1978

# Piero G. Ruffinengo v. Robert F. And Nancy H. Miller The Art Company, J. Blair Jones , John Does 1 Through 20 : Petition of Respondents-Defendants For Rehearing And Memorandum of Points And Authorities In Support Thereof

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

# PETITION OF RESPONDENTS-DEFENDANTS FOR REHEARING AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

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Attorney for
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IN THE SUPREME COURT OF THE STATE OF UTAH

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PETITION OF RESPONDENTS-DEFENDANTS FOR REHEARING

COME NOW respondents-defendants and petition this honorable court for rehearing of this appeal from judgment of the Third Judicial District Court, the Honorable Dean E. Conder, Judge. This petition is based upon the following points of error in the ruling by the majority of the court in its written opinion filed May 5, 1978:

POINT I. THE OPINION OF THE MAJORITY OF THE COURT ON ISSUE OF STANDING DIRECTLY CONTRAVENES THE RULES PROMULGATED AND THE LAW AS DECREED BY THE COURT IN THAT IT CONTRADICTS THE EXPRESS LANGUAGE OF RULE 56(e) AND TURNS UPON REPRESENTATIONS NOT PROPERLY BEFORE THE COURT.

POINT II. BASED UPON THE UNDISPUTED EVIDENCE BEFORE THE COURT APPELLANT CANNOT TRACE THE RESTRICTIVE COVENANT BACK TO A COMMON GRANTOR AND THEREFORE APPELLANT HAS NO STANDING TO ENFORCE SUCH A COVENANT.

POINT III. EVEN ASSUMING SATISFACTION OF THE DOCTRINE OF HAYES V. GIBBS APPELLANT WAS NOT INTENDED TO BE BENEFITTED BY THE RESTRICTIVE COVENANT AND THEREFORE LACKS STANDING TO ENFORCE IT.

POINT IV. COUNSEL REQUESTS CLARIFICATION AS TO WHETHER ON REMAND SUMMARY JUDGMENT WOULD BE AVAILABLE IF ADDITIONAL UNDISPUTED FACTS DEMONSTRATED THAT APPELLANT LACKS STANDING UNDER THE DOCTRINE OF HAYES V. GIBBS.

Dated this 25th day of May, 1978.

FABIAN & CLENDENIN

By Anthony L. Rampton
Anthony L. Rampton

By Thomas A. Ellison
Thomas A. Ellison

# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS-RESPONDENTS' PETITION FOR REHEARING

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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 OF APPEAL FOLLOWING PRIOR HEARING

This appeal was taken from a decision of the Third Judicial District Court for Salt Lake County, the Honorable Dean E. Conder presiding, granting defendants-respondents' motion for summary judgment on the separate 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 covenants by the doctrine of collateral estoppel.

The appeal was argued orally to this honorable court on April 12, 1978. On May 5, 1978 the court filed a written opinion, per Justice Hall and concurred in by Justices Crockett and Maughan, (a copy of which is attached hereto) reversing the decision of the trial court and remanding the case for further proceedings not inconsistent with the opinion of the court. Chief Justice Ellett wrote a dissenting opinion which was concurred in by Justice Wilkins.

It is with respect to the court's ruling on the issue of standing to which defendants-respondents seek rehearing before the court for the reasons stated herein.

## POINT I

THE OPINION OF THE MAJORITY OF THE COURT ON THE ISSUE OF STANDING DIRECTLY CONTRAVENES THE RULES PROMULGATED AND THE LAW AS DECREED BY THE COURT IN THAT IT CONTRADICTS THE EXPRESS LANGUAGE OF RULE 56(e) AND TURNS UPON REPRESENTATIONS NOT PROPERLY BEFORE THE COURT.

The opinion of the majority on the issue of standing is based upon the summary judgment requirements of Rule 56, Utah Rules of Civil Procedure, declaring that there remains as to the question of standing an issue of material fact which precludes summary judgment determination. However, in so ruling the majority does contradicts Rule 56 and relies upon oral and written representations made by counsel for appellant which are totally without support in the entire record, and certainly devoid of the type of support expressly required by Rule 56(e). Without such reliance and therefore because of the error of such reliance, the opinion the majority cannot stand.

