

1954

State of Utah et al v. Fred Tedesco et al : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH, by and through its
ENGINEERING COMMISSION, D.
H. WHITTENBURG, Chairman, H.
J. CORLEISSEN and LAYTON
MAXFIELD, Members of the Engi-
neering Commission,

Plaintiff and Respondent,

vs.

FRED TEDESCO and KLEA B. TE-
DESCO, his wife, et al,

Defendants,

and

BIRD & EVANS, INC.

Counter-claimants and Appellants.

FILED

DEC - 3 1954

Clerk, Supreme Court, Utah

Case No. ~~8249~~
8270

BRIEF OF APPELLANTS

PUGSLEY, HAYES & RAMPTON
Attorneys for Appellants

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Case No. 8249

BRIEF OF APPELLANTS

INTRODUCTORY

This case was tried before a jury in the Third Judicial District Court in and for Salt Lake County, the Hon. Ray Van

Cott presiding. The jury returned a verdict in favor of the counter claimants in the amount of \$30,500.00. Thereafter the Court entered an Order granting the Motion of the plaintiffs and respondents for judgment notwithstanding the verdict. This appeal is taken from such Order.

STATEMENT OF FACTS

There is no dispute between the parties here as to whether or not the appellants have been damaged by the condemnation of the property taken for the "This is the Place" monument. The only question is whether or not such damages are compensable under the law.

Prior to the 11th day of July, 1951, Wagner Improvement Company, a corporation which was organized for the purpose of planning and developing certain properties belonging to the Charles H. Deere estate, was the owner of approximately 180 acres of land on the eastern boundary of Salt Lake City. Bird & Evans, Inc., the appellants herein, were the owners of approximately 35 acres of land east of and immediately adjoining the land of Wagner Improvement Company (R. 70). The map which is attached to this brief as an appendix shows the relative location of these two tracts. In the middle 1940's, the Wagner Improvement Company and the predecessors in interest of Bird & Evans, Inc., Mr. and Mrs. William Webb, set about the work of planning and developing an exclusive subdivision to be known as Oak Hills Subdivision to cover both the lands owned by the Wagner Improvement Company and the lands owned by the Webbs (R. 71). During the course of

the development, Bird & Evans, Inc., was formed, which company acquired the land from the Webbs, the Webbs retaining an interest therein.

The work of planning and development of the subdivision went on uninterrupted by this transfer of title. Mr. Dean F. Brayton, a Salt Lake attorney was Vice-President of Wagner Improvement Company and the manager of their activities in the state of Utah. He was also attorney for the Webbs and later became attorney for Bird & Evans, Inc., for the purpose of carrying out the development of the subdivision. Mr. A. B. Paulsen, an architect and subdividing consultant, was jointly employed by the Webbs and the Wagner Improvement Company, and later, after Bird & Evans, Inc., came into existence, Mr. Paulsen became a stockholder and officer in Bird & Evans, Inc.

It was agreed between the owners of the two properties that Mr. Paulsen and Mr. Brayton should represent both sides in planning and carrying out the subdivision development (R. 78-79). It was further agreed that the costs of planning would be divided between the owners of the two tracts of land in proportion to their land holdings, and, in fact, the very considerable expense entailed in planning was so borne and was so paid (R. 72). As to the installation of improvements on the subdivision, it was agreed that the costs of installation of these improvements would be borne by the owners of the lots within the subdivision abutting the particular improvement in question (R. 82). Restrictive covenants were drawn up by Mr. Brayton and agreed upon by the owners of both properties to be placed in effect as the plats were recorded and accepted

in the office of the County Recorder. These restrictive covenants appeared in evidence as Exhibit 8 and generally limited use of the property in question to high grade residence units, some minor exceptions being made for commercial areas. The work of planning of said subdivision was completed sometime prior to July 11, 1951 and the work of development thereof was underway at that time. Exhibits 1 to 7 inclusive are a few of the many maps and drawings which were prepared on this project. Exhibit 3 is a survey which was made by Mr. Thomas Heath in 1948. Mr. Heath at the time of the trial was right-of-way agent for the state of Utah and appeared at all times in court during the trial of this case as a representative of the state of Utah.

From an examination of these exhibits, it is clear that the Bird & Evans property and the Wagner Improvement property were considered by the planners as a single piece of property and planning and development work thereon was proceeding as if no difference in ownership existed. In fact it will be seen from an examination of Exhibit 1 that along the border line of the two tracts the lots were subdivided so that individual lots lay partly in the Bird & Evans tract and partly in the Wagner Improvement Company tract. No attention was paid at all by the planners and developers to the property line between the two tracts. They proceeded as if it were not there and as if the entire tract were of common ownership.

