1979

Gold Oil Land Development Corporation, A Corporation v. Steven C. Davis And Kristi Ann Davis, His Wife, Wade R. Davis And Hrs. Wade Davis, His Wife, And Leo M.Bertagnole, A Single Man : Brief of Respondent Gold Oil Land Development Corporation

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

GOLD OIL LAND DEVELOPMENT CORPORATION, a corporation, Plaintiff and Respondent, vs STEVEN C. DAVIS and KRISTI ANN DAVIS, hiw wife, WADE R. DAVIS and MRS. WADE DAVIS, his wife, and LEO M. BERTAGNOLE, a single man, Defendants and Appellants.	Case No. 16461

BRIEF OF RESPONDENT
GOLD OIL LAND DEVELOPMENT CORPORATION

Appeal from the Judgment of the
Fourth Judicial District Court of Utah County
Honorable J. Robert Bullock, Judge

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NATURE OF THE CASE

This case involves the validity of a quit-claim deed (Exhibit 1) to 12-1/2 acres of land in Utah County wherein the respondent, Gold Oil Land Development Corporation, was the grantor and Leo M. Bertagnole was the grantee. The respondent (plaintiff in the court below) claims that the deed was void for lack of delivery and lack of consideration. There were subsequent attempts to convey the subject property by the defendant, Leo M. Bertagnole, and the defendant, Steven C. Davis, the effectiveness of which to convey title depended upon the validity of Exhibit 1.

DISPOSITION IN LOWER COURT

A trial was held on April 2, 1979, before the Honorable J. Robert Bullock, Judge, in the Fourth Judicial District Court of Utah County, without a jury. Upon submission of the matter to him for decision, the court found that there was no valid, absolute delivery of the quit-claim deed (Exhibit 1), but that the delivery was conditional and the delivery conditions had not been performed.

The court also found that the subsequent deeds involving the subject property (Exhibits 2 and 3) were also invalid and not effective to convey any title to the property described therein.

RELIEF SOUGHT ON APPEAL

The defendant/appellant, Steven C. Davis, seeks to have the lower court's decision reversed, and to have the matter remanded to the lower court for further trial.

STATEMENT OF FACTS

The brief of the appellant fails to set forth an adequate statement of facts. The record on file in this court supports the following statement of facts:

The respondent owned an option to purchase 142-1/2 acres of real property in Salem Hills, Utah County, which property was owned by Mack A. Jacobson and E. D. Jacobson (Exhibit 9). The validity of the option agreement is not in question.

On February 8, 1977, the 12-1/2 acres subject of this action was involved in a sale/option agreement between the respondent and International Mortgages, Inc. (Exhibit 7).

Upon returning from a trip to Hawaii, Verdi R. White, Chairman of the Board of the respondent corporation, discovered that the appellant Davis had come into possession of a signed blank deed and had filled in his name and that of his wife as grantees, and a description of the entire 142-1/2 acres involved in the option, and that the defendant Davis had wrongfully recorded this deed in the Utah County Recorder's Office (Exhibit 12). Verdi White confronted the defendant Davis, demanding that the property be returned. The defendant Davis wanted the matter to be discussed with his attorney, Mr. Medlin, and an appointment was set up for that purpose. Mr. Medlin was the appellant Davis' lawyer (R. 89-92).

At the conference the appellant's attorney, Mr. Medlin, stated that the appellant was suit-proof and that he could tie up the property for one or two years if necessary, and that it was best that some kind of an agreement be made with appellant to get it back. At that conference the appellant Davis felt that he could sell the 12-1/2 acres involved in this lawsuit for $125,000 to the defendant Bertagnole.

Mr. Mowrey, representing International Mortgages, Inc., to whom the 12-1/2 acres had been committed, was present at the conference. They all agreed to allow Mr. Davis to sell the property to Mr. Bertagnole for $125,000, and that if he was successful he would have $35,000 for making the sale, $35,000 would be paid to respondent White, $35,000 would go to Mortgages, Inc., and $15,000 would be used to pay off the property under

the option, and the balance would go to Mr. Medlin. In an attempt to implement this verbal agreement, a written agreement was thereupon prepared in Medlin's office by Mr. Medlin, signed by the Chairman of the Board of respondent and by the appellant Steven Davis (Exhibit 4, R. 93).