This issue of standing as briefed and argued to the Court by both parties is governed by the case of Hayes v. Gibbs, 111 U.54, 169 P.2d 781 (1946). Basically, this case requires that one to have standing to enforce a restrictive covenant which is part of general scheme for building and development, one must able to trace the covenant back to a common grantor. 169 P.2d 783-786. This interpretation of Hayes v. Gibbs is adopted by majority opinion (Opinion p. 2). Consequently the issue of ing turns upon whether the appellant can trace the restrictive covenant encumbering respondents' property back to a common

In reference to this issue, the majority opinion makes several determinative declarations. In its recitation of the "basic facts presented" the majority states:

> "[T]he litigants are the owners of adjacent lots in Northcrest Subdivision which share a common boundary, although one lot is in Plat "E" and the other in Plat "F" of said subdivision; the two plats were developed by separate corporate entities hence the lots in question were ostensibly not acquired from a common grantor, however [Appellant] maintains that both corporations were wholly owned by one James B. Cunningham; the lots in both plats are subject to the same restrictive covenants as to structure height, they merely having been imposed by different developers; ..." (emphasis added). (Opinion p.1).

The majority then concludes that as to this issue of whether there is a common grantor there remains a question of fact, stating:

> "The issue of standing raised in the pleadings is one of material fact which precludes that the entry of summary judgment ...
>
> [Appellant] contends he and [Respondents] did derive their titles from a common grantor since the corporate developers were in fact one and the same." (emphasis added). (Opinion p.2).

These pivotal contentions by appellant emphasized above and relied upon by the majority to create the summary judgment defeating "issue of material fact" are not the product of the record, but rather are entirely founded upon written and oral representations of appellant's counsel on appeal.

The primary purpose of the summary judgment procedure as stated by this court in Dupler v. Yeates, 10 U.2d 251, 351 P.2d 624 (1960) "is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may

be raised in the pleadings, and that the moving party is entit
to judgment as a matter of law." 351 P.2d at 636 (emphasis ad

Prior to the 1965 amendment to Rule 56(e) there was
question as to whether allegations in pleadings were alone suf
to create issues of fact when opposed by affidavits. See Chris
v. Financial Service Co., 14 U.2d 101, 377 P.2d 1010 (1963).
However, the 1965 amendment removed all doubt. Rule 56(e) no
requires a party opposing a motion for summary judgment to co
forward with admissible evidence in the form of affidavit or
deposition, or suffer the consequences. Rule 56(e) now reads
part:

> "When a motion for summary judgment is made and sup
> as provided in this Rule, an adverse party may not rest
> the mere allegations or denials of his pleading, but his
> response by affidavits or as otherwise provided in this
> must set forth specific facts showing that there is a ge
> issue for trial. If he does not so respond, summary judg
> if appropriate, shall be entered against him." (emphasis
> added).

Any question of whether the vestiges of Christensen
supra remained following the amendment was expressly disposed
this court in United American Life Insurance Company v. Wille
U.2d 279, 444 P.2d 755 (1968) wherein a party attempted to re
upon Christensen contending that mere allegations were suffi
The court met such a contention with the following reply:

> "When that case [Christensen] was decided, it place
> all by itself among the states of the Nation, and the so
> associate it had in that regard was the Third Federal Cir
> (Citation omitted) Quite aside from having the distinc
> causing Utah to be the only soldier in the Nation to ta
> step," the case is now no authority for the claim made
> appellants for the reason that Rule 56(e) was amended

by the addition of the following language ..." (the court then quotes Rules 56(e).

The majority's assertion that the issue of standing as raised in the pleadings is one of material fact which precludes the entry of summary judgment not only abrogates the 1965 amendment to Rule 56(e), but also relegates Utah to become once again "the only soldier in the nation to be in step." Additionally, the reliance upon gratuitous and totally unsupported statements by counsel to the effect that the two corporate developers were both wholly owned by Mr. Cunningham and were one in the same directly contravenes Rule 56(e). If appellant has any shread of evidence to support these claims the time to come forward has long since passed. To allow such unsupported assertions to form the basis of the majority's remand of this case to the trial court makes a shambles of the letter and spirit of Rule 56(e) and the remand should not be allowed to stand.

