement. However, this argument will assume that Appellant is a promisee of the covenant and may enforce it. It is interesting to note that Appellant, who alleges in paragraph 17 of his complaint that he is in privity with the Millers (and consequently the former plaintiffs), must argue on this appeal that no privity exists between himself and the former plaintiffs to avoid the application of collateral estoppel.

was undertaken by two neighbors, one of whom, like Appellant, owned property adjoining the Millers'. Seeking injunctive relief, Suit 1 necessarily would have benefited not only these plaintiffs but every other promisee-landowner including Appellant if it had been successful. The present suit, and any other suit which could have been (or may still be) brought, depends on a relitigation of the compliance of the same house with the same restrictive covenant as was involved in Suit 1. The existence of identical issues, interests and representation of a common legal right constitute all of the elements of privity.

It is apparent that the application of collateral estoppel in this case would not be unfair to Appellant. His interest has been fully represented and his positions fully litigated by able counsel in Suit 1. Appellant apparently does not contend otherwise, relying solely on the concept of an absolute right to a day in court as the ground for reversal on this point of decision. He does not claim to have any new evidence to present, nor any new arguments, on the issue of compliance. Appellant does attempt to argue that his right to enforce the covenant is not the same as that of other property owners because "not all damages are identical." Appellant's Brief at 21. But questions of damages are not even relevant to this discussion. It is on questions of liability, the only issues reached by the court in the previous

case, that this discussion is focused, and on those issues, the rights and interests of all the promisee-landowners and the evidence available to any of them are identical. In short, Appellant's case has already been heard, and only because the result was adverse to him does he seek to have the issues litigated again. It would not be unfair to deny him the opportunity.

It is also crucial to recognize the gross unfairness to Respondents that the present situation creates. They have already incurred the cost and delay of two lawsuits at the trial level and this appeal. How many other potential plaintiffs are waiting for their turn to bring a lawsuit to enforce the covenant is unknown. Unless the doctrine of collateral estoppel has application to foreclose this and subsequent suits on the same issues, Respondents face a potentially unlimited number of separate lawsuits by plaintiffs who might seek to relitigate the issue of breach of the restrictive covenant until they get a favorable judgment. The costs to Respondents have already been exorbitant--at some point this must end!

Also, from the standpoint of conserving scarce judicial resources, it would be unwise to set a judicial precedent that would allow and encourage plaintiffs with identical rights to be enforced against the same defendant to bring suits seriatim until a favorable judgment is achieved.

Only an application of existing privity precedents can arrive at such a result. Campbell v. Nassau County, 192 Misc. 821, 192 N.Y.S.2d 179, 183 (1948).

Of course, as Appellant notes, considerations of judicial economy and fairness to Respondents should not be applied to deny potential plaintiffs their substantive rights. But the broad doctrine of privity as adopted by this Court and argued in this brief, is appropriately limited to protect such rights. The doctrine does not apply merely because the issues are the same. In addition, the right being enforced must be the same, and the interests of the privity must be identical with those of the party to the former suit. Appellant reviews the facts of dozens of cases which are obviously dissimilar from this case because the rights asserted and the interests of the parties were not the same. Respondents do not claim that these cases, on the facts, should have been decided the other way. For example in Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943), this Court properly determined that the State Engineer was not representing the interests of certain protestors in denying plaintiff's application for appropriation of water. The State Engineer has statutory responsibilities that would preclude representation or identity of interests even though the same result was sought. The California Supreme Court in Dillard v. McKnight, 34 Cal. 2d 209, 209 P.2d 387 (1948)

restated the broad definition of privity and determined that one partner was not in privity with another where they had been sued in their individual capacities. And in Wolff v. DuPuis, 233 Or. 317, 378 P.2d 707 (1963), a non-community property state, the Oregon Supreme Court properly held that a husband, suing for loss of consortium, an independent cause of action, was not in privity with his wife who had sued earlier for personal injuries caused by the same accident.

It is obvious that examples of common rights and identical interests are relatively rare in comparison to examples of independent or differing rights and interests and that the concept of privity as described in this brief will have limited application. But where common rights and identical interests exist and have been represented in a prior suit, there should be no hesitation to apply the doctrine. The privy's rights simply have had their day in court.

POINT IV

THE APPLICATION OF COLLATERAL ESTOPPEL DID NOT RESULT IN A DENIAL OF DUE PROCESS IN THIS CASE

Throughout his brief Appellant claims he has been denied due process of law by not giving him a day in court on the issues that have been resolved. Specifically he claims he had a right to notice of the action, a right to a hearing, a right to personally control the course of litigation

and a right to appeal. Apparently Appellant argues that the requirements of due process cannot be met unless he personally was in court and litigating the issues. This the Constitution simply does not require.