This agreement authorized Mr. Medlin to deliver to the respondent a quit-claim deed signed by Steven C. Davis and his wife to the 142 acres (Exhibit 14) in the event the contemplated sale of the 12-1/2 acres as set forth in that agreement had not been consummated, and the money delivered by 5 o'clock P.M. on Friday, March 18, 1977. The agreement also provided that Verdi R. White would cooperate in any way with the contemplated sale to the defendant Bertagnole and associates. To carry out this responsibility, Verdi White was present in the defendant Bertagnole's office during March 16th, 17th, and 18th, to give cooperation in the event appellant Davis' negotiations with Bertagnole ripened into a deal (R.96).

The quit-claim deed (Exhibit 1) which is the subject matter of this lawsuit, was prepared in the Bertagnole office by the appellant Davis on his own typewriter. The appellant Davis also on that same date prepared an escrow letter on his typewriter, which is plaintiff's Exhibit 10, which directed that the quit-claim deed be delivered upon the payment of $125,000, and that in the event the sale was not consummated the document should be returned. The Surety Title Company was designated as the escrow agent (R. 97). Mr. White was given a copy of the escrow

letter but the original was retained by Mr. Davis and Mr. Medlin, and Mr. White never saw the original after that date. The witness Verdi White stated that the only reason for being in Mr. Bertagnole's office was to close the deal for $125,000, and that the $125,000 or any part of it had never been received by the respondent (R. 100). Mr. White stated that he never authorized the delivery of the deed to Mr. Bertagnole unless the sale had been consummated; that he never authorized the delivery of the deed to Stewart Title Company in Provo; and that he did not become aware of the fact that it had been recorded until some time in May or June (R. 101).

On cross examination the witness, Verdi White, testified that it was represented to him that Mr. Medlin was Mr. Davis' attorney, and that he never paid Mr. Medlin any attorney's fee (R. 104).

On cross examination the witness, Verdi White, stated that the appellant Davis prepared the escrow letter (Exhibit 10), and that he left the preparation of the letter up to the appellant Davis (R. 106, 107). He stated that Exhibit 1 was handed to the appellant Davis and was never tendered to the defendant Bertagnole at all (R. 108).

When it became apparent that Bertagnole was not going to pay the $125,000 for the 12-1/2 acres, Mr. Medlin delivered to Verdi White Mr. Davis' deed on the 142-1/2 acres, at approximately 3:30 P.M. so that Mr. White could get it on record in Provo that same day (R. 109).

Mr. Mowrey, who was present at the Bertagnole office, was not an agent of the respondent. He was there representing his own mortgage company (R. 110).

The appellant Davis never ever communicated to the respondent any alternative arrangement with Bertagnole with respect to the 12-1/2 acres (R. 114).

The witness Mowrey testified that on behalf of International Mortgages, Inc. he had never authorized or approved the sale of the 12-1/2 acres to Mr. Bertagnole or anyone else for less than $125,000, and that the property had an appraised value of $12,500 per acre (R. 129, 130).

The appellant Davis was called as a witness and testified as follows: when he recorded the deed which he had made out to himself for the 142 acres, he considered himself to be the owner. On further interrogation he did not consider himself the owner of the 142 acres (R. 148).

He stated that Jim Medlin was not his attorney but that he felt he should have the counsel of a person knowledgeable of law, and that he had had some previous dealings with Mr. Medlin (R. 150).

He acknowledged that the sale price to Bertagnole was $125,000 (R. 152), and that he was to receive the first $35,000 out of the sale, and that he was to conduct the negotiations with Bertagnole, and that he presented the offer of $125,000 to the defendant Bertagnole (R. 153).

He had knowledge of the previous commitment to International Mortgages, Inc. of the subject property for $62,500 (R. 134), and he had submitted financial information to the bank to help that transaction (R. 155).

On March 17th, after the completion of the meeting in Mr. Medlin's office where Exhibit 4 had been prepared and executed, the appellant Davis explained to the defendant Bertagnole that he had been given the opportunity of selling the 12-1/2 acres to him for $125,000 (R. 158)

The appellant Davis acknowledged that he prepared Exhibit 1 on his typewriter and also Exhibit 10, that he didn't know where the original of Exhibit 10 was and didn't know what was done with it. He again admitted that at that time he understood that the deed was to be delivered to Mr. Bertagnole upon his payment of $125,000 (R. 161).