## POINT II

BASED UPON THE UNDISPUTED EVIDENCE BEFORE THE COURT APPELLANT CANNOT TRACE THE RESTRICTIVE COVENANT BACK TO A COMMON GRANTOR AND THEREFORE APPELLANT HAS NO STANDING TO ENFORCE SUCH A COVENANT.

As acknowledged by the majority opinion, the doctrine of Hayes v. Gibbs, supra, requires that appellant be able to trace the restrictive covenant which he is seeking to enforce back to a common grantor. (Opinion p.2). Also as stated by the majority opinion there is ostensibly no common grantor, appellant having acquired his lot from Northcrest Manor and respondents having

acquired their lot from Northcrest Investment. The only evi
before the lower court on this issue, and therefore before
court, consists of testimony by one James B. Cunningham whic
contained within two affidavits; one in support of the moti
summary judgment and one in opposition thereto. These affi
state in their entirety as follows:

"JAMES B. CUNNINGHAM, under oath, hereby deposes a
states:

1. I am the president of the Northcrest Investmen
Corporation, the developer of Plat "F" of the Northcres
Subdivision. I have been president of this corporatio
the date of its incorporation.

2. That neither the Northcrest Investment Corpora
nor myself personally participated and/or owned an inte
the development of Plat "E" of the Northcrest Subdivisi

3. When Northcrest Investment Corporation acquire
property identified as Northcrest Subdivision, Plat "F"
was no restrictive covenant encumbering the property.

4. I made the attached restrictive covenants ap
to the lots in Plat "F" Northcrest Subdivision, togethe
the buyers of such lots, by recording the same in the
of the Salt Lake County Recorder on or about August 21,

5. The primary purpose and intent of the height re
tions contained within the attached covenant is to prote
view of the Salt Lake Valley for those lots in Plat "F"
uphill side of property subject to the restrictions." (
added).

"JAMES B. CUNNINGHAM, under oath hereby deposes a
states:

1. Phenix Investment Inc. purchased all of the st
Northcrest Manor Inc., which had developed Plat E of Nor
Subdivision, and then dissolved the Northcrest Manor Co
and brought all of its land into Phenix Investment Inc.
land investment company, which then transferred the la
Northcrest Investment Co. of which I am President.

2. It was through Northcrest Investment Co. tha
continued development of Northcrest Subdivision. After

purchased the stock of Northcrest Manor, I continued the development of the area maintaining the same name for the Subdivision and filing restrictive covenants like those filed for the portion of the Subdivision already developed." (emphasis added).

It is admitted that appellant's lot is in Plat "E" which was developed by Northcrest Manor and that respondent's lot is in Plat "F" which was developed by Northcrest Investment. Thus, once again, the critical issue before the court is whether Northcrest Manor, Inc. and Northcrest Investment were one and the same corporation wholly owned by James Cunningham. The only evidence before the court is that neither Mr. Cunningham nor Northcrest Investment Corporation participated in and/or owned any interest in the development of Plat "E", and therefore no interest in Northcrest Manor at the critical point in time when Plat "E" was developed.

Following acquisition by Phenix Investment, Inc. of the Northcrest Manor stock and the immediate dissolution of Northcrest Manor (which made the purchase of the stock of Northcrest Manor tantamount to the outright purchase of the assets of Northcrest Manor) the land in Plat "F" was ultimately deeded to Northcrest Investment. This letter of conveyance of Plat "F" was not encumbered by any restrictive covenant, thereby making impossible any chain of covenant back to Northcrest Manor.

Under these undisputed facts there is no manner or means by which appellant can argue that the test of Hayes v. Gibbs has been met. All interest and ownership in Plat "F" was circuitously transferred from Northcrest Manor to Northcrest Investment without the encumbrance of restrictive covenant. This break in the chain of covenant by the only grantor common to both appellant and

respondent, i.e. Northcrest Manor, breaks the enforceability of the covenant and thereby deprives appellant of any standing to enforce the covenant.