Of course, in any case of this type where the issue of privity is involved, the court must decide whether one who was not a party to a former suit will be denied a personal day in court on issues determined in that suit. Privies are persons who are affected by lawsuits but who are not entitled to come before the court or to a hearing and who have no control over the litigation and no right to appeal. Despite these facts, privies usually find themselves bound to the determinations of those lawsuits and determinations which, more often than not, are adverse to the privies' desires. It is apparent that the right to a day in court is not absolute.

The issue of privity was briefed and twice argued orally to Judge Conder below. Because the Judge was apparently uncertain as to the law of privity and recognized that mere identity of issues was not a sufficient basis for applying collateral estoppel, the rehearing argument focused particularly on the issue of privity. Respondents' counsel admitted that if privity did not exist, collateral estoppel could not be applied. The Judge necessarily found that Appellant was in privity with the plaintiffs in Suit 1 to reach his conclusion. For Appellant to argue that he cannot be bound without his

personal day in court, as he does in Point I of his brief, and to argue that a judgment can bind only parties and their privies, as he does in Point II, is to totally miss the issue of whether Appellant is in privity, the issue addressed by the court below and presently before this Court. Nor is it helpful to recite the facts of an almost endless number of cases without any attempt to compare them to the circumstances of this case. Each case must be decided and reviewed on its own facts. See Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231 (1931).

This is not to imply that Constitutional standards do not apply to this case or any case where privity may be found to exist. Such is not the law. The finding of privity itself denotes a conclusion that the application of collateral estoppel to a non-party is appropriate. See Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950). Many factors reflect on the appropriateness of applying collateral estoppel including considerations of judicial economy, fairness to the defendants who may be required to relitigate issues, and the potential of hardship to the person who seeks to relitigate the issues if that opportunity is denied. The final determination on the privity issue must be fair. See Bruszewski v. United States, supra; McFadden v. McFadden, 239 Or. 76, 396 P.2d 202, 204 (1964); Hudson Transit Corp. v. Antonucci, 137 N.J. Law 704, 61 A.2d 180, 182 (1948) (privity

is "such a connection in interest with the litigation and subject matter as in reason and justice precludes a re-litigation of the issue"). It has been stated that regardless of the test for privity adopted by the court, "there can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due-process sense." Wolff v. DuPuis, 233 P.2d 317, 378 P.2d 707, 710 (1963).

What, then, are the requirements of due process that must be met before a person may be considered to be in privity? We would submit that the requirements of due process are met where a court is assured that 1) the interest of the party and the privity are identical, 2) there is a common right for which vindication is sought in both suits, and 3) the interests of the privity were in fact fully litigated and protected by the party in the prior suit. There is no absolute due process requirement of notice, hearing, or continuance of the litigation or appeal where a court finds those three requirements have been met.

An analysis of the key case relied upon by Appellant to establish his absolute right to a day in court leads to the conclusion drawn in the prior paragraph. In Hansberry, 311 U.S. 32 (1940), the United States Supreme Court held that an application of collateral estoppel to the defendants which prevented them from challenging the validity of an

agreement restricting the use of land by racial minorities, violated due process. The defendants were precluded on the theory that they were members of a class which had been represented in a prior case in which it was determined that the agreement was binding and effective. The Court reasoned that the interests of the defendants, who were Black, differed from the interests of those who litigated the former suit and that the defendants had not been represented in that case. The Court stated:

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

311 U.S. at 44-45 (citations omitted).

Beyond the relatively narrow holding of Hansberry, the decision affords significant latitude for state courts to make cases binding on persons who are not actually present for the litigation. The Court recognized that situations exist where all interested persons are not before the court,

noting specifically that

where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

311 U.S. at 41-42. While the Court was not required by the facts to hold that in all such cases collateral estoppel be applied to those so represented, the court set down the standard of review to be applied:

With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

311 U.S. at 42 (citations omitted).

It is clear that the requirements of the Hansberg opinion have been met in our case. The procedure of a hearing at the trial level and this appeal have tested fully the propriety of applying collateral estoppel. The decisive issues are identical in the two cases. The interests of Appellant in this case are identical to those of the former plaintiff. Both cases sought to assert a common legal right represented by the same restrictive agreement to which Appellant and the former plaintiffs are all parties.*/

*/Again, this argument assumes Appellant has standing on an issue argued in Point I of the brief.

