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Piero G. Ruffinengo v. Robert F. And Nancy H. Miller The Art Company, J. Blair Jones , John Does 1 Through 20 : Plaintiff-Appellant's Memorandum of Points And Authorities In Response To Defendants-Respondents' Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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.

Case No. 15348

PLAINTIFF-APPELLANT'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN RESPONSE TO DEFENDANTS-RESPONDENTS' PETITION FOR REHEARING

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

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PETITION FOR REHEARING

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## STATEMENT OF THE NATURE OF THE CASE

plaintiff adopts the statement as laid out in Defendants' petition for Rehearing.

## DISPOSITION OF APPEAL FOLLOWING PRIOR HEARING

plaintiff adopts the statement as laid out in Defendants' petition for Rehearing.

## RESPONSE TO PETITION FOR REHEARING

### POINT I

THE OPINION OF THE MAJORITY OF THE COURT ON THE ISSUE OF STANDING DOES NOT CONTRAVENE CASE LAW, DOES NOT CONTRADICT RULE 56(e) OF THE UTAH RULES OF CIVIL PROCEDURE AND DOES NOT TURN UPON REPRESENTATIONS NOT PROPERLY BEFORE THE COURT.

Defendants' contention that the majority's opinion on the issue of standing contravenes case law and the language of Rule 56(e) of the Utah Rules of Civil Procedure and turns upon representations not properly before the court can only result from a misreading of the court's opinion.

The majority opinion refers to the "issue of standing raised in the pleadings" and Defendants interpret this as meaning that the issue of standing is raised only in the pleadings and that, therefore, the court didn't demand compliance with Rule 56(e). The issue of standing is indeed raised in the pleadings; but it is also raised in the affidavits of James Cunningham (R. 79-80,89-90). Defendants apparently ignore the majority opinion's statement that summary judgment is proper "only if the pleadings, depositions, answers to

interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." Having made such a statement, the court is obviously aware of the proper standards for summary judgment and it is fair to assume the court followed those standards.

In their contentions that the "issue of material fact is not a product of the record but is founded only upon written and oral representations" by the Plaintiff's attorney (Petition for Rehearing at 3), Defendants again have apparently ignored Mr. Cunningham's affidavits. Mr. Cunningham's affidavits clearly support Plaintiff's contention that he and Defendants derived their titles from a common grantor. In his affidavit (R. 89), Mr. Cunningham states that Phenix Investment purchased the stock of Northcrest Manor (the corporation which developed Plaintiff's Plat E). In the same affidavit he also refers to himself personally as the purchaser: "After I purchased the stock of Northcrest Manor..." This clearly indicated that Mr. Cunningham considered he and Phenix Investment to be one and the same or that he controlled Phenix Investment. He goes on to state that Phenix Investment dissolved Northcrest Manor and transferred its assets to Northcrest Investment (the corporation which developed Plat F), of which he is the president. Without doubt, this affidavit (R. 79-80) gives rise to the issue of common grantor and standing.

In their Petition for Rehearing, Defendants also state that the case of Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (1946), "requires that for one to have standing to enforce a restrictive

covenant which is a part of a general scheme for building and development, one must be able to trace the covenant back to a common grantor (Petition for Rehearing at 2). That is not the holding of Hayes. Hayes held that if it can be shown that the original developer intended a general building scheme, a subsequent grantee can enforce the restrictive covenant even against a grantee whose deed does not contain the restrictive covenant. The question of whether a common grantor was necessary was not raised in the case. The original developer, Douglas Heights Land and Improvement Company, conveyed several lots in the subdivision to Hubbard Investment Company. Some of the deeds contained the restrictive covenant and some did not. Hubbard later conveyed a lot restricted by the covenant to Hayes and a lot not so restricted to Gibbs. Hayes sued to enforce the covenant against Gibbs even though his deed did not contain the restrictive covenant and even though the land was not so restricted when it was conveyed by the original developer; Hayes based his right to enforce the covenant on the fact that the original developer had intended a general building scheme or plan of development.

In his original brief, Plaintiff had made two different arguments for standing -- one based on the uniform plan of development theory of Hayes v. Gibbs (see Point IV in Plaintiff's Appeal Brief). (Plaintiff also made an estoppel argument entitling him to standing which is not relevant to this discussion.)

Defendants have confused these two theories, ignored issues of fact raised in Mr. Cunningham's affidavits, completely misstated the



holding of Hayes v. Gibbs and assumes that this court, in its opinion, has done the same.

## POINT II

THE EVIDENCE BEFORE THE COURT IS NOT UNDISPUTED AND APPELLANT SHOULD BE GIVEN THE OPPORTUNITY TO INTRODUCE THE EVIDENCE WHICH WILL SUPPORT HIS POSITION.