## POINT III

### EVEN ASSUMING SATISFACTION OF THE DOCTRINE OF HAYES V. CITY, APPELLANT WAS NOT INTENDED TO BE BENEFITTED BY THE RESTRICTIVE COVENANT AND THEREFORE LACKS STANDING TO ENFORCE IT.

The restrictive covenant in question provides in relevant part:

> "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 to wit;
>
> 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 and no structure shall be erected, 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 ... 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 ..." (emphasis added).

According to the undisputed testimony of James Cunningham, he, on behalf of Northcrest Investment, made this covenant applicable to Plat "F" for the "primary purpose and intent" of preserving the view of the Salt Lake Valley "for those lots in Plat "F" on the

uphill side of the property subject to the restriction." It is admitted by the appellant that his lot is not in Plat "F" and that his lot is below, or on the downhill side, of respondents' lot.

In construing the provisions of a restrictive covenant such as the one quoted above it is important to keep two rules of construction in mind. First, whether or not a restrictive covenant applies to land is a matter of the intent on the part of the one who imposes the restrictions. See, e.g. Hayes v. Gibbs, 20 Am.Jur. 2d, Covenants, etc., Sec. 292; see also annotation in 89 A.L.R. at page 812. Secondly, in construing any ambiguous terms in a restrictive covenant all doubts must be resolved in favor of the free and unrestricted use of the property. These two rules of construction were combined by this court in Parrish v. Richards, 8 U.2d 419, 336 P.2d 122 (1959) wherein it was stated:

> "[I]n the construction of uncertain or ambiguous restrictions the courts will resolve all doubts in favor of the free and unrestricted use of property, and that it will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties." Id. at 336 P.2d 122.

Applying these rules of construction it is apparent that appellant was not intended by the grantor to be benefitted by the covenant. Clearly, the fact that appellant's lot is below respondents' makes the height restriction protecting the view of Salt Lake Valley inapplicable. As to the question of whether the enforcement provisions apply to all owners of lots in the Northcrest Subdivision or just to those in Plat "F" there appears some ambiguity on the face of the covenant. However, given the stated intention of the grantor to benefit "those lots in Plat "F", and the

presumption favoring the free and unrestricted use of proper
again must conclude that appellant was not intended to be ben
by this covenant and, therefore, that he has no standing.

Importantly, with respect to both the intent of Mr. Cunningham and the restrictive covenant applicable to Plat "
appellant failed at the trial court to create an issue of fac
The undisputed facts fully support the trial court's granting
summary judgment for lack of standing.

POINT IV

COUNSEL REQUESTS CLARIFICATION AS TO WHETHER ON REMAND S
JUDGMENT WOULD BE AVAILABLE IF ADDITIONAL UNDISPUTED FAC
DEMONSTRATED THAT APPELLANT LACKS STANDING UNDER THE DOC
OF HAYES V. GIBBS.

Counsel is somewhat at a loss as to how it should
with the following inquiry. The majority opinion reverses an
remands due to remaining questions of fact relating to the Ha
v. Gibbs issue of standing. However, in so doing the majorit
states that this issue of standing itself "as raised in the p
ings is one of material fact which precludes the entry of sum
judgment."

If this court rejects the positions set forth in Po
hereof respondents find themselves in a position of having ad
tional undisputable facts regarding the Hayes v. Gibbs issue
standing but facing a declaration that under no circumstance
the issue of standing be determined on summary judgment. Per
this quandry depicts the rationale behind the amendment to R
(e) (see Point I) but nevertheless leaves respondents with

prospect of discovery and trial on the merits when under undisputed facts appellant has no standing.

Counsel for respondent respectfully requests that the court answer the question as to whether, given undisputed facts which would demonstrate appellant's lack of standing under the doctrine of Hayes v. Gibbs, summary judgment could be again granted by the lower court.

Respectfully Submitted this 25th day of May, 1978.