This conclusion is bolstered by the United States Supreme Court decision of Chicago, Rock Island & Pacific Ry Co. v. Schendel, 270 U.S. 611 (1926). The decision precluded a personal representative of a railway company employee from recovering under a federal employers' liability law where the widow of the employee had already recovered under state law. The key issue that had been adjudicated in state court was that the decedent had been employed in intrastate commerce, which made the federal act inapplicable. The Court did not expressly rule on the ground of privity but instead relied upon the representation of the same essential interest in the first suit. Importantly, the precluded party had no right to notice, no right to be heard on the issue, no opportunity to control the litigation and no right to appeal.

Rule 23 of the Utah Rules of Civil Procedure also illustrates that there is no absolute right to notice or hearing. Appellant assumes that if the first suit had been brought as a class action, he would have had a right to notice and to opt out. See Appellant's Brief at 21-22. But such would not have been the case. The notice and option provisions of Rule 23(c) by their own terms apply only to Rule 23(b)(3) type suits, where issues common to the class predominate over individual questions. The former case, however, would have been brought under either Rule 23(b)(2), since it sought final injunctive relief, or Rule 23 (b)(1)(A), since

the defendants faced inconsistent standards of conduct. Under these class actions, there is no right to notice or opt out, and Appellant would have been bound nevertheless.

CONCLUSION

Appellant's complaint requested equitable relief from the court below, and equity requires a balancing of the interests of the contending parties. Respondents have already been put to the expense of two separate suits challenging the compliance of their home with the same provisions of the same restrictive covenant. Now Appellant argues that the Third Judicial District Court should hear arguments for the third time on this neighborhood dispute. But of even more significance, if the Appellant's legal positions are adopted by this Court, and extended to their logical conclusion, everyone on the North hillside of Salt Lake City who is subject to a similar covenant and takes from a common grantor will have the legal right to sue the Millers in endless succession until success is achieved. Only the six-year statute of limitations would ultimately provide sanctuary. The potential expense of litigation, not to mention the costs of complying with a successful judgment would be immense, far outweighing any conceivable injury to Appellant caused by the aesthetic impact of the Millers' house. The equities clearly favor the Respondents.

If this neighborhood dispute does not end here, it will have no end. Fortunately, two established legal

doctrines provide the means by which this litigation may be concluded. First, as argued in Point I, Appellant is not entitled to enforce the restrictive covenant, which is applicable only to the property in Plat "F" of the Northcrest Subdivision. The property in Plat "F" was not burdened by a restrictive covenant before it was acquired by Northcrest Investment Corporation. Northcrest Investment made the covenant applicable to all of its grantees. Appellant was not a grantee of Northcrest Investment at all and consequently is not a party to the restrictive covenant applicable to the Millers' house. As required by Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (1946), the Appellant must demonstrate that his and the Millers' title derives from a common grantor, who conveyed to both (or their predecessors) subject to the same restrictive agreement. This Appellant cannot do.

This Court has stated "that in the construction of uncertain or ambiguous restrictions, the courts will resolve all doubts in favor of the free and unrestricted use of property." Parrish v. Richards, 8 Utah 2d 419, 336 P.2d 122, 123 (1959). The same principle should be applied in determining who is entitled to enforce a restrictive covenant.

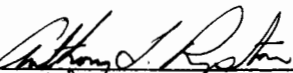
The second legal doctrine that provides an end to this case is collateral estoppel, which applies because Appellant is in privity with the plaintiffs in Suit 1. The circumstances of this case establish conclusively that the requirements of

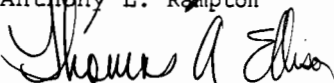
privity as set out in Glen Allen Mining Co. v. Park Galleria Co., 77 Utah 362, 296 P. 231 (1931), and Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943), have been met. This doctrine of privity, as argued in this brief, is appropriate limited to assure that fairness and justice are achieved and the requirements of due process are met.

Both of the foregoing independently sufficient points of law were relied upon by the trial court in granting summary judgment. With regard to the application of these doctrines, a genuine issue of fact exists. Consequently, the lower court's granting of summary judgment should be upheld and Respondents should be awarded their costs on this appeal.

Respectfully submitted this 11th day of November, 1977.


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CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing to Nann Novinski-Durando, 432 300 East, Suite 210, Salt Lake City, Utah 84111 on November 1, 1977.


Thomas A. Ellison