He stated he was given possession of the deed because he was handling the negotiations for the sale to Leo Bertagnole on behalf of Gold (R. 161). He admitted being given the deed and other escrow documents mentioned in Exhibit 10 (R. 162).

The appellant Davis claimed that there was modification of the agreement and that he continued to hold the deed subject to the grantee paying $10,000, as represented by the earnest money agreement (Exhibit 5), which incidentally shows Steven C. Davis as the seller and not the respondent, and could not

possibly be binding upon the respondent. Although the earnest money agreement directs that the purchase price be paid to appellant Davis and James B. Medlin, Davis testified that he was to receive the $10,000 (R. 162).

The Exhibit 10 had been prepared by Mr. Medlin after Verdi White had left to record the deed in Provo.

Exhibit 1 was never given to the Surety Title Company in escrow as required by Exhibit 10, nor was it delivered to Security Title where Exhibit 5 was prepared in the absence of a representative of respondent (R. 165).

On May 3, 1977, the defendant Bertagnole and the appellant Davis agreed to modify the $10,000 purchase requirement between appellant Davis and himself, and in lieu thereof Bertagnole was to receive the deed (Exhibit 1) to the 12-1/2 acres and convey back to Davis 10 acres, retaining 2-1/2 acres for himself. When asked if Bertagnole was to get the other 2-1/2 acres because he paid the $100 down to Jim Medlin, the appellant Davis answered:

> "Leo Bertagnole and I exhausted a lot of time, money, traveling in getting this thing straightened out. And I agreed with him that he was deservent of maintaining some of that property because of his time and effort. But I agreed that with him mutually." (R. 166).

The appellant Davis described what transpired at the Stewart Title Company on May 3, 1977, as follows:

> "Q. So you understood at the when you were at the Stewart Title office that at that time he was going to deed you back at that time 10 acres. Did he do it right at the office? Was it prepared at that office?

A. The deed?

Q. Yes.

A. For 10 acres?

Q. Um-hum.

A. As I recall, yes, it was prepared on a Stewart Title Deed.

Q. Who prepared it?

A. Stewart Titles.

Q. They did it for you down there?

A. Yes.

Q. On that same day?

A. Yes.

Q. And then he signed that deed which I have had marked as the Exhibit, Plaintiff's Exhibit 13; is that the deed that he signed at that day?

A. On May 3rd?

Q. Yes.

A. Yes.

Q. And this was done at the Stewart Title office?

A. Yes, sir.

Q. And they were told to record this along with the Exhibit 1?

A. Upon the request of Leo, yes." (R. 168).

The witness Davis testified that all the land in Salem Hills was valued at approximately $12,500 an acre (R. 174).

Exhibit 14 is the deed back to Gold of the 142 acres, which was delivered by Mr. Medlin on the 18th, pursuant to the March 16th agreement (R. 176).

The defendant Bertagnole testified that he did not remember having had plaintiff's Exhibit 10 delivered to him, and that he did not receive defendant's Exhibit 1 at any time prior to the time that it had been recorded, and he stated that this deed was not recorded at his instance and request (R. 187).

Bertagnole further testified that he signed the deed conveying the 10 acres back to Mr. and Mrs. Davis at the Stewart Title Company, and he saw defendant's Exhibit 1 delivered to the title company at the same time that his deed to the 10 acres was given them (R. 188). He stated that defendant's Exhibit 1 was not handed to him in his office. (R. 191).

Witness Bertagnole testified that he told Mr. Medlin that he was not interested at all in paying $125,000 for 12-1/2 acres (R. 197). He stated that the major part of the negotiation was conducted by Mr. Medlin (R. 198).

With respect to the ultimate exchange of deeds, the witness Bertagnole testified as follows:

> "A. Steve called me on the phone and said, 'Leo, I would be willing to give you 2-1/2 acres if you would deed me back 10 acres of the property.' I told Steve that sounded like something that was quite generous of him. I did explain that I had spent a lot of time and efforts on this and I felt that I would be entitled to some consideration. So Steve agreed to give me 2-1/2 acres if I would deed the rest of the property back to him." (R. 207, 208).

On further examination by his own counsel, appellant Davis acknowledged that he was given possession of defendant's Exhibit 1 and that it never did get into Mr. Medlin's hands. (R. 215).