FABIAN & CLENDENIN

By _____
Anthony L. Rampton

By _____
Thomas A. Ellison

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of May, 1978, postage prepaid, I mailed a copy of the foregoing to Nann Novinski-Durando at 431 South 300 East, Suite 210, Salt Lake City, Utah, 84111.

_____

IN THE SUPREME COURT OF THE STATE OF UTAH

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Piero G. Ruffinengo,
Plaintiff and Appellant,

v.

Robert F. and Nancy H. Miller,
The Art Company, J. Blair Jones,
John Does 1 through 20,
Defendants and Respondents.

No. 15348

FILED
May 5, 1978

Geoffrey J. Butler

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HALL, Justice:

Plaintiff (hereinafter "Ruffinengo") appeals from a summary judgm dismissing his suit to enjoin the construction of a house by defendants (hereinafter "Miller") alleged to be in violation of a restrictive covenant prohibiting the construction of dwellings in excess of two stories.

The basic facts presented to the trial court are as follows: the litigants are the owners of adjacent lots in Northcrest Subdivision which share a common boundary, although one lot is in Plat "E" and the other in Plat "F" of said subdivision; the two plats were developed by separate corporate entities hence the lots in question were ostensibly not acquired from a common grantor, however, Ruffinengo maintains that both corpor were wholly owned by one James B. Cunningham; the lots in both plats a subject to the same restrictive covenants as to structure height, they ma having been imposed by different developers; the covenants specifically provide for enforcement by any "owner or owners of any of the lots in s subdivision;" prior to the filing of the instant case, Miller had successfu defended a nearly identical lawsuit brought by two other lot owners in the subdivision wherein it was determined that the dwelling was not in violat of the covenants.

The trial court determined, as a matter of law, that Ruffinengo ha no standing to maintain the action since his grantor was not common to b and that he was further barred by the doctrine of collateral estoppel sin issue presented had already been determined in the prior proceeding. H contends the trial court erred in so doing, and we agree.

Summary Judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the a if any, show that there is no genuine issue as to any material fact and moving party is entitled to a judgment as a matter of law.[1] If there is

1. Rules of Civil Procedure, Rule 56(c). In re Williams' Estates, 10 348 P.2d 683 (1960).

nuine issue as to any material fact, summary judgment should be denied.[2]

The issue of standing raised in the pleadings is one of material ct which precludes the entry of summary judgment. The covenant in estion is found in the chain of title of all lots in the subdivision and rports to allow enforcement by any and all lot owners.

Ruffinengo contends he and Miller did derive their titles from a mmon grantor since the corporate developers were in fact one and the me. It has long been established that if a general scheme for building r development is intended by the original grantor, subsequent grantees ay bring action against each other to enforce restrictive covenants, and ch intent may be shown by the acts of the grantor and the attendant rcumstances.[3] It necessarily follows that Ruffinengo should be afforded e opportunity to make such a showing by presenting his evidence.

As to the matter of collateral estoppel, it is to be noted ffinengo was not a party nor in privity with a party in the prior suit ainst Miller. Consequently, he cannot be bound by that proceeding. llateral estoppel is not a defense as against a litigant who was not party to the action and judgment claimed to have created an estoppel.[4]

The proposition was clearly stated in Blonder-Tongue v. University Illinois Foundation[5] as follows:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more adjudications of the identical issue which stand squarely against their position.

It is also to be noted that if the doctrine should be applied to these cts that Ruffinengo would be denied his constitutional right to appeal cause he was not a party to the prior suit.

Miller's contention that if Ruffinengo is not estopped all other lot ners could also sue and that the burden of litigation and accompanying pense would be enormous, has no real merit for he needed only resort Rule 19 (a)[6] to protect against such eventualities. The rule reads in rt as follows:

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Young v. Felornia, 121 Utah 646, 244 P.2d 862 (1952).

Hayes, et al. v. Gibbs, et al., 110 Utah 54, 169 P.2d 781 (1946), citing orn v. Campbell, 192 N.Y. 490, 85 N.E. 687 (1908).