Because of the fact that the market could absorb each year only a limited number of lots of this high quality, and because of the further fact that subdivided land generally takes a higher valuation for tax purposes than does unsub-

divided land, the planners and developers jointly agreed that a plat of the entire subdivision should not be filed but that the subdivision should be divided into a number of plats. Each plat should be filed individually and should be developed and placed on the market before an additional plat should be filed. The restrictive covenants which it had been agreed should be applicable to all plats were made of record as to each plat at the time the plat in question was filed.

The Wagner Improvement Company property lay partly on the north side and partly on the south side of Emigration Canyon. The Bird & Evans property lay entirely on the south side of the canyon. At the time of the filing of the condemnation action by the state on July 11, 1951, the plats to the area lying north of the canyon had been recorded and partially sold out. The plats on the area south of the canyon, those affecting both properties, had not yet been filed. Mr. Brayton testified that he believed that the demand for residential property would have warranted the filing of these plants and the installation of the improvements thereon in the year 1951 (R. 83). Mr. Wright and Mr. Benedict, expert witnesses for the appellants, assumed in their appraisals that the plats might not have been filed until 1953 (R. 112). Mr. Werner Kiepe, an expert witness, called by the state of Utah who was well acquainted with demands for residential property of this type, testified that in his opinion the demand for residential property was such that the owners of the property would have proceeded with the development and sale on the south side of the canyon, including the Bird & Evans property in the year 1954 (R. 154).

On July 11, 1951, the state instituted condemnation proceedings to condemn certain lands for the purpose of constructing a state park. They took substantially all of the Wagner Improvement Company property on the north side of the canyon, and a portion of that on the south including all of the land which lay between the Bird & Evans property and the existing residential area of Salt Lake City. The land taken by the condemnation proceedings is shown on the appendix attached hereto. It will be noted from an examination thereof that the condemnation action took the land right up to, but not including the Bird & Evans property.

As has been stated before, all parties are agreed that as a result of the condemnation of a portion of the subdivision of which it was a part, the Bird & Evans property suffered substantial damages. Mr. Werner Kiepe testified that in his opinion as a direct result of the condemnation action the Bird & Evans property had been diminished in value by \$9,600.00. Mr. Edward M. Ashton, another appraiser for the state, estimated the diminution in value at \$14,000.00. Mr. Ralph Wright and Mr. Joseph Benedict, appraisers for the appellants, placed the figure for diminution of value at \$58,000.00 and \$57,500.00 respectively. The jury determined the amount to be \$30,500.00.

The reason for this diminution in value of Bird & Evans property as a result of the condemning of a portion of the subdivision is obvious. Before the condemnation it had been part and parcel of a large and exclusive subdivision for which it had contributed substantial sums of money for planning and development. The restrictive covenants binding both upon

it and the owners of the balance of the land in the subdivision required the use of the land only for high class residential purposes. The owners of the other lots were required by this agreement to aid in and contribute to the installation of the improvements which were necessary before the land could be sold as subdivision property. Immediately after the condemnation all of these advantages were gone. The money spent for planning was down the drain. The advantages in the installation of improvements resulting from the reciprocal agreements were gone. If the owners of the Bird & Evans property, or any other person that cared to purchase the property from them on the market, desired to use it for residential purposes, its highest and best use, they had to start over with planning and development. They had to bring utilities and other improvements entirely at their own expense from a considerable distance in order to qualify the property for residential purposes. Obviously, as all parties agreed the market value of the Bird & Evans property for residential subdivision purposes was materially decreased.

The nature of the damage to the Bird & Evans property was exactly the same in kind and character, although somewhat more severe in degree, as the damage to the portion of the Wagner Improvement property lying immediately south of the portion condemned as shown on the appendix. The State of Utah stipulated to a judgment against itself for the damages to the above mentioned portion of the Wagner Improvement tract not taken (see judgment of condemnation in the Deere estate case attached to this record.*) They resist damages to the Bird & Evans tract only on the ground of diversity of owner-

ship, in spite of the fact that there existed the reciprocal agreements, in spite of the fact that they were all parts of a common subdivision and in spite of the fact that the damages were exactly the same in nature.

(*Charles D. Wiman and Burton F. Peek, Trustees, appear as the owners of the Wagner Improvement Company tract in the Decree as these trustees took the property over for liquidation after condemnation was commenced because of a tax advantage from having the trustees liquidate rather than the corporation.)