The appellant Davis testified that on March 17th he was endeavoring to sell the 12-1/2 acres to Bertagnole for $125,000 (R. 220).

The appellant Davis further testified that the sale price of $125,000 was the figure stated between Verdi White (representing Gold) and Fred Mowrey (representing International Mortgages, Inc.) (R. 220).

The witness Mowrey testified specifically that he never agreed with anyone for the alternative sale of the property for $10,000. He further testified that Verdi White was not present and had left before the $10,000 agreement was reached between Davis and Bertagnole (R. 230).

Mr. Mowrey also testified that he heard Verdi White's portion of a telephone conversation with his attorney, Dwight King, in which Verdi White stated that he was calling to let Mr. King know that he was making no contrary dealings to the agreement that had been agreed upon, and that he was leaving the others to go to Provo to record the deed, and that he was making no other dealings. This telephone call was made in the presence of everyone there in the Bertagnole office (R. 231). The witness, Verdi White, testified to the same effect (R. 236), as did also his son, Verdi White, Jr. (R. 238).

ARGUMENT

POINT 1

THE GREAT PREPONDERANCE OF THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THERE WAS NO VALID DELIVERY OF EXHIBIT 1, AND THAT THE DELIVERY CONDITIONS WERE NEVER PERFORMED.

All of the evidence referred to in the Statement of Facts in this brief establish that the deed (Exhibit 1), was prepared by the appellant Davis on March 17, 1977, on his typewriter, in the office of the defendant, Leo Bertagnole, and that this deed was never delivered to the grantee therein. The evidence further clearly and convincingly shows that the appellant Davis, to whom the deed was entrusted, was not authorized to deliver it unless he had received on behalf of the grantor the sum of $125,000 from the grantee, which sum represented the purchase price of the property described in the deed (R. 93, 97, 100, 101). Indeed, the appellant Davis acknowledged that the sale price to the grantee was $125,000 (R. 152), that he presented the offer of $125,000 to the grantee after the deed was prepared (R. 153). He further testified that he was given possession of the deed and other escrow documents mentioned in Exhibit 10 because he was handling the negotiations for the sale to the grantee on behalf of the respondent (R. 161, 162). The grantee in Exhibit 1 testified that he had never received the deed at any time prior to the date that it was recorded,

and that the deed was not recorded at his instance and request (R. 187). The appellant Davis admitted that the Surety Title Company was to be the escrow agent of the deed, as shown on Exhibit 10, and that the escrow agent was to deliver the deed upon payment of $125,000 to the respondent (R. 164, Exhibit 10).

Appellant Davis loosely insisted that all of the parties present in Bertagnole's office, including the respondent, agreed to the modification of the sale price to $10,000, and that all of the proceeds of that sale were to go to him personally. He gave no testimony as to how this agreement was reached, what any of the persons said with respect to it which indicated such agreement. He obviously based all his testimony in that respect on the provisions of the March 16th agreement (Exhibit 4) which provided that he was to receive the first $35,000 when the sale to Bertagnole was consummated. This is indicated by the following excerpt from page 218 of the record:

"Q. And you say now that everybody there agreed that that $10,000 would go to you personally?

A. As stated in the March 16th Agreement, with reference to that Agreement."

It is interesting that Davis felt it was necessary to claim that all the others agreed on the modification of the escrow and the reduction of the purchase price from $125,000 to $10,000 -- yet he didn't consult them when he further modified it himself by delivering the deed on May 3rd to the

Stewart Title Company for recording in exchange for a deed back to himself of 10 of the 12-1/2 acres, in lieu of the payment of $10,000.

Fred Mowrey, representing International Mortgages, Inc. who had an interest in the sale to Leo Bertagnole, and Verdi White, representing the respondent, testified that the condition of the payment of $125,000 was never altered by either of them. It is true that the appellant Davis claimed that all agreed to subsequently alter the purchase price requirement for the 12-1/2 acres from $125,000 to $10,000, but the court was fully justified in disbelieving this, especially with the land having an appraised value of $12,500 per acre (R. 174).