Carmen v. Slavens, Utah, 546 P.2d 601 (1976); Halling v. Industrial mmission of Utah, 71 Utah 112, 263 P. 78 (1927).

402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

Utah Rules Civil Procedure.

> . . . persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Miller's further contention that Ruffinengo was "in privity" sim... because he had an identical right to his neighbor's that was previously adjudicated is not persuasive. This is so for two basic reasons:

> (1) It is not at all unforseeable that Ruffinengo might reach a different result than did the other lot owners in the prior suit, simply because he may present a far different or convincing case.
>
> (2) This court has a consistent policy of resolving doubts in favor of permitting parties to have their day in court on the merits of the controversy.[7]

Reversed and remanded for further proceedings not inconsistent with this opinion.

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WE CONCUR:

J. Allan Crockett, Justice

Richard J. Maughan, Justice

ELLETT, Chief Justice: (Concurring in part and dissenting)

The question presented by this appeal is this: can an owner of la... adjoining land subject to restrictive covenants enforce those restrictio...

The plaintiff owns land in Plat E which was owned and developed by Northcrest Manor, Inc.. Phenix Investment, Inc., another corpora... purchased the stock of Northcrest Manor and thereafter transferred ce... land previously owned by Northcrest Manor, Inc. to a corporation call... Northcrest Investment which developed the land and subdivided it as "Northcrest Subdivision, Plat F." In connection with the developme... then owner filed a document in the office of the County Recorder of Sa... which so far as material hereto reads:

7. Carmen v. Slavens, supra, footnote 4.

KNOW ALL MEN BY THESE PRESENTS:

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, to wit:

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; . . .

The plaintiff owns no land in Plat F but does own a lot in Plat E which abuts against the defendants' land in Plat F.

One James B. Cunningham made an affidavit which was filed with the trial court. The contents thereof were not disputed. The affidavit is as follows:

JAMES B. CUNNINGHAM, under oath, hereby deposes and states:

1. I am the president of the Northcrest Investment Corporation, the developer of Plat "F" of the Northcrest Subdivision. I have been president of this corporation since the date of its incorporation.

2. That neither the Northcrest Investment Corporation nor myself personally participated and/or owned an interest in the development of Plat "E" of the Northcrest Subdivision.

3. When Northcrest Investment Corporation acquired the property identified as Northcrest Subdivision, Plat "F" there was no restrictive covenant encumbering the property.

4. I made the attached restrictive covenants applicable to the lots in Plat "F" Northcrest Subdivision, together with the buyers of such lots, by recording the same in the Office of the Salt Lake County Recorder on or about August 21, 1957.

5. The primary purpose and intent of the height restrictions contained within the attached covenant is to protect the view of the Salt Lake valley for those lots in Plat "F" on the uphill side of property subject to the restrictions. [Emphasis added.]

Whether or not a restrictive covenant applies to land is a matter of intent on the part of the one who imposes the restrictions.[1] In this case it is clear that when the restrictions were placed upon Plat F by Mr. Cunningham, the president of Northcrest Investment Corporation, he did so to protect the view of owners on the uphill side of the land in in that plat.

It is to be noticed that plaintiff does not claim that defendants' land is subjected to any restrictions other than those set out by Northcrest Investment Corporation as above set forth. There is no claim that any prior restriction made by anyone other than Northcrest Investment, Inc. confers any right upon the plaintiff to object to the manner in which the defendants propose to build their home. At the time the restrictions were made to apply to "Northcrest Subdivision, Plat F" the Northcrest Investment Corporation did not own any of the land in Plat E in which plaintiff's land is located.

I concur in the holding that the plaintiff is not estopped from bringing this suit because of any "collateral estoppel," but I dissent from the order remanding the case for trial. There are no disputed issues of fact shown in this case and I think the trial court correctly ruled that the plaintiff has no right to maintain the suit. I would affirm that ruling and award costs to the respondent.

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WILKINS, Justice, concurs in the views expressed in the concurring in part and dissenting opinion of Mr. Chief Justice Ellett.

1. 20 Am. Jur. 2d, Covenants etc., Sec. 292; see the annotation in 84 A.L.R. at page 812.