DA 21-0514

In the Supreme Court of the State of Montana

JIM L. TOWSLEY and BETTY SMITH TOWSLEY,

Plaintiffs/Appellees,

v.

DAVID P. STANZAK, MARGO L. STANZAK, CRAIG FITCH, CARYN MISKE, LAURENCE B, MILLER, JR., STEPHEN M. ZANDI, KARIN M. ZANDI, and all persons, known or unknown, claiming or who might claim any right, title, interest in or lien or encumbrance upon the personal property described in the Complaint below which is adverse to the Plaintiff's ownership or a cloud upon Plaintiff's title thereto, whether such a claim or possible claim may be present or contingent,

Defendants/Appellants.

Appeal from the Montana Fourth Judicial District Court
Missoula County
Hon. Jason Marks, DV-32-2020-18

APPELLANTS' OPENING BRIEF

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The Parties to This Case

The Appellees in this case—the Towsleys—were not a party below. Instead, the original Plaintiff (and Appellee) in this quiet title action was the Rose Family Trust.

The Towsleys purchased their property after the district court quieted title in the Rose Trust's favor, and were therefore substituted on appeal. For ease of reference and to be consistent with the district court's order, this brief will generally refer to the Rose Trust, or Rose individually, instead of the Towsleys.

Introduction and Statement of the Case

This Court has long recognized that an express easement may be created by referring "in an instrument of conveyance" to a recorded certificate of survey on which the easement is adequately described. *Yorlum Properties Ltd. v. Lincoln Cty.*, 2013 MT 298, ¶ 16, 372 Mont. 159, 311 P.3d 748 (collecting cases). This is the so-called easement-by-reference doctrine. *Id.*

In this case, the Rose Trust entered into a contract for deed to sell a parcel to the Appellants' predecessor in interest—the Benjamins. The parties then recorded a notice of purchasers' interest (NPI) which, among other things, identified the parties and described the property via reference to Certificate of Survey (COS) 569, which everyone—including the district court—agrees shows an easement for the benefit of the Appellants' properties, with one caveat discussed below. The NPI also included a metes and bounds description of the easement shown on COS 569, and specifically mentions the easement. The Appellants, all Defendants in the quiet title action below, are the successors in interest to the Benjamins.

Years later, after a dispute arose over the Appellants' right to use the easement shown on COS 569, the Rose Trust filed a quiet title action. The Rose Trust alleged that the Appellants had no right to use the easement shown on COS 569. The Appellants counterclaimed for a declaratory judgment that, by virtue of the NPI's express reference to COS 569 and the easement shown on it, they had an express easement

created by reference, over the Rose Trust's property, in the location shown on that COS. Recognizing that this was a purely legal issue, no discovery was conducted, and the parties filed cross-motions for summary judgment.

Ultimately, the district court held that the Appellants had failed to establish that they had an easement solely because it concluded that an NPI is not a "conveyance" that can give rise to an easement. It then quieted title in favor of the Rose Trust. The Appellants timely appealed.

Issues Presented

I. The Montana Code specifically provides that abstracts of instruments can be recorded and constitute a valid conveyance. Did the district court err in holding that notice of purchasers' interest, which is an abstract of a contract for deed, is not a valid conveyance sufficient to establish that element of an easement by reference?

II. If a properly recorded notice of purchasers' interest is indeed a conveyance as defined by Montana law, do the Appellants currently have an easement across the Rose Trust's property as shown on COS 569 by virtue of the easement-by-reference doctrine?

Statement of Facts

A. The disputed easement on COS 569.

In 1975, Margaret Rose recorded COS 569 in Missoula County.[1] The purpose of COS 569 was "[t]o establish the boundaries of a parcel of land." That parcel was a 23.4 acre property carved out of a larger parcel owned by Rose.[2]

COS 569 shows a "30' private road easement" running from an "existing 60' Forest Service road easement" to that newly created 23 acre parcel.[3] The Forest Service "easement" shown on this COS is now

[1] Appellants' Appendix ("App.") at 1.
[2] App. at 1.
[3] App. at 17.

commonly referred to as Houle Creek Road.

Also in 1975, Rose (or the Rose Trust, which is referred to interchangeably with Rose herself throughout this brief) recorded COS 648. COS 648 created Parcel E, which was also owned by Rose at the time.[4] The 30-foot easement shown on COS 569 traverses Parcel E. COS 648 also identifies another easement. This time, it is specifically identified as an "easement for C.S. 569," and that easement provides a more direct route from the 23-acre parcel to Houle Creek Road. This is the access the Appellants currently use to access their property.[5]

Two years later, in 1977, the Benjamins entered into a contract for deed with Rose to buy the 23-acre parcel created by COS 569. That contract for deed was memorialized in an NPI that was duly recorded in Missoula County. The NPI referred to COS 569—and it expressly mentioned the easement shown on the COS.[6] It is undisputed that this NPI referred to the 23-acre parcel created by COS 569—because as alleged in the Complaint, "in November 1977, Rose sold to Benjamin the entirety of COS 569 via a contract for deed."

The NPI includes the names and locations of the parties; a metes and bounds description of the real property affected; a plain statement that it refers to another document—that is, a "written agreement for

[4] App. at 3, 18.
[5] Their actual easement was created by a different COS that is not at issue in this appeal.
[6] App. at 17.

the sale of property" that includes a warranty deed escrowed in Western Montana National Bank; and a statement that "a copy of said agreement may be obtained from the Buyers at the above address." And it has notarized signatures of all the parties.[7]

Two years after the NPI was recorded, the Benjamins subdivided the 23-acre parcel into smaller parcels, which were shown on COS 2233.[8] One of those parcels was subsequently divided once more, in COS 5794. Thus, the original 23-acre parcel created by Rose in COS 569 is now owned by the four sets of Appellants;

- David and Margo Stanzak;
- Caryn Miske;
- Laurence Miller, Jr.; and
- Steven and Karin Zandi.

At the time these Appellants purchased their properties, they were aware of the easement and nobody had ever questioned their right to use it.[9] The easement provides the most straightforward access to the 23-acre parcel, because their other access routes "are somewhat convoluted and can be difficult to traverse in the winter."[10] In addition, some of the Appellants want to conduct tree thinning on their property, and their primary access has a turn that is too tight for logging trucks.

[7] App. at 15–16.
[8] App. at 4.
[9] App. at 19.
[10] App. at 20.

And—perhaps most importantly—the easement provides an additional exit in case of wildfire.[11]

B. The parties' arguments below and the district court's decision.

When the Appellants moved for summary judgment, they argued that they had an express easement by grant and reservation that was created by the NPI's reference to COS 569. In other words, they argued they had an easement by reference.[12]

In response, the Rose Trust argued that while most of the elements of the easement-by-reference doctrine were satisfied, the easement shown on COS 569 was "never validly conveyed by an instrument of conveyance" and that, even if it was, it was extinguished by the later-recorded COS 648, which Rose claimed created a "replacement easement."[13]

Ultimately, the district court agreed with the Rose Trust's first argument, and concluded that all elements of the easement-by-reference doctrine would have been satisfied, except that the NPI was not a valid conveyance.[14]

Standard of Review

This Court reviews orders granting summary judgment de novo, applying the criteria of Rule 56(c), M. R. Civ. P. *Nunez v. Watchtower*

[11] App. at 20.
[12] App. at 4.
[13] *See* App. at 4–5.
[14] App. at 5.

Bible & Tract Soc'y of New York, Inc., 2020 MT 3, ¶ 9, 398 Mont. 261, 455 P.3d 829. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

Summary of the Argument

The Rose Trust conceded below that the "easement depicted on COS 569 was a valid easement, and any subsequent conveyance referencing the easement depicted on COS 569 would have been valid under the easement by reference doctrine." But it argued that the NPI was not a valid conveyance sufficient to satisfy that element of the easement-by-reference doctrine, and further argued that the easement no longer exists. The district court only addressed the Trust's contention that the NPI was not a valid "conveyance" sufficient to establish an easement, and agreed with it, rejecting the Appellants' argument that an NPI was a valid conveyance under Montana law.

But the district court was wrong, and gave a too-narrow reading to the statutory scheme providing that a properly recorded NPI is an instrument of conveyance, just like any other recorded instrument that is sufficient to establish an easement by reference. That statutory scheme requires looking at multiple interrelated parts of Title 70 of the Montana Code.

The first relevant part sets out the requirements for a valid contract for deed, including that either the contract for deed "or an abstract of the contract" can be recorded. Section 70–20–115(1). The next part addresses recording transactions relating to real property, and explains that the term "instrument" as used in the recording statutes "includes an abstract of an instrument." Section 70–21–101. Then, § 70–21–201 explains that "any instrument" affecting the title to or possession of real property may be recorded. Putting these statutes together, an NPI is an "abstract" of an "instrument…affecting the title to" real property that may be recorded.

Next, the statutes that address the effect of recording provide that the term "conveyance," as used in that part, "embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected, except wills." Section 70–21–301. Therefore, because an NPI is an instrument in writing by which interests in real property can be affected, it is a conveyance within the meaning of Montana law.

Argument

This case presents a pure and narrow question of law: whether a properly recorded notice of purchasers' interest constitutes a "conveyance" sufficient to satisfy that portion of the easement-by-reference doctrine. It is—and this Court has recognized a recorded

notice of a contract for deed as a valid conveyance in a variety of circumstances.

Indeed, if a properly recorded NPI is *not* a conveyance under Montana law—as the district court held—then a recorded NPI would be worthless, and a subsequent purchaser or mortgagee would not be charged with constructive notice of the existence of the NPI, which is a direct stand-in for a contract for deed. Thus, under the Trust's theory, a subsequent purchaser could take clear title to a property notwithstanding the existence of a recorded NPI. But that can't be right, because it would call into question innumerable recorded NPIs throughout the state that currently provide constructive notice to subsequent purchasers and mortgagees of the existence of the contract for deed. It also runs afoul of this Court's long-standing recognition that a buyer purchasing real property pursuant to a contract for deed holds equitable title, which is "an ownership interest." *Hannah v. Martinson*, 232 Mont. 469, 471, 758 P.2d 276, 278 (1988). It is impossible to square the district court's conclusion that an NPI is not a conveyance, when—as explained below—it is an abstract of a document that conveys an ownership interest.

I. An NPI is expressly defined as a valid conveyance under Montana law, and it is therefore sufficient to satisfy the only disputed element of the Appellants' easement-by-reference counterclaim.

It is well-established that an easement can be expressly granted

by referring in an instrument of conveyance to a recorded certificate of survey on which the easement is adequately described. *Yorlum*, ¶ 15. Here, there is no dispute that COS 569 was recorded, or that the disputed easement is adequately described on that COS.[15]

The only dispute between the parties about the initial existence of the easement was whether the recorded NPI that stood in for, and referred to, the Benjamins' contract for deed constituted a valid conveyance. The Rose Trust argued that the NPI was not a valid "conveyance," and the district court agreed, concluding that the "NPI does not contain language of conveyance showing a grant of an estate in real property."[16]

The district court went on to note that while an NPI meets the definition of a "conveyance" in § 70–21–301, "that definition includes language specifically limiting its application to § 70–21–302 through 70–21–304."[17] The district court then walked through what was actually included in the NPI—which it curiously referred to as a "memorandum." The district court recognized that the parties had entered into a "written agreement…for the sale of a 23.24 acre parcel of property, described by metes and bounds, subject to a 30 foot easement

[15] Indeed, the district court "agree[d] that COS 569 clearly shows an easement" and "also agree[d] that COS 569 was referenced clearly in the 1977 NPI." App. at 6.
[16] App. at 6. For this proposition, the district court cited § 70–21–103, without further explanation. But this statute discusses *unrecorded* deeds, and it is not clear what the district court's citation might be referring to.
[17] App. at 6.

according to COS 569."[18] The district court contrasted the NPI with easements later granted to the Benjamins, which it concluded *were* instruments of conveyance because they included language stating the grantor does "hereby grant, bargain, sell and convey" the "following described [different] easement."[19] Thus, the district court held that "[a]lthough COS 569 was a recorded certificate of survey, the 1977 NPI is not an instrument of conveyance and created no easement rights" benefitting the Benjamins or their successors.[20]

But the district court's conclusion is not consistent with the Montana Code, which specifically contemplates that an NPI is an "abstract" of a contract for deed, and then provides that such an "abstract" can be recorded just like any other instrument that affects title to or encumbers a property, and that it will have the same effect. An NPI therefore serves as a direct stand-in for a contract for deed, which is itself a conveyance under Montana law.

While the statutes require marching through multiple chapters of Title 70, they lead to the straightforward result that an NPI is an abstract of a contract for deed that can be recorded, and because it is an instrument that affects title to real property, it is expressly a "conveyance" under Montana law. A duly recorded NPI therefore satisfies the portion of the easement-by-reference doctrine that requires

[18] App. at 7.
[19] App. at 7.
[20] App. at 8.

a conveyance.

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The concept of an NPI comes from § 70–20–115(1), MCA, which defines a "purchaser under contract for deed" as a person who has entered into a contract for deed with the owner of a property who "will deliver the deed to the property to the purchaser when certain conditions have been met, such as completion of payments by the purchaser," where the parties have "recorded the contract or an *abstract* of the contract in accordance with Title 70, chapter 21." (Emphasis added.)

Section 70–21–101, MCA, in turn, is titled "Instrument defined—abstract," and it provides that, for purposes of "part 2 of this chapter," "*the word instrument includes an abstract of an instrument* that must be executed and acknowledged or proved by all parties executing the abstracted document and contains:"

> (1) the names and addresses of the parties to the instrument;
> (2) a description of the real property affected;
> (3) a statement that this is an abstract of another document;
> (4) a short statement of the effect of the document abstracted;
> (5) the name and address of the person who will provide a full and complete copy of the document abstracted, without cost, upon request of any person.

Section 70–21–101, MCA (emphasis added). As mentioned above, there is no dispute that the NPI here satisfies the above criteria, and it is therefore an "abstract of an instrument," which is expressly a legal "instrument" under § 70–21–101.

The reference in § 70–21–101 to "part 2 of this chapter" refers to the statutes at § 70–21–201 *et seq*., which address recording procedures and the effect of recording real property transactions. Section 70–21–101(1) defines "what may be recorded," and it includes "any instrument…affecting the title to or possession of real property[.]"

Moving on to the part 3 of the same chapter, which is titled "effect of recording," § 70–21–301 defines a "conveyance" for purposes of §§ 70–21–302 through 70–21–304, and the term "embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected[.]" Section 70–21–301. The very next statute provides that "every conveyance of real property acknowledged or proved and certified and recorded as provided by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." Section 70–21–302.

Finally, § 70–21–305 provides that an "abstract of a conveyance or encumbrance of real property…shall have the same effect *for all purposes of this part* as if the conveyance or encumbrance of real property had been acknowledged or proved and certified and recorded as prescribed by law." (Emphasis added.)

In sum, as a matter of purely statutory law, the NPI at issue here is an abstract of a contract for deed, which affects title to and encumbers real property. An abstract is specifically defined as an

instrument. Because it is an instrument, an NPI can be recorded. And because it is an instrument that can be recorded that affects title to real property, it is expressly a "conveyance" under § 70–21–301. In case that is not enough, § 70–21–305 adds suspenders to § 70–21–301's belt, and clarifies, in so many words, that any recorded "abstract of a conveyance or encumbrance" has the same effect as any other recorded instrument that conveys equitable title or possession to the buyers.

The district court was therefore wrong and should be reversed. Because the Rose Trust conceded and the district court agreed that all elements of the easement-by-reference doctrine would have been satisfied if the 1977 NPI was a conveyance, the Court should direct the district court to enter judgment that the Appellants have an easement as shown in COS 569.

II. A party's unilateral recording of a self-interested "replacement easement" cannot, without more, terminate an easement that already exists.

The Rose Trust's remaining argument below—left unaddressed by the district court—is that subsequent certificates of survey recorded by the Rose Trust somehow wiped out the easement shown on COS 569. But the Rose Trust did not identify any document where the parties agreed to terminate the easement, it merely argued that the mere granting of an additional easement—as shown on COS 648—automatically terminated the existing easement.

But COS 648 has nothing to do with any property owned by the

Benjamins or any other of the Appellants' predecessors in interest.[21] Indeed, on its face, COS 648 created a new parcel—"E"—which, prior to this appeal, had always been owned by the Rose Family or the Rose Trust, and the disputed easement from COS 569 travels over that parcel. In other words, neither the Benjamins nor any of the other Appellants' predecessors in interest were a party to COS 648 in any manner, and they did not receive any benefits arising from COS 648. Simply recording a self-serving "replacement easement" on a COS that benefits only the servient estate cannot extinguish an existing easement.

Even though the Appellants came to acquire other access besides the easement shown on COS 569, express easements are not lost due to non-use, even where that non-use is due to another available access. *Woods v. Shannon*, 2015 MT 76, ¶ 17, 378 Mont. 365, 344 P.3d 413.

Beyond the legal problems with the idea that a servient tenement can unilaterally terminate an express easement by recording a new COS that shows a "replacement easement," there is a significant policy problem. Consider the effect of that argument: if there is an easement across A's property for the benefit of B, but A did not like that easement's location, A would have the unilateral right to record a new COS identifying a "replacement easement" purportedly for the "benefit" of B but without B's input or consent. Under the Trust's theory of the

[21] COS 648 is in the Appendix at 18.

disputed easement below, that would be totally fine, and B would just have to live with the "replacement easement," like it or not. Fortunately, this is not the law, and the Court can conclude that the easement shown on COS 569 still exists, despite the fact that the Appellants have additional accesses to their properties.

Conclusion

The district court should be reversed, and this Court should direct the district court to enter a judgment that the Appellants have an express easement over the Appellees' property, as shown on COS 569.

February 25, 2022.

/s/ Jesse C. Kodadek

Certificate of Compliance

The undersigned hereby certifies that the body of this brief contains 3570 words, as calculated by Microsoft Word. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse C. Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-25-2022:

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