The appellant Davis relies heavily upon the earnest money agreement (Exhibit 5). That agreement was never signed by respondent. Appellant Davis had no right to sell the property worth over $100,000 to the grantee in the deed for $10,000, and his signing the earnest money agreement as the seller could not be binding upon the respondent, especially when the defendant Bertagnole had full knowledge of the respondent's interest in the property. If the earnest money agreement is evidence of anything, it is evidence of the fact that the quit-claim deed dated March 17th was not considered to be absolute by either the appellant Davis or the grantee, because the grantee was still endeavoring to purchase the property therein described for $10,000.

The appellant Davis, having failed in his attempt to sell the property to Bertagnole for $125,000 as the condition for delivery of the deed required, was still endeavoring to get $10,000 for himself to which he was not entitled. Counsel for the appellant claims that in the negotiations regarding the $10,000 earnest money agreement, James Medlin was acting as attorney for the respondent. This is not true, and is not supported by the evidence. The only thing James Medlin was authorized to do by the respondent was the closing of the projected sale to Bertagnole for $125,000, pursuant to Exhibit 4.

It is blatantly inconsistent for counsel for the appellant to claim that Exhibit 1 was absolute on its face on March 17, 1977, when appellant was thereafter endeavoring to negotiate the $125,000 sale price with the grantee, and failing in that, he still endeavored to negotiate a sale of the property to Bertagnole for various other prices including the $10,000 earnest money agreement. The record, therefore, clearly and convincingly shows that Exhibit 1 had never been delivered to the grantee, that the grantee never paid anything for it, and that the conditions for the delivery of the deed had never been performed.

The ultimate delivery of Exhibit 1 by the appellant Davis to the Stewart Title Company for recording on May 3rd was a clear breach of trust. The recording of Exhibit 3, by which the grantee on Exhibit 1 endeavored to convey back to appellant

Davis 10 acres of the land involved in Exhibit 1, was a further clear manifestation of the fact that the grantee in Exhibit 1 gave no consideration for it to the grantor in Exhibit 1. He simply collaborated with the appellant in an arrangement to provide the appellant with 10 acres of ground for which appellant paid nothing to him or, more importantly, to respondent.

It is mystifying that counsel for the appellant should place such heavy reliance upon the earnest money agreement between him and the defendant Bertagnole, when neither party to the earnest money agreement considered themselves bound by it, because they negotiated a still different deal between themselves on May 3rd when appellant Davis finally breached his trust by allowing Exhibit 1 to be recorded by the Stewart Title Company.

Furthermore, in claiming that the terms of the escrow letter (Exhibit 10) were extinguished and merged into the terms contained in the earnest money agreement, counsel for the appellant sidestepped the fact that the respondent was not a party to the earnest money agreement and did not at any time, verbally or in writing, acquiesce therein or accept it as the seller of the property involved. The appellant Davis' idle claim that Verdi White, who was already on his way to Provo at the time, and Fred Mowrey, agreed to the modification of the sales price from $125,000 to $10,000, was incredible and insusceptible of reasonable belief. The trial court was fully justified in disbelieving portions of the appellant Davis'

evasive and contradictory testimony, which were repudiated by the uncontroverted testimony of others summarized in this brief.

Counsel for the appellant misstates the record and misrepresents the fact when she asserts that upon execution of the earnest money agreement Leo Bertagnole was given a quit-claim deed (defendant's Exhibit 1). The record clearly shows that even the terms of the earnest money agreement between appellant Davis and Leo Bertagnole were never actually carried out. The further fact is that the grantee in Exhibit 1 himself testified that he never received delivery of the quit-claim deed, and that it was not even recorded at his request (R. 187). Even when Exhibit 1 was recorded by the Stewart Title Company on May 3, 1977, the grantee had not paid to anyone the amount called for by the earnest money agreement. He was agreeably surprised that the appellant Davis would be willing to give him the deed to 12-1/2 acres of valuable land if he would be good enough to deed 10 acres of that land back to the appellant Davis (R. 197). Leo Bertagnole in this respect testified as follows:

> "Steve called me on the phone and said, "Leo I would be willing to give you 2-1/2 acres if you would deed me back 10 acres of the property.' I told Steve that sounded like something that was quite generous of him. I did explain that I had spent a lot of time and efforts on this and I felt that I would be entitled to some consideration. So Steve agreed to give me 2-1/2 acres if I would deed the rest of the property back to him." (R. 207, 208).

From the above testimony of the grantee it is quite obvious that he had not theretofore paid any consideration for it, and that he was pleased to deed back 10 acres to appellant Davis and keep 2-1/2 acres for himself. These deeds all show on their face that they were recorded at the request of Stewart Title Company.

Again, counsel for appellant sidesteps the fact that there was not one iota of evidence in the record to the effect that the respondent or any of its officers were ever informed of this final transaction between Davis and Bertagnole, involving respondent's property, nor is there any evidence in the record that the respondent or any of its officers ever authorized the final arrangements made between Davis and Bertagnole, and the delivery and recording of Exhibit 1. The appellant Davis wrongfully parted with the possession of Exhibit 1, not because of Bertagnole's compliance with the earnest money agreement between him and Davis, but simply because "Leo Bertagnole and I exhausted a lot of time, money, traveling in getting this thing straightened out."

Appellant Davis apparently hoped and expected by this devious agreement to obtain for himself 10 acres of valuable land for which he paid nothing, either to the defendant Bertagnole or to the respondent; and he now comes into this court appealing for its sanction of this unjust enrichment of himself. He asks this court to reward his breach of trust

with its declaration that he is now properly, legally, and equitably vested with the ownership of 10 acres of land which belongs to the respondent, and for which he paid nothing.

POINT 2

THE ADMISSION INTO EVIDENCE OF EXHIBIT 10 WAS NOT PREJUDICIAL ERROR.

Counsel for appellant devotes a considerable part of her brief to a discussion of the inadmissability of Exhibit 10, and erroneously claims that the evidence fails otherwise to show that the deed was conditionally delivered to the appellant on March 17, 1977. Whether Exhibit 10 was admissable for all purposes is not important here. Exhibit 10 was prepared by the appellant himself prior to the time that the deed was entrusted to him, and is at the very least evidence of the fact that he knew that he was not to deliver the deed to the grantee unless he had obtained the sale price of $125,000 for the land, and that in the event the sale was not consummated that he was required to return the deed to the grantor. Although appellant's contradictory and evasive testimony in many respects could well have been bolstered by documentary evidence, he should not complain that Exhibit 10, though a copy, was in full agreement with hiw own testimony, that he prepared it, and that at the time he prepared it he knew that the condition for the delivery of the deed was the payment by the grantee of $125,000.

If he didn't know it, why did he immediately thereafter endeavor to obtain $125,000 from the grantee? Furthermore, when without authority from the grantor he was negotiating an alternative price for the land, he knew that no consideration had been paid for the land by the grantee and that the deed could not be delivered until the grantee had paid for it.

The best evidence rule was not offended by the admission in evidence of Exhibit 10. How could the appellant have been prejudiced when he himself prepared the Exhibit, retained the original, and did not know what happened to the original? He was the last person to have possession of it, and if he did not know where it was he would not have been able to produce it even if a demand had been made upon him for it prior to or during the trial. If the original, which was last in his possession, was available to him and if he knew where to find it, he certainly could have produced it at the trial. He never claimed that the contents of the copy offered and received in evidence was in any respect different from the original.

The best evidence rule allows secondary evidence to be received at the court's discretion when it is not possible to obtain the original documents, particularly when they were last known to be in the possession of the adverse party. See Utah Code Annotated 1953, Section 78-25-16, Rule 70 of the Rules of Evidence, and Juanita J. Meyer vs General American Corporat vs William R. McCurtain, 569 P. 2d 1094 (Utah 1977).

Without regard to Exhibit 10, the great preponderance of the evidence supports the court's finding of non delivery of Exhibit 1, and non compliance of the grantee with the delivery conditions imposed upon him when Exhibit 1 was entrusted to him by the grantor. Indeed, there is not any believable evidence to the contrary.

CONCLUSION

The respondent has no quarrel with any of the principles of law set forth in the numerous authorities cited in appellant's brief. We earnestly submit that they are simply not helpful in the resolution of this appeal, in view of the record. Counsel for the appellant should not expect to be successful in diverting this court from the issues of the case by the citation of irrelevant authority. To reward appellant's breach of trust by presenting him with 10 acres of land, for which he paid nothing, and allowing defendant Bertagnole to obtain 2-1/2 acres of land, for which he paid nothing, thus depriving respondent of 12-1/2 acres of valuable land, would be a gross miscarriage of justice.

For the various reasons set forth in this brief, and in the furtherance of justice and equity, respondent respectfully urges this court to affirm the judgment of the court below.

Respectfully submitted,

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