Respondents state that the transfer from Northcrest Manor to Northcrest Investments of the land owned by Northcrest Manor and not yet encumbered by restrictive covenants is sufficient to negate the enforceability of the covenants by lot owners who purchased the lots developed by Northcrest Manor. Respondents are incorrect in their interpretation of the law. Both in Hayes v. Gibbs and in the present case the original developers were filing restrictive covenants on the lots as they were developed and therefore lots which were developed at a later date were not yet encumbered by restrictive covenants. This state of affairs is not sufficient to break the enforceability of the covenants by the owners of lots which were encumbered earlier against the owners of lots encumbered at a later date. This would obviously destroy the doctrine of "common plan of development" which looks at how a tract has in fact been developed in order to determine enforceability among the various owners of lots in a single subdivision.

The Court's ruling that this issue was not proper for summary judgment is correct since the lower court did not afford Plaintiff the opportunity to show that a common plan of development existed.

That such common plan existed is shown by Mr. Cunningham's affidavit which states:

"After I 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.)  
(R. 89)

It is clear from the foregoing that the owners of Northcrest Manor did not consider the subdivision completed at the time of the purchase of the stock and that they did in fact complete it by maintaining the same name, the same covenants and the same progressive alphabetical denomination of the plats.

It is therefore clear that Plaintiff should be given the opportunity to introduce the evidence which would prove his case. If Defendants are so confident that there are no material facts at issue, it is not clear why they are so vigorous in their efforts to deny Plaintiff his day in court.

### POINT III

#### APPELLANT WAS INTENDED TO BE THE BENEFICIARY OF THE RESTRICTIVE COVENANTS.

Defendants confuse the doctrine applicable to determine what constitutes a violation with the doctrines of law applicable to determine who has standing to enforce the covenants.

Defendants cite Parrish v. Richards, 8 Utah2d 419, 336 P.2d 122 (1959) (Petition for Rehearing at 9) to support their contention that Plaintiff should have no standing to sue because of the rule of law which requires that all doubts be resolved in favor of the free and unrestricted use of property.

The rule set forth in Parrish v. Richards deals with the issue of what constitutes a violation of restrictive covenant but was not intended to apply in determining who can enforce the covenants. It should be clear that the two issues are separate and distinct. Parrish did not deal with whether plaintiffs had standing to sue but whether defendants had violated the covenants. Parrish v. Richards sheds no light on and is not controlling in the present case.

Defendants also rely on the affidavit of Mr. Cunningham to determine the enforceability of the covenants by Plaintiff (Petition for Rehearing at 8).

To bolster their point that the intention of Mr. Cunningham is controlling Defendants cite 89 A.L.R. 812 (Petition for Rehearing at 9). This A.L.R. annotation specifically states that the intent of the parties is to be determined by the documents and not by the recollection of an individual almost twenty years after the fact. The rule of construction, contained in the A.L.R. annotation is as follows:

"Whether one not a party to a restrictive covenant has a right to enforce it depends on the intention of the parties imposing it, and this intention is to be ascertained from the language of the deed itself." 89 A.L.R. at 812.

It should also be noted that Mr. Cunningham was not the drafter of the covenants since they had been used before he acquired the site of Northcrest Manor.

If, as Defendants claim, the sole purpose of the covenants was to protect lots uphill in Plat F, then it is not clear why the covenants do not state so but rather make no mention whatsoever of what the purpose of the covenants is.

If the logic adopted by Defendants were to prevail, it would also mean that in Plat F the owners of uphill lots could sue the owners of downhill lots but not vice versa. That this was the intent of the covenants is certainly not clear under any reasonable reading of the covenants.

Even assuming, for purposes of discussion, that the intent stated by Mr. Cunningham can be derived from a reading of the covenants, it would not follow that Plaintiff has no standing to sue. Mr. Cunningham did not state that the only purpose of the covenants was to maintain the view but rather the primary one. Obviously he must have intended the other purposes also.

#### POINT IV

THE COURT SHOULD DENY RESPONDENTS THE  
OPPORTUNITY TO PURSUE ANOTHER SUMMARY  
JUDGMENT.

Defendants' request to be given another opportunity for summary judgment is inappropriate since the court has already decided that there are material facts which preclude the granting of summary judgment.

Defendants are also asking the court to pass on the propriety of allowing the introduction of additional facts in order to obtain another summary judgment without providing the court with any legal support for their position. Plaintiff is therefore unable to refute arguments which have not been presented to the court. The lack of legal support for Defendants' position prevents the existence of a legal dispute. Counsel for Plaintiff respectfully submits that the

court should only answer a question when there is a legal dispute and should therefore decline to answer Defendants' question.

Respectfully submitted this 14th day of June, 1978.

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Nann Novinski-Durando  
Attorney for Plaintiff

#### CERTIFICATE OF MAILING

I hereby certify that I caused to be hand delivered two copies of the foregoing to Anthony L. Rampton and Thomas A. Ellison, Attorneys for Defendants, at 800 Continental Bank Building, Salt Lake City, Utah 84101, on June 14th, 1978.

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Nann Novinski-Durando