STATEMENT OF POINTS

POINT ONE

THE CLAIM OF THE COUNTERCLAIMANTS WAS PROPERLY COGNIZABLE BEFORE THE COURT.

POINT TWO

THE COUNTERCLAIMANTS ARE ENTITLED TO JUDGMENT FOR THE CONDEMNATION AND DESTRUCTION OF THEIR RECIPROCAL COVENANTS.

POINT THREE

THE COUNTERCLAIMANTS ARE NOT BARRED FROM CLAIMING DAMAGES BY THE STATUTE OF FRAUDS.

ARGUMENT

POINT ONE

THE CLAIM OF THE COUNTERCLAIMANTS WAS PROPERLY COGNIZABLE BEFORE THE COURT.

In the respondent's Motion to Dismiss made to the court immediately before trial of the action started, the first ground of the Motion was that the appellant was not properly before the court and that its remedy lay with the Board of Examiners. This point has already been determined by this court on intermediate appeal in *State v. Bird & Evans, Inc.*, 265 Pac. (2d) 639. There the court held that our counterclaim was properly filed and that we were not precluded from recovering because of the fact that the claim of Bird & Evans as to its property actually taken had been litigated to judgment.

Neither the case of *Hjorth v. Whittenburg*, 241 Pac. (2d) 907 or *State v. District Court, Fourth Judicial District*, 78 Pac. (2d) 502, have any applicability here. In *Hjorth v. Whittenburg* the plaintiff was seeking a judgment against the road commissioners in a separate action. The court held that their remedy, if any there was, lay with the Board of Examiners. In this case, however, we are properly before the Court in an action which the State itself started. We have filed our Counterclaim under the provisions of Section 78-34-7 U.C.A., 1953 which provides as follows:

"All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed

by him, in the same manner as if named in the complaint."

We are seeking to have our damages assessed under the provisions of Section 78-34-10, U.C.A., 1953 which provides as follows:

"The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest herein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages. * * * * "

Certainly if this court felt that we could not properly have our claim for damages adjudicated by the courts, it would have dismissed the action on the intermediate appeal and would not have remanded it to proceed in accordance with that opinion which held that the counterclaim was properly filed. It may be that the state has abandoned this position as counsel did not argue it strenuously, however, if it is urged

in the answering brief, we will argue the question more extensively in a reply brief.

POINT TWO

THE COUNTERCLAIMANTS ARE ENTITLED TO JUDGMENT FOR THE CONDEMNATION AND DESTRUCTION OF THEIR RECIPROCAL COVENANTS.

It is the position of appellants that the agreements reached between the Wagner Improvement Company and Bird & Evans gave each reciprocal rights in the other's property, which rights have been condemned in this action. These reciprocal rights having been condemned and extinguished, the resulting damage is the diminution in value of the dominant tenancy. Each tract of land had an interest in the other arising by contract and by a course of dealing over many years. This right was to have the other lands devoted to residential purposes and to have the other lands bear their proportionate share of the costs of the development of the subdivision. These rights constituted reciprocal covenants which are clearly property rights.

In regard to the condemnation of reciprocal covenants and the right of the owner of the land not taken to recover for destruction of such reciprocal covenants, the following language is found in Volume 2 of Nichlos on Eminent Domain, page 81:

"The majority view holds that such a restriction often characterized as an equitable servitude consti-

tutes property in the constitutional sense and must be compensated for if taken. Such restrictions constitute equitable easements on the land restricted and when such land is taken for a public use that will violate the restrictions, there is a taking of the property of the owners of the land for the benefit of which the restrictions were imposed. The owners of such property cannot maintain proceedings for damages against the original owner or enforce the restrictions against the condemnor, but they are entitled to an award of compensation for the destruction of their easements."

The following language is found in 1 Lewis on Eminent Domain 429:

"When property subject to a restrictive covenant is taken for public use, the owner of the property for whose benefit the restriction is imposed, is entitled to compensation."

In the case of *Johnstone v. Detroit G.H.&M. Railroad Co.*, a Michigan case, reported at 222 N.W. 325, the court stated:

"The principal question is whether because of the proposed violations of the restrictions the state must pay compensation to the owners of other lots in the subdivision whose land is not actually and physically taken under our Constitution, Article 13, No. 1, which prohibits the taking of private property for public use without just compensation therefor."

In disposing of this case the Court went on to say on page 331:

"The claim of counsel for defendants that the destruction of the easements at bar is by virtue of police power and not under the power of eminent domain is answered by *Allen v. City of Detroit*, *supra*. Their con-

tention that there is a difference in the character and effect of the power of eminent domain when exercised by the state than when used by a municipality is not tenable. It is the same attribute of sovereignty, whatever the agency through which it is exercised. * * * *”

“It is therefore held that owners of property in a subdivision in which under a general plan the property is restricted to specific uses and in which the restrictions are valid, subsisting and enforceable against the lands in the hands of private owners, are entitled to compensation upon the taking of any part of such subdivision for public use in violation of such restrictions. That aside from nominal damage for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put, and that in determining such diminution the effect by way of benefit as well as by way of injury of such use, is to be taken into such account.”

The state of New York is much more restrictive than is the state of Utah in the question of what damages may be recovered where no part of the land is taken. The state of Utah will permit recovery where a railroad injures property by emitting cinders, smoke, vibration, etc. The state of New York will not. However, in the case of *Flynn v. New York, W & B Ry Co., et al*, 112 N.E. 913, the railroad was actually built across a piece of property subject to a restrictive covenant in favor of the plaintiff's property that the condemned property would be used only for residential purposes. In allowing recovery in that case, the Court stated:

“These restrictive covenants create a property right and make a direct and compensational the damages which otherwise would be consequential and noncom-

pensational. Radcliffs Ex'rs v. Mayor, etc. of Brooklyn, 4 N.Y., 195; 53 Am. Dec. 357; Uline v. N.Y.C. and H.R.R.R. Co., 101 N.Y. 98; 4 N.E. 536; 54 Am. Rep. 661. No matter how unpleasant a neighbor the railroad may prove, if it takes no property by physical appropriation, it is not chargeable with damages for impaired values due only to proximity. But something in the nature of an easement of privacy over another's land may be acquired by covenant in order that one may live apart from the disagreeable sights and sounds of business if one desires, and if that right has a value and the railroad subtracts a portion thereof by building on the restricted land, it is difficult to conceive why compensation should not follow. * * * *

"The right of the property owner is measured by the depreciation in value which his land sustains."

In the case of Britton v. School District, a Missouri case, 44 S.W. (2d) 33, the plaintiff was granted an injunction against the school board to restrain the board from building a school house on lands in violation of restrictive covenants until they condemned the reciprocal rights of the owners of adjoining lots.

A similar case was at issue in the case of State v. Mulloy, also a Missouri case, reported at 61 S.W. (2d) 741. There the court stated:

"The plaintiffs in the injunction suit (relators here) are owners of lots in University Heights Subdivision. The defendant school district was proceeding to erect and use buildings and grounds in such subdivision for school purposes in violation of valid building restrictions excluding and prohibiting such use. It is the well settled law of this state that where the deeds of conveyance impose valid restrictions on the lands within

a given area, then each lot and the owner of the same has an easement in each and all other lots affected by the restrictions, which easement is a property right to be protected by injunction at the owner's instance restraining and preventing violations of the building restrictions. Such building restrictions and the rights arising therefrom are subordinate to the right of eminent domain and can be extinguished by condemnation proceedings. If that suit was between individuals, the plaintiffs would be entitled absolutely to the injunctive relief prayed for and damages could be considered, but this defendant is clothed with the power of eminent domain and may exercise that right by condemnation and for that reason only this Court did not grant at once and absolutely the injunction prayed for. The easement in plaintiffs' favor in the land which defendant proposes to use for school purposes is within the protection of the constitutional provisions which provide that private property cannot be taken for private use with or without compensation and that 'private property shall not be taken or damaged for public use without just compensation, such compensation shall be ascertained by a jury or board of commissioners' in the manner provided by law."

The same rule applies in Federal Courts. In the case of *U.S. v. Gossler*, from the U. S. District of Oregon, reported at 60 Fed. Supp. 971, the Court said:

"If payment were made for a specific interest such as the fee title out of the aggregate, the Government would abrogate the other interests without paying monetary consideration therefor. Such a result does not satisfy the demands of the amendment. The United States is liable to the owner of easement appurtenant in a suit condemning the fee of the servient estate."

In the case of *Town of Stamford v. Vuono*, 143 Atl. 245, this same subject was treated by the court as follows:

"The plaintiff also contends that these restrictions, insofar as they prohibit the erection of a high school or other municipal building upon the restricted property, are void as against public policy. The argument in support of this contention is that no contractual agreement between the owners of property should be permitted to prevent the use of that property by an agency of the state when its use is required in the exercise of a governmental function, that to require the state to make compensation for the right taken would interfere with this governmental function, and therefore should not be permitted. The fallacy of the argument lies in the assumption of its minor premise that the requirement that the state compensate the owner of the dominant tenement for the taking of his interest in the servient tenement actually interferes with the exercise of any governmental function. There is, of course, a clear distinction between the rights of the private owner of land which is subject to a restrictive easement and those of a governmental agency which requires for public purposes the use of the land in violation of the restriction. The private owner may not violate the restriction; if he attempts to do so, he may be restrained by injunction. The governmental agency may not be restrained from making such use of the property as the public purpose for which it is acquired may require, but, if that involves the taking of private property, it must make compensation for the same. When, therefore, property subject to a restrictive easement is taken for a public use, it has been held that the owner of the property for whose benefit the restriction is imposed is entitled to compensation. *Ladd v. Boston*, 151 Mass. 585, 24 N.E. 858, 21 Am. St. Rep. 481; *Flynn v. R.R.*, 218 N.Y. 140, 112, N.E. 913, Ann.

Cas. 1918B, 588; Allen v. Detroit, 167 Mich. 464, 133 N.W. 317, 36 L.R.A. (N.S.) 890; Peters v. Buckner, 288 Mo. 618, 232 S.W. 1024; and note to same in 17 A.L.R. 543; Kirby v. School Board (1896) 1 Ch. 437; Long Eaton Recreation Co. v. Midland Ry. Co., (1902) 2 K. B. 574; 1 Lewis Em. Dom. (3rd Ed.), Sec. 224; 1 Nichols, Em. Dom. (2d) Sec. 121.

From the foregoing it appears that the law is well settled to the effect that where the state condemns land which is subject to reciprocal covenants with other land, the owners of the land not taken are entitled to recover damages if the value of their land is diminished by the taking of the land subject to the reciprocal agreement and the agreements thus extinguished. In the next succeeding section, we will discuss more at length the question of whether or not the Bird & Evans and the Wagner tracts actually had reciprocal rights one in the other which had been destroyed by this condemnation action.

POINT THREE

THE COUNTERCLAIMANTS ARE NOT BARRED FROM CLAIMING DAMAGES BY THE STATUTE OF FRAUDS.

The state does not deny the existence of the agreement between Bird & Evans and Wagner Improvement Company for the development of the Oak Hills Subdivision. They merely maintain that as such agreement created an interest in land and was not reduced to writing it is within the provisions

of the Statute of Frauds. It is true that the agreement between the two companies was not reduced to a written document subscribed by both parties and it is understandable why that was not done. They had jointly hired legal counsel and engineering services. Each had proceeded to pay its proportionate share of the same. The restrictive covenants were reduced to writing but had not actually been signed and filed except as to the plats on the north side of the canyon. The appellants, however, claim that the Statute of Frauds does not constitute a defense for the State in this case for two reasons. First: because the agreements are taken out of the Statute of Frauds by substantial part performance; and Second: the State not being a party to such agreements is not in a position to rely on the Statute of Frauds as a defense.

It is the well settled law in this State that substantial part performance of an oral agreement takes said agreement from under the operation of the Statute of Frauds. In this regard see *Brinton v. Van Cott*, 8 Ut 480; *Lynch et al v. Cogivlio et al*, 17 Ut 106; and *Van Natta v. Heywood et al*, 57 Ut 376.

There has been substantial part performance in this case of the agreement between the two parties. The planning work on the entire subdivision was completed. Bird & Evans had paid a proportionate part of this. Wagner Improvement Company had had advantage of this planning service on the plats which had actually been filed and the lots sold prior to the time of the condemnation action. Wagner Improvement Company, therefore, would have been in no position to back down from the agreement even had it so desired. The facts, how-

ever, are clear that it would have been equally to the advantage of Wagner Improvement Company and Bird & Evans, Inc., to go through with the subdivision had not the State intervened, therefore, it is inconceivable that there would have been any repudiation of the contract by Wagner Improvement Company even if there had been no part performance.

The State, however, is in no position to attack the contract between Wagner Improvement Company and Bird & Evans, Inc., collaterally as they have attempted to do in this action. It is a well settled rule of law that the defense of the Statute of Frauds is not available to anyone not a party to the contract.

In the case of *Leibowitz v. Central National Bank*, 60 N.E. (2d) 727, an action was brought against a third party for wrongful interference with the performance of a contract. The defendant claimed as a defense that the contract was within the Statute of Frauds, and it, therefore, could not be held liable for interfering with the contract. The situation is almost an exact parallel to that presented here. In disposing of that case, the Court stated:

“It is argued that plaintiff is prevented by Sec. 8384 General Code, The Statute of Frauds, from maintaining this action. That section might be available to a defendant in an action between the parties. It is a mere defense. It is not a matter of substance. With it the defendant in this instance can have no concern because in an action based upon the contract itself such a defense might not have been alleged or insisted upon.”

The same matter was before the Supreme Court of Wyo-

ming in the case of *Laverents v. Gattis*, 150 Pac. (2d) 867. In disposing of the contention, the Court stated:

“We think, moreover, that the legal conclusions which counsel for plaintiff draws from the fact that no written assignment was made, are not well taken. He states that ‘it is almost elementary that the assignment of a purchaser’s interest under a land contract must be in writing to be effective.’ And he cites us, among other cases, to *Wilkie v. Womble*, 90 N.C. 254; *Connor v. Tippet*, 57 Miss. 594. These cases are not at all in point. They deal with the enforcement of an oral contract relating to real estate as between the parties themselves. We have no such case here. In the case at bar, Tucker was a stranger to the oral contract made between the plaintiff and the defendants. It is a general rule that the defense of the statute of frauds is personal and cannot be interposed by strangers to the agreement. 27 C.J. 304; 37 C.J.S., *Frauds*, Statute of, Sec. 391, p. 715. In 49 Am. Jur. 896, it is stated:

“ ‘The defense of the statute of frauds is a personal one available only to a party to the contract to which the statute is alleged to apply and his representatives and privies. The statute is intended for the protection of the party sought to be charged. It does not make it inherently wrong for a party to enter into an oral contract concerning a subject matter coming within the meaning of the statute. In fact, in most jurisdictions, by its terms or by necessary implication, the statute merely makes an oral contract voidable as a protection to those who might otherwise suffer by reason of pretended oral promises; generally, it may be said that the statute is not intended to be the means of preventing voluntary fulfilment of a moral obligation created by the oral agreement. Its benefits cannot be claimed by one who is not a party or privy to the oral

contract and is not sought to be charged personally on such contract.

“ ‘As has been said, it does not rest with a stranger to say that the parties to the oral agreement will not abide by the same regardless of the statute; it is for the party himself (or his privy) to decide whether he shall avail himself of the defense. If he feels that he should discharge the moral obligation although he may have a perfect legal defense, no stranger or third party not privy to the contract can complain. This rule applies even under statutes which provide that such agreements are void unless reduced to writing and signed by the party charged. It ordinarily prevents even creditors of a party to the contract from asserting the benefit of the contract.’ ”

To this same effect see also *U.S. Fid. & Guar. Co. v. Mills*, 146 F (2d) 694; *Bradley v. Hall*, an Alabama case, 195 So. 883; *Sun Insurance Co. v. Thomas (Ky.)* 90 S.W. (2d) 675, *Weitz v. Gordon (Miss)* 184 So. 798; *Alder v. Pilot Ind.*, 57 N.Y. Sup (2d) 539; *Caldwell v. Caldwell (Tenn)* 133 S.W. (2d) 1009.

CONCLUSION

Once again we repeat the question here is not whether the counterclaimants have been damaged. Everyone agrees that they have been damaged, and the jury, having heard the conflicting evidence as to the amount, fixed the figure at \$30,500.00. The only question is whether or not the damages are of such a nature as to be compensable. The State has admitted in its Stipulation with the Deere estate that such dam-

ages would be compensable if the land were in common ownership. It is the position of the appellants that the diversity of ownership makes no difference here because of the reciprocal rights held by the owners in each others' lands due to the joint agreements and the work done on planning and developing of Oak Hills Subdivision. These agreements were valid and subsisting and are taken out of the Statute of Frauds by substantial performance. Further the State is not in a position to rely on the Statute of Frauds as a defense in this case. Therefore, it appears that the Court was in error in granting the Motion for Judgment Notwithstanding the Verdict and that that this Court should order the verdict of the jury reinstated.

Respectfully submitted,

PUGSLEY, HAYES & RAMPTON

Attorneys for Appellants



NORTH

SCALE 1" = 800'

HOGLE CO.

1880.0'

WAGNER IMPROVEMENT
NO. PROPERTY

2640'

35.0'

280'

639.39'

310'

230.0'

UTA PIPE
NE CO.