Case No. DA 21-0514

IN THE SUPREME COURT OF THE STATE OF MONTANA

JIM L. TOWSLEY AND BETTY SMITH TOWSLEY,

Plaintiffs and Appellees,

vs.

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 and Appellants.

On Appeal from the Montana Fourth Judicial District Court, Missoula County, Cause No. DV-20-18, the Honorable Jason Marks presiding

RESPONSE BRIEF OF APPELLEES JIM L. TOWSLEY AND BETTY SMITH TOWSLEY

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Whether the District Court correctly concluded that a notice of purchaser's interest pursuant to an executory contract for deed does not constitute an "instrument of conveyance" for purposes of triggering Montana's easement-by-reference doctrine?

II. STATEMENT OF THE CASE

This case concerns the existence, or not, of an easement over and across the Appellee/Plaintiff Rose Family Trust's ("Rose") Missoula County real property in favor of Appellants' adjacent real property pursuant to Montana's easement-by-reference doctrine.[1] Appellants David P. Stanzak, Margo L. Stanzak, Craig Fitch, Caryn Miske, Laurence B. Miller, Jr., Stephen M. Zandi, and Karin M. Zandi (collectively "Stanzak") mistakenly contend that a recorded notice of purchaser's interest ("NPI") under an executory contract for deed constitutes an "instrument of conveyance" for purposes of triggering Montana's easement-by-reference doctrine. The District Court correctly determined that a recorded NPI is not an "instrument of conveyance" and, therefore, does not satisfy the requirements of the doctrine.

[1] As correctly noted in Appellants' Opening Brief, Appellees Jim L. and Betty Smith Towsley were not parties to the District Court action. The original Appellee (and Plaintiff below) was the Rose Family Trust (successor to Margaret Rose). The Towsleys acquired the subject Rose Family Trust's real property after the District Court quieted title in favor of the Rose Family Trust. For consistency with Appellants' Opening Brief and the District Court record below, Appellees will be referred to as the "Rose" throughout this Answer Brief.

Accordingly, the District Court correctly granted summary judgment and quieted title to the disputed easement in Rose.

On January 7, 2020, Rose filed its Complaint to Quiet Title and Request for Declaratory and Injunctive Relief with respect to an easement depicted on Certificate of Survey 569 ("COS 569") and claimed by Stanzak. Therein, Rose asserted that the COS 569 easement does not exist and Stanzak has no interest in or right to use the alleged easement. On March 23, 2020, Stanzak answered, denying Rose's entitlement to quiet title and declaratory and injunctive relief, and counterclaimed for quiet title and declaratory and injunctive relief relative to their right to use the easement depicted on COS 569. On April 13, 2020, Rose answered the Counterclaim, denying Stanzak's alleged right to use the easement.

The parties filed cross-motions for summary judgment regarding their respective rights to the easement depicted on COS 569. On July 14, 2021, the District Court issued its Order on Cross-Motions for Summary Judgment in favor of Rose. In its Order, the District Court correctly concluded that a recorded notice of purchaser's interest under an executory contract for deed is not an "instrument of conveyance" for purposes of Montana's easement-by-reference doctrine and, as a result, the NPI created no easement rights benefiting Stanzak or Stanzak's predecessor in title.

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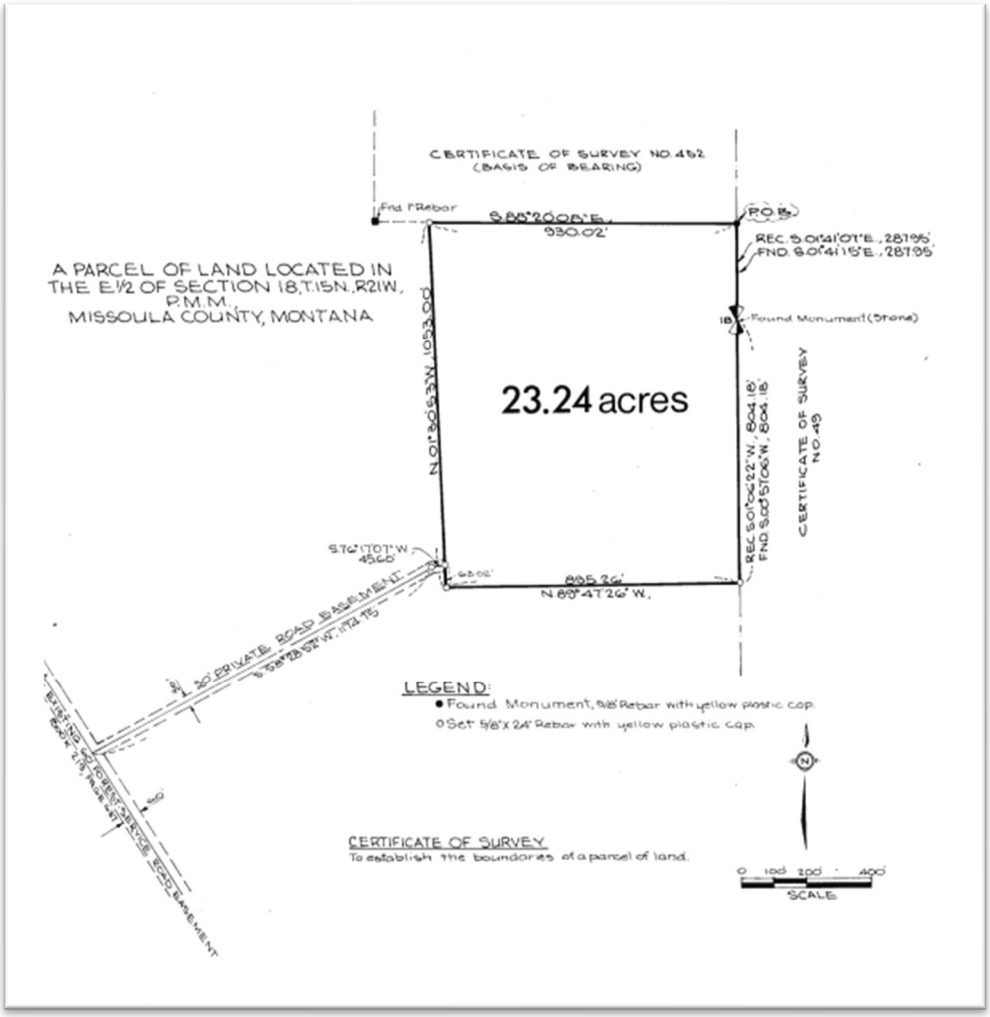
III. STATEMENT OF THE FACTS

Margaret Rose prepared and filed COS 569 with the Missoula County Clerk and Recorder on April 21, 1975. COS 569 established the boundaries of a 23.24 acre parcel of land and depicted a "30' PRIVATE ROAD EASEMENT" from the 23.24 acre parcel, across other real property owned by Rose, to an existing Forest Service Road commonly known as Houle Creek Road. Appellants' App. 3, 17. For the Court's convenience and reference, the pertinent portion of COS 569 is set forth below:



Confusingly, rather than describing the parcel established by COS 569 as "together with" the depicted easement, the survey's metes and bounds description states that the parcel is "subject to" the easement. Appellants' App. 17.

After recording COS 569, on August 1, 1975, Rose prepared and filed Certificate of Survey 648 ("COS 648"), which created a 59.15 acre parcel adjacent to, and largely to the South and West of, the COS 569 parcel. Appellants' App. 17–18. COS 648 includes the area traversed by the original COS 569 easement but eliminates the easement shown on COS 569. Instead, COS 648 depicts a relocated replacement "Easement for C.S. #569[.]" The metes and bounds description of the COS 648 easement expressly states: "REPLACEMENT EASEMENT FOR C.S. #569 PARCEL: A 30.0 FT STRIP FOR ROAD AND UTILITY EASEMENT PURPOSES FOR ACCESS FROM THE PUBLIC ROAD TO A PARCEL SHOWN ON CS #569[.]" Appellants' App. 3, 17-18. For the Court's convenience and reference, the pertinent portion of COS 648 is set forth below:

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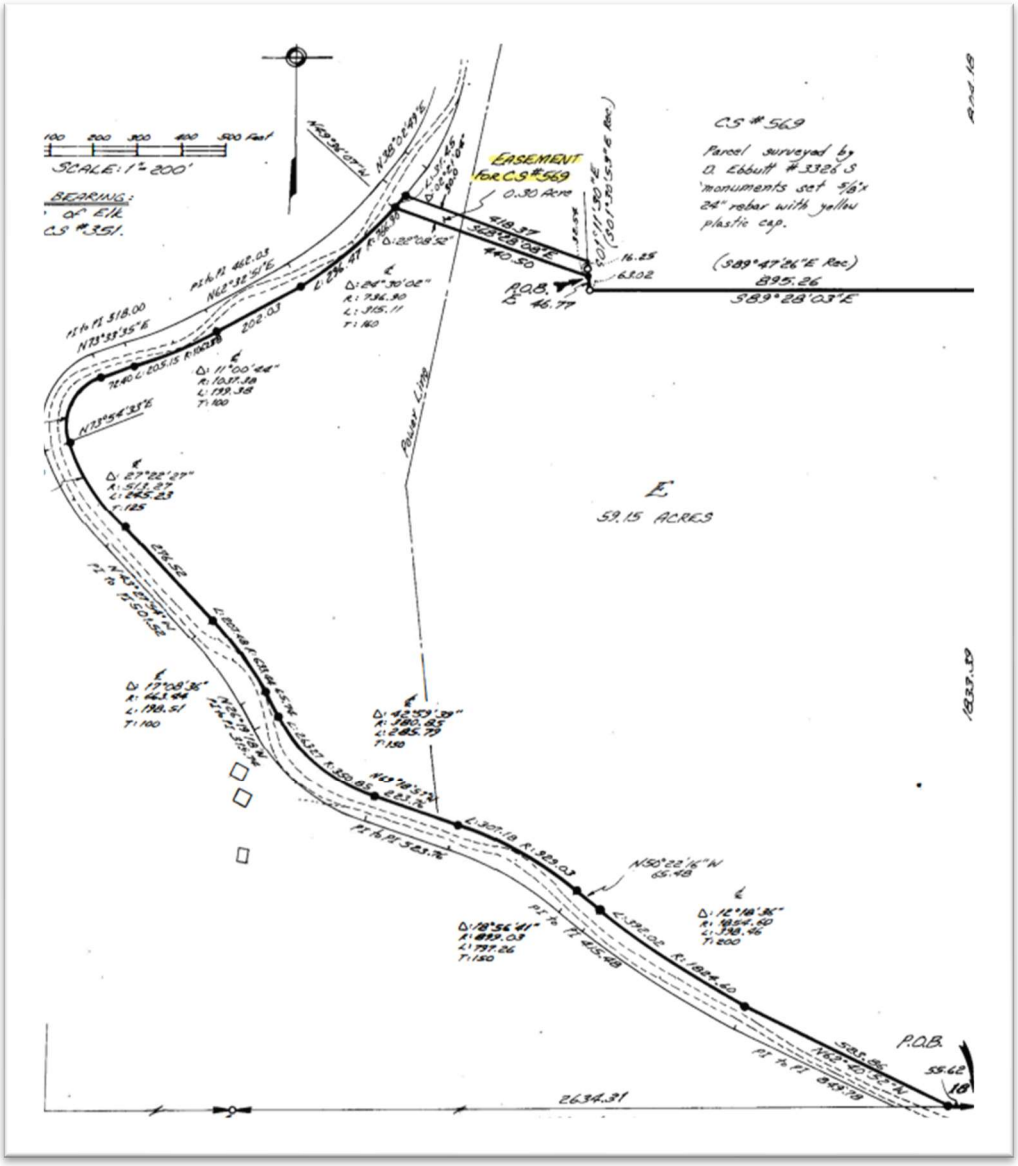


At the time COS 648 was recorded, Rose owned all of the real property encompassed by COS 569 and COS 648. Appellants' Opening Br. 7.

More than two years after COS 648 was recorded, on December 1, 1977, Rose, as seller, and Kenneth and Teri Benjamin, as buyers, recorded an NPI in connection with a November 1, 1977 contract for deed between Rose and the Benjamins. Appellants' App. 3, 15–16. According to the NPI, Rose and the

Benjamins entered into a written agreement for the purchase and sale of the 23.24 acre COS 569 parcel:

> WITNESSETH: That the Seller on the date hereof, entered into a written agreement for the sale to the Buyers of the following described real property, situated in the County of Missoula, State of Montana, to-wit:
>
> > A parcel of land located in the East ½ of Section 18, T. 15 N., R. 21 W., P.M.M., Missoula County, Montana and more particularly described as follows:
> >
> > Beginning at the Southeast Corner of a parcel of land as shown on Certificate of Survey No. 452; thence S.01°41'15" E., 287.95 feet to the East ¼ Corner of Section 18; thence S.00°57'06"W., 804.18 feet; thence N.89°47'26"W., 895.26 feet; thence N.01°30'53"W., 1116.02 feet to an intersection with the South Boundary of Certificate of Survey No. 452; thence S.88°20'08" E., along said South Boundary 930.02 feet to the point of beginning; contains 23.24 acres more or less.
> >
> > Subject to a 30 foot access easement being 15 feet each side of the following described centerline; beginning at a point N.01°30'53" W., 63.02 feet from the Southwest Corner of the above described parcel; thence S.76°17'07" W., 54.60 feet; thence S.58°28'52" W., 1174.75 feet to an intersection with the centerline of an existing U.S. Forest Service Road, according to the official map or plat certificate of Survey No. 569, thereof on file and of record in the office of the County Clerk and Recorder, Missoula County, Montana.
> >
> > Reserving unto Margaret A. Rose, her heirs, devisees, personal representatives and assigns an undivided one-half interest in and to all oil, gas and other minerals in, on, or under the above-described property, together with the right of ingress and egress to explore for and remove the same.

The NPI goes on to state that the written sales agreement was escrowed with a warranty deed from Rose to the Benjamins, and that the warranty deed would be

delivered by the escrow agent upon payment of the purchase price:

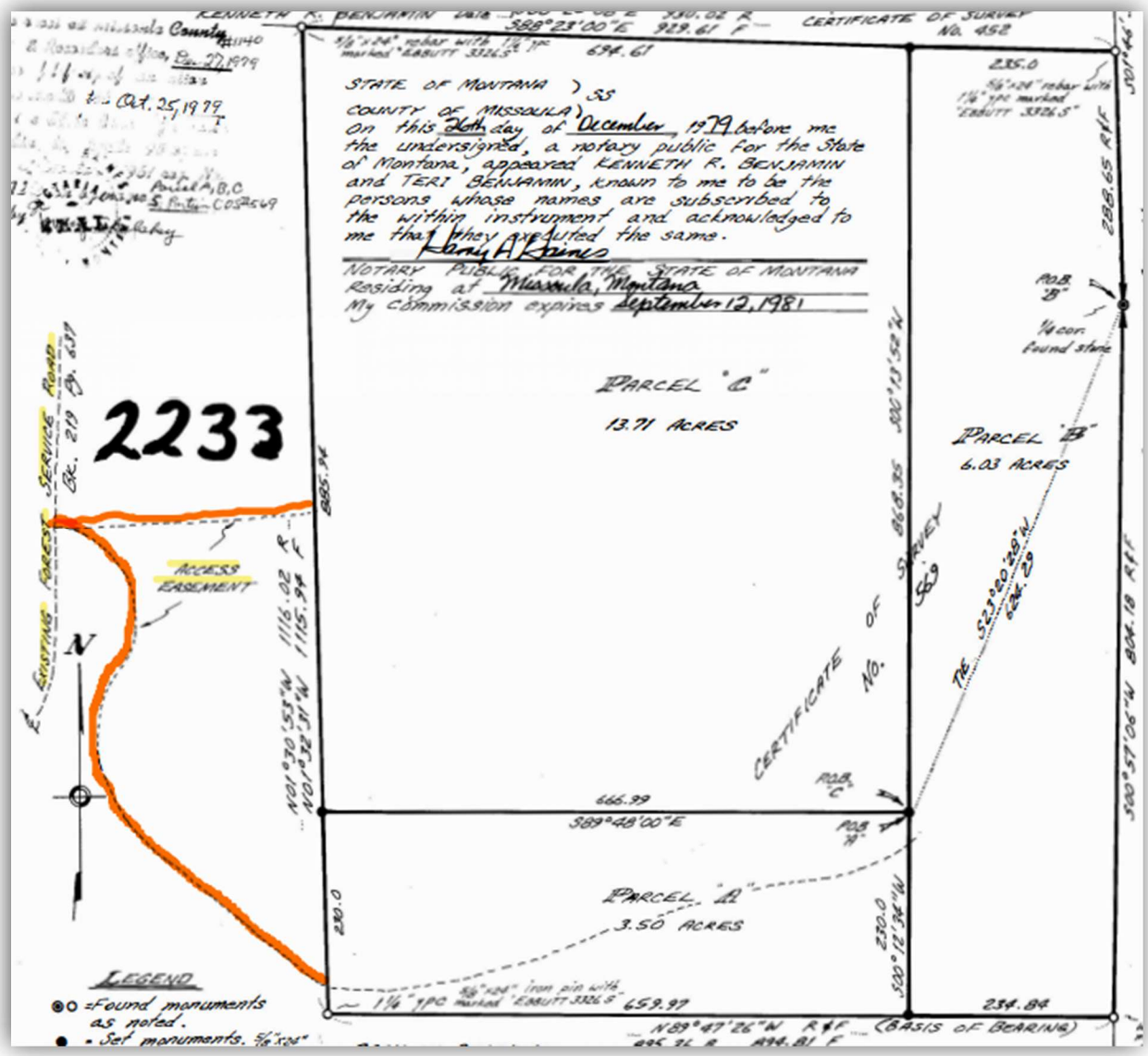
> That said agreement has been escrowed in the Western Montana National Bank, of Missoula, Montana, together with a Warranty Deed from the Seller to the Buyers. That said agreement requires payments to be made by the Buyers in amortization of the balance due on the purchase price, and upon payment in full of the purchase price, the said Western Montana National Bank of Missoula, as the escrow agent, is instructed to deliver the said Warranty Deed to the Buyers

It is undisputed the escrowed warranty deed was never delivered or recorded. Appellees' App. 4-8.

Approximately two years after recording the NPI, on December 27, 1979, the contract purchasers (the Benjamins) recorded COS 2233. Appellees' App. 3. COS 2233 divided the original COS 569 parcel into three smaller parcels described as Parcels A, B, and C. COS 2233 understandably does not describe, depict, or reference the easement depicted on COS 569 since that easement had been eliminated and replaced per COS 648. On the same day that COS 2233 was recorded, Rose also granted express access easements, for the benefit of Parcels A, B, and C of COS 2233, to the Benjamins via two deeds of easement.[2] Appellees' App. 1-3; Appellants' App. 4. These express easements followed two existing roads crossing Rose's real property and depicted on COS 2233. For the Court's convenience and reference, the pertinent portion of COS 2233, with the two

[2] There is no dispute that Appellants currently enjoy legal and actual access to their properties. The easement claimed in this action would provide additional access.

express easements granted contemporaneously therewith highlighted in orange, is set forth below:



The deeds of easement from Rose to the Benjamins were recorded on January 16, 1980 and March 2, 1992. Appellees' App. 1-2.

Rose subsequently conveyed Parcels A, B, and C of COS 2233 to the Benjamins via warranty deeds dated February 26, 1980 and May 25, 1984, and

recorded June 9, 1980 and May 2, 1992.[3] Appellees' App. 4–8; Appellants' App. 4. Rose's fulfillment conveyances of Parcels A, B, and C of COS 2233 (and parcel C-1 of COS 2276) to the Benjamins evidence the parties' implicit agreement and consent to modify the legal description of the real property subject to the NPI. The Benjamins, of course, are the Appellants' predecessors in interest. Appellants now assert an express easement-by-reference over the COS 569 easement arising solely out of the NPI.

IV. STANDARD OF REVIEW

A district court's summary judgment ruling is reviewed *de novo*. *Rolan v. New West Health Services*, 2022 MT 1, ¶ 17, 407 Mont. 34, 504 P.3d 464. Summary judgment is appropriate "when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id*.; Mont. R. Civ. P. 56(c).

V. SUMMARY OF THE ARGUMENT

This case turns on the meaning of the term "instrument of conveyance" as used in connection with Montana's easement-by-reference doctrine. More particularly, this case asks whether a recorded NPI under an executory contract for

[3] Rose also conveyed a mortgage tract, within the bounds of Parcel C of COS 2233, known as the Benjamin Mortgage Parcel C-1 of COS 2276 to the Benjamins in June of 1980. Appellants' App. 4; Appellees' App. 6, 9. COS 2276 does not describe, depict, or reference the easement described and depicted on COS 569.

deed that was never fully performed as contemplated is an instrument of conveyance which triggers the easement-by-reference doctrine and gives rise to an express easement. The District Court correctly concluded that it is not.

Montana's easement-by-reference doctrine allows for the creation of an express easement by reference in an "instrument of conveyance" to a recorded plat or survey sufficiently describing the easement. The triggering instrument must be sufficient to effect a conveyance. This means that it must contain language of conveyance, *i.e.*, language creating, granting, surrendering, or declaring a present interest in real property. The NPI at issue does not contain any such language and does not create any present title interest. Instead, it is a public record device for providing notice of a potential future conveyance. As a result, an NPI is not an "instrument of conveyance" for purposes of the easement-by-reference doctrine.

Indeed, the NPI is explicit that the actual instrument of conveyance (an escrowed warranty deed) will not be delivered until a future date upon the satisfaction of various contractual conditions precedent. A grant of an interest in real property is not effective until delivery. The NPI, therefore, cannot be properly construed as a conveyance: Rather than serving to convey, the NPI only describes a potential future conveyance. Because the NPI does not contain conveyance language and, according to its own terms, does not effect a present conveyance, it does not amount to an instrument of conveyance.

This conclusion is consistent with established real property law which defines a written transfer of real property as a grant or conveyance and further defines a "transfer" of property as occurring when title is conveyed from one living person to another. Because an NPI does not so transfer or convey title, it cannot amount to an instrument of conveyance. Stanzak's assertion of the equitable ownership interest of a purchaser under a contract for deed does not alter this conclusion. A contract purchaser's ownership interest, whether equitable or otherwise, remains contingent and, in this particular case, the real property as described in the NPI (by reference to a superseded plat) was never conveyed because the parties to the NPI (apparently) agreed to re-survey and re-describe the property which was the subject of their contract.

Furthermore, the plain language of the recording statutes, the longstanding doctrine of merger, and the requirement that unity of legal title be severed before an easement is created, all support the District Court's conclusion. Stanzak's reliance on the recording statutes fails to salvage their alleged easement. Stanzak relies heavily on the statutes' definition of "conveyance." That definition's application, however, is expressly limited to a narrow subset of the recording statutes. The term "conveyance," outside of the recording statutes, has a well-developed meaning distinct from that used to define which documents qualify for recording with a county's Clerk and Recorder and their associated priority. The

"conveyance" definition utilized in the recording context does not apply to, and certainly does not govern, the meaning of the term "instrument of conveyance" in connection with express easements-by-reference.

Stanzak's position also runs afoul of the merger doctrine. Merger operates when a buyer and seller enter into a contract for the sale of real property and subsequently deliver a deed conveying title. In that event, the terms of the sale contract generally merge with the deed and a purchaser's rights are thereafter found in the deed rather than the contract. While an exception to this general rule allows the parties to intend that an agreement be collateral and not merge with the deed, grants of access generally are not construed as collateral and so do merge with the deed. Here, the deeds conveying the contract land (the purported dominant estate) from Rose to Stanzak's predecessor do not reference the NPI or the contract for deed, or convey by reference to COS 569. Instead, the land is conveyed by reference to COS 2233 and COS 2276, surveys which do not depict or describe the claimed easement. As a result, any access rights that may have been referenced in the NPI merged into the deeds and were thereby extinguished.

Stanzak's assertion of the alleged COS 569 easement-by-reference also ignores the principle that an easement's dominant and servient estates cannot be held in common ownership—unity of legal title must be severed for an easement to arise. As noted, the NPI does not contain any language of conveyance and does

not presently transfer legal title from one person to another. Indisputably, Rose held legal title to the COS 648 and COS 2233/2276 (formerly COS 569) parcels—the purported servient and dominant estates—until she severed the common estate by conveying the COS 2233 and 2276 parcels (the purported dominant estates) by delivery of warranty deeds referencing only those surveys. The warranty deeds from Rose to the Benjamins are decisive as to whether, and which, easement-by-reference was created. Because those deeds, and the surveys which they, cite are silent as to the COS 569 easement, that former potential easement never arose.

Finally, Stanzak's argument that, prior to the contract for deed, Rose could not locate, relocate, or eliminate depicted easements affecting real property owned only by Rose is borderline frivolous. Such easements could be placed anywhere by the common owner because they would not spring into existence until severance of title. Stanzak's predecessor obviously had no interest—contractual or otherwise—in any depicted easement before the contract for deed. If an owner of two parcels of real property attempts to create an easement over one of the parcels in favor of the other parcel, the purported interest is a legal nullity until unity of legal title is severed. Before that event, therefore, the purported easement depicted on COS 569 could not exist and Rose could unilaterally relocate or eliminate it.

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VI. ARGUMENT

The question in this case is whether the subject NPI constitutes an "instrument of conveyance" for purposes of triggering the easement-by-reference doctrine. It does not. The District Court correctly concluded that, as a matter of law, a recorded notice of purchaser's interest is not an "instrument of conveyance" for purposes of Montana's easement-by-reference doctrine because it contains no language of conveyance and so does not serve to convey. Appellants' App. 6–8. Therefore, the original COS 569 easement claimed by Stanzak does not exist and the District Court's order granting summary judgment in Rose's favor should be affirmed. Stanzak's arguments otherwise are unavailing.

A. A Notice Of Purchaser's Interest Is Not An "Instrument Of Conveyance" For Purposes Of Montana's Easement-By-Reference Doctrine Because It Does Not Effect A Conveyance.

Under Montana law, "[a]n easement cannot be created except by an instrument in writing, by operation of law, or by prescription." *Wilkinson, LLC v. Scott and Cindy Erler, LLP*, 2021 MT 177, ¶ 9, 404 Mont. 541, 491 P.3d 704 (addressing creation of easements-by-reference). "In a series of cases, this Court has recognized that an express easement may be created by referring in an instrument of conveyance to a recorded plat or certificate of survey on which the easement is adequately described." *Yorlum Properties Ltd. v. Lincoln County*, 2013 MT 298, ¶ 16, 372 Mont. 159, 311 P.3d 748 (citing cases recognizing

easements-by-reference) (emphasis added). In addressing this type of express easement, the Court has observed that "[w]hen the deed itself contains no language reserving (or granting) an easement, our easement-by-reference doctrine contemplates that an explicit reference in the deed to a plat or certificate of survey on which an easement is clearly depicted and adequately described is sufficient to establish the easement." *Yorlum*, ¶ 16 (emphasis added, citing *Blazer v. Wall*, 2008 MT 145, ¶ 41, 372 Mont. 159, 311 P.3d 748 (describing history and requirements of of easement-by-reference doctrine)). "An easement created in this manner—i.e., by reference in an instrument of conveyance to a plat or certificate of survey on which the easement is adequately described—must arise expressly[.]" *Blazer*, ¶ 41.

Express easements must satisfy certain title, severance, and substantive requirements. *O'Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶ 17, 396 Mont. 454, 446 P.3d 509 (addressing the creation of easements, including easements-by-reference). The creation of an express easement requires a signed writing that includes "language sufficient to both describe the fee or lesser interest conveyed or reserved and effect the conveyance." *O'Keefe*, ¶ 18 (emphasis added); *see also* §§ 70-1-501, -502, -507, -519, MCA; §§ 70-20-101, -103, MCA. With respect to easements-by-reference, the instrument of conveyance and referenced plat or survey are viewed together for sufficiency: "[T]o create an easement by express

grant[,] an instrument of conveyance and any referenced subdivision plat, certificate of survey, or map of record must be sufficient *together* to express clear and unambiguous grantor intent to grant … an easement." *O'Keefe*, ¶ 18 (emphasis in original). Because the subject NPI, or any NPI for that matter, does not purport to presently grant any easement (or any property interest), it is not an instrument of conveyance and, regardless of reference to any COS of record, it does not satisfy the requirements for creation of an easement-by-reference.

The NPI is not—and cannot be—an "instrument of conveyance" for purposes of the easement-by-reference doctrine. Valid instruments of conveyance must "contain language of conveyance." *Broadwater Development, L.L.C. v. Nelson*, 2009 MT 317, ¶ 27, 352 Mont. 401, 219 P.3d 492; *Kuhlman v. Rivera*, 216 Mont. 353, 359, 70 P.2d 982, 985 (1985). In the context of easements (including easements-by-reference), this Court has relied upon § 70-20-101, MCA, to define "language of conveyance," holding that "[a]n interest in real property can be 'created, granted, surrendered, or declared.'" *Broadwater Development*, ¶ 31 (quoting § 70-20-101, MCA). As correctly noted by the District Court, the NPI at issue does not contain any such language because it does not create, grant, surrender, or declare any interest in real property—rather, it provides notice of a potential future grant upon satisfaction of certain contractual conditions. Appellants' App. 6–8; *see also* § 70-20-103, MCA (form of grant of interest in real

property); § 70-20-101, MCA. Montana law "recognizes the difference between a conveyance and a contract to convey." *Dobitz v. Oakland*, 172 Mont. 126, 129-30, 561 P.2d 441, 443 (1977). In concluding that the contractual restriction on assignment of the buyer's interest in a contract for deed does not unlawfully restrain alienation, the *Dobitz* Court observed that contracts for deed are executory "and the legal title does not pass until the conveyance is actually made." *Id.* (emphasis added) Because an NPI does not pass legal title, no conveyance is actually made and the NPI is not an instrument of conveyance.

Here, the NPI states that, on November 1, 1977, Rose and the Benjamins "entered into a written agreement for the sale" of the 23.24 acre COS 569 parcel using the parcel's metes and bounds description. Appellants' App. 15-16. The NPI further provides:

> That said agreement has been escrowed in the Western Montana National Bank, of Missoula, Montana, together with a Warranty Deed from the Seller to the Buyers. That said agreement requires payments to be made by the Buyers in amortization of the balance due on the purchase price, and upon payment in full of the purchase price, the said Western Montana National Bank of Missoula, as the escrow agent, is instructed to deliver the said Warranty Deed to the Buyers.

By its plain language, the NPI does not convey anything—it does not create, grant, surrender, or declare an interest in real property. *See* § 70-20-101, MCA; *Richman v. Gehring Ranch Corp.*, 2001 MT 293, ¶ 20, 307 Mont. 443, 37 P.3d 732 (2001) (noting that a contract for deed provides for potential access rights and is not a

present grant). It instead provides notice of a potential future conveyance. *Richman*, ¶¶ 20-21, 24-26; § 70-21-302, MCA. Because the NPI does not contain language of conveyance, it cannot work to convey anything.

This Court rejected a similar attempt "to turn into a conveyance what is obviously intended as a sale contract" in *Norwegian Lutheran Church of America v. Armstrong*, 112 Mont. 528, 531-32, 118 P.2d 380, 381-82 (1941). In that case, a contract purchaser asserted that the sales contract was, in fact, a conveyance (or grant) because it stated that the vendor "hereby sells, grants and conveys," rather than that the vendor "hereby agrees to sell, grant and convey." *Id*. at 531, 118 P.2d at 381. While acknowledging that the words "hereby sells, grants and conveys," standing alone, would be sufficient to convey title, the Court applied the rules of contract interpretation, which require that the whole of the document be read together, and "principles of common sense," to conclude that no conveyance (or grant) was intended. *Id*., 118 P.2d at 382. To that end, the Court observed that, if the sales contract itself were a conveyance, there would have been no need for the vendor to deliver "a good and sufficient deed" upon full payment. *Id*. Here, the subject NPI is even more deficient than the contract for sale in *Norwegian Lutheran Church* because it contains no language of conveyance at all—it simply provides public notice of the existence of the sale contract. Like the defendant in

Norwegian Lutheran Church, Stanzak attempts "to turn into a conveyance what is obviously intended as a sale contract."

Those statutes addressing transfer and conveyance of real property also support the conclusion that the NPI is not an "instrument of conveyance" for purposes of the easement-by-reference doctrine. Section 70-1-507, MCA, provides that a "transfer" of real property in writing "is called a grant or conveyance[.]" (emphasis added). The "transfer" of property is further defined as "an act of the parties or of the law by which title to property is conveyed from one living person to another[.]" § 70-1-501, MCA (emphasis added); *see also* § 70-1-519, MCA ("transfer vests in the transferee all the actual title to the thing transferred"). An NPI does not convey, grant, or transfer, legal title from one living person to another—it simply provides notice of that future possibility. *See Blakely v. Kelstrup*, 218 Mont. 304, 306, 708 P.2d 253, 254 (1985) ("Recordation is a device to establish priority, but has nothing to do with conveying title."); *Elk Park Ranch, Inc. v. Park County*, 282 Mont. 154, 163-64, 935 P.2d 1131, 1136-37 (1997) (same); *Richman*, ¶ 20 (contract for deed provides potential rights as opposed to being a present grant). Accordingly, the subject NPI is not—and cannot be—an "instrument of conveyance" for purposes of triggering Montana's easement-by-reference doctrine.

The doctrine that a grant of an interest in real property takes effect "only upon its delivery by the grantor" further reinforces this conclusion. § 70-1-508, MCA. A contract for deed "is an agreement by a seller to deliver the deed to the property when certain conditions have been met." *Tungsten Holdings, Inc. v. Olson*, 2002 MT 158, ¶ 16, 310 Mont. 374, 50 P.3d 1086 (a contract for deed is an executory contract); *Dobitz*, 172 Mont. at 130, 561 P.2d at 443 (distinguishing between a conveyance and a contract to convey); § 28-2-104, MCA ("An executed contract is one the object of which is fully performed. All others are executory."). It is not a present grant. *Richman*, ¶¶ 20-21, 24-26; *Dobitz*, 172 Mont. at 130, 561 P.2d at 443; *Norwegian Lutheran Church*, 112 Mont. at 531-32, 118 P.2d at 381-82. As explained in *Dobitz*, "legal title does not pass until the conveyance is actually made." 172 Mont. at 130, 561 P.2d at 443. The NPI at issue expressly states that the actual instrument of conveyance—a separate warranty deed held in escrow—has not been delivered and will only be delivered upon satisfaction of the conditions precedent described in the agreement. As a result, no conveyance was made by the NPI. Contrary to Stanzak's arguments, the NPI itself is not an instrument of conveyance but, rather, only a public record notice device. *See* § 70-1-508, MCA; § 70-21-302, MCA. If the NPI itself were an instrument of conveyance, the escrowed, to-be-delivered warranty deed would be superfluous. *Norwegian Lutheran Church*, 112 Mont. at 532, 118 P.2d at 382.

Further undermining Stanzak's position are the inconvenient facts that Stanzak's predecessor did not acquire the subject property as described by COS 569 and no deed containing the COS 569 legal description was delivered or recorded. Instead, those deeds actually delivered and recorded convey the land by reference to COS 2233 and COS 2276, surveys which neither describe nor depict the claimed COS 569 easement. Appellees' App. 3-9. And, contemporaneously with the recording of COS 2233, Rose expressly granted other access easements to Stanzak's predecessor, again undermining any assertion that the NPI from years before was itself the conveyance. It is, of course, apparent from the contract buyers' new surveys (COS 2233 and COS 2276), and the contract seller's execution of apparently new fulfillment deeds referencing same, that the parties agreed to the new legal description of the contract property.

In a final note on this issue, the District Court also correctly concluded that the doctrine of the purchaser's equitable interest in the contract property is immaterial. Appellants' App. 7-8. The subject NPI provided constructive notice of a potential future conveyance that never came to pass. And, according to its plain language, the NPI did not contain language of conveyance since it did not purport to create, grant, surrender, or declare an interest in real property. Indisputably, it did not transfer any legal title interest in the property. Stanzak points to no authority concluding that the equitable interest acquired by the

purchaser during the term of the contract gives rise to a perpetual easement-by-reference as so claimed—particularly when the equitable interest *per se* never "ripens" into a legal title interest, which requires a distinct conveyance. The equitable interest of the purchaser under a contract for deed has been described as having a "chameleon-like nature … because they may vary in their characterization, depending on the purpose for which the analysis is made. The buyer's interest under such a contract accordingly constitutes equitable title for equitable purposes, but under a common law analysis it is simply a contract right, and is therefore personal property." Charles W. Willey, *Montana Real Estate Transactions* at 240 (State Bar of Montana 2010) (emphasis in original).

Montana law has long recognized the distinction between a present conveyance and a contract to convey. *Dobitz*, 172 Mont. at 130, 561 P.2d at 443; *Norwegian Lutheran Church*, 112 Mont. at 531-32, 118 P.2d at 381-82. An NPI is a means of providing constructive notice of a contract to convey, nothing more. It is not itself a conveyance and so it cannot give rise to an easement-by-reference.

B. Stanzak's Various Arguments Are Contrary To Established Montana Property Law.

Stanzak's selective reliance on unrelated portions of Title 70 of the Code does not overcome the plain language of those statutes or longstanding Montana common law. Likewise, Stanzak misconstrues the operative, controlling doctrines, or ignores them.

1. The recording statutes do not define an "instrument of conveyance" for purposes of the easement-by-reference doctrine.

Stanzak relies on the definition of "conveyance" set forth in § 70-21-301, MCA, of Montana's recording statutes as the main basis of their easement claim. Stanzak Opening Br. at 12–16. But this reliance is misplaced. As an initial matter, and as correctly observed by the District Court in its Order on Summary Judgment, § 70-21-301, MCA, the statute primarily relied upon by Stanzak, expressly limits the application of its definition of "conveyance" to certain of the recording statutes themselves—namely, §§ 70-21-302 through 70-21-304, MCA, which address recording as constructive notice, after-acquired interests in real property, and the effect of recording first. § 70-21-301, MCA. Thus, Stanzak's "extra-territorial" use of the definition, in the creation of an express easement, is outside the limiting terms of the statute and so is an improper application. Instead, the statutory definitions governing grants and transfers of interests in real property, that is § 70-20-101 and §§ 70-1-501, -507, -508, MCA, combined with this Court's historical analysis that, in the context of easements (including easements-by-reference), an instrument of conveyance must contain language of conveyance, dictate that the "conveyance" definition of the recording statutes does not apply to the common law animal known as the easement-by-reference doctrine.

This Court has been clear that "[r]ecordation is a device to establish priority, but has nothing to do with conveying title." *Elk Park Ranch*, 282 Mont. at 164,

935 P.2d at 1136-37 (fact of recording one-party deeds does not render deeds a valid conveyance). Accordingly, whether the NPI is a "conveyance" for purposes of recording is immaterial and does not render the NPI an "instrument of conveyance" which triggers the easement-by-reference doctrine. Indeed, the Clerk and Recorder's Office accepts for recording all manner of instruments that do not convey title to real property, such as lis pendens, notices of right to claim a lien, powers of attorney, judgments, and, with all due respect, anything that satisfies the requirements of legal description and authenticated originality. *See* §§ 70-21-201, -203, MCA.

Stanzak's assertion that a recorded NPI will no longer provide constructive notice if this Court does not recognize the NPI as an "instrument of conveyance" which triggers the easement-by-reference doctrine mixes apples and oranges, to employ a tired phrase. Section 70-21-301, MCA, sets forth a broad definition of "conveyance" for purposes of the effect of recording and constructive notice. An NPI undoubtably is recordable. Section 70-21-302, MCA, in turn, provides that "[e]very conveyance [as defined in § 70-21-301, MCA] … from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." Accordingly, upon recording, an NPI provides constructive notice of its contents to subsequent purchasers and encumbrancers. *See* §§ 70-21-101, -201, -301, -302, MCA. Such is the intended,

but limited, effect of recording, which has nothing to do with whether the NPI operates as an "instrument of conveyance" outside of the recording context. § 70-21-301, MCA (limiting application of "conveyance" definition to recording statutes). Recordability alone, which concerns constructive notice and priority, does not work to create an easement. *See Elk Park Ranch*, 282 Mont. at 164, 935 P.2d at 1136-37 (recordation has nothing to do with conveying title).

2. The terms of the NPI merged into the deeds that were executed, delivered, and recorded.

Stanzak's assertion that the NPI is an instrument of conveyance also runs afoul of the longstanding merger doctrine. *See Morehouse v. Northern Land Co.*, 68 Mont. 96, 101, 216 P. 792, 794 (1923) (holding that contract term requiring conveyance of "perfect title" merged into deed for an undivided three-fourths interest in property). The doctrine of merger applies "where a buyer and seller enter into a contract for the sale of real property and subsequently execute a deed conveying title to the real property." *Urquhart v. Teller*, 1998 MT 119, ¶ 31, 288 Mont. 497, 958 P.2d 714 (holding covenants in contract for deed merged into and were extinguished by conveyance deed). The doctrine provides:

> It is a general tenet of contract law that all provisions in a contract for sale of real property are merged into the deed. Thus, when a deed has been executed, the purchaser's rights are generally found in the deed covenants, not the executed contract. An exception to the general rule of merger occurs when parties intended for an agreement in a contract for sale to be collateral. Covenants relating to title, quantity, and possession of land are generally not collateral and merge into the deed.

Richman, ¶ 21 (citing *Urquhart*, ¶ 28); *Morehouse*, 68 Mont. at 101, 216 P. at 794. Because a grant of access erodes an owner's right to exclusive possession, it is not collateral and merges into the deed. *See Richman*, ¶¶ 21, 25. This Court previously has concluded that potential access rights created by language in a real property sales contract merge with the conveyance deeds. *Id*., ¶¶ 24-26. In *Richman*, a contract purchaser asserted that a sales contract provision stating "Seller hereby grants privileges to future Buyers whereby they shall enjoy hunting rights, Snow Mobile [sic] rights, and horseback trail rights over other lands that the Seller now owns…" was not a promise to be carried out in the future, but, rather, an immediate grant of an easement. *Id*., ¶ 16. The *Richman* Court rejected this assertion, holding that the cited contract language was part of an agreement to transfer property in the future, and, therefore, was extinguished by the conveyance deeds that made no mention of such access rights. *Id*., ¶¶ 15-21. In so concluding, the Court observed, *inter alia*, that because a grant of access erodes the seller's right to exclusive possession of its retained lands, and because the conveyance deeds did not refer to any purported access rights, such rights merged with and were extinguished by the conveyance deeds. *Id*., ¶ 25. The same is true here.

Nothing in the NPI at issue indicates that the parties intended that any potential access rights treated in the underlying contract (assuming such existed) or implicated by the NPI itself would be collateral and not merge into the deed. As in

Richman, the NPI is clear that it does not presently grant any real property interest, fee or easement. At most, it provides notice of potential fee title if certain contractual conditions are met. Moreover, akin to *Richman* and *Urquhart*, the fulfillment deeds that ultimately conveyed title refer to COS 2233 and COS 2276, not COS 569, and do not describe or refer to the claimed easement or NPI. Appellees' App. 1-3. As noted in *Richman*, grants of access rights erode an owner's right to exclusive possession of real property and, therefore, are not collateral. 307 Mont. at 448, 37 P.3d 732. Accordingly, the doctrine of merger applies and any potential access rights stated in the original contract for deed or NPI merged, that is, were extinguished, with the deeds actually conveying title.

That the terms of the NPI (and underlying contract) merged with the conveyance deeds, which operated to extinguish any purported access rights, is reinforced by Rose's express grants of two other easements benefitting the COS 2233 parcels (*i.e.*, what is now the Stanzak's real property) upon the recording of COS 2233. These express grants support the conclusion that the parties did not intend any purported access rights referred to in the contract or NPI to be collateral and further reflect the parties' apparent agreement to alter the description of the contract ground originally identified as COS 569.[4]

[4] That Rose expressly granted two different easements to Stanzak's predecessor also strongly demonstrates that Rose and Stanzak's predecessor knew how to create easements when intended. *See* Appellants' App. 4; Appellees' App. 1–3.

3. The NPI could not give rise to the claimed easement-by-reference because it did not sever unity of title.

The easement claimed by Stanzak also fails because the NPI did not sever Rose's unity of title. As noted, express easements must satisfy certain title, severance, and substantive requirements. *O'Keefe*, ¶ 17. And, when property is under common ownership, an express easement thereon arises only upon severance of the intended dominant and servient estates from that common legal ownership. *Id*.; §70-17-105, MCA. When "legal ownership" of the dominant and servient estates are vested in the same party, an easement cannot exist. *Tungsten Holdings*, ¶ 19. "Property must be divided between or among separate owners for an easement to be created because it is fundamental that one property owner cannot have an easement across his or own land." *Ruana v. Grigonis*, 275 Mont. 441, 448, 913 P.2d 1247, 1252 (1996) (recognizing the easement by reference doctrine); *see also Broadwater Development*, ¶ 36; §§ 70-17-105, -111(1)(a), MCA.[5]

As discussed, the NPI did not transfer or convey any legal title to real property—it merely provided notice of a potential future conveyance. *Richman*, ¶ 20; *Tungsten Holdings*, ¶ 16; *Elk Park Ranch*, 282 Mont. at 164, 935 P.2d at 1136-37. Because the NPI did not sever by conveyance Rose's common legal

[5] This Court, acknowledging the *Restatement (Third) of Property: Servitudes*, recognizes a narrow exception to this rule in the context of general plan developments. *See Hudson v. Irwin*, 2018 MT 8, ¶¶ 17-20, 390 Mont. 138, 408 P.3d 1283.

ownership of the dominant and servient estates, the NPI *per se* could create no easement. *O'Keefe*, ¶ 17; *Tungsten Holdings*, ¶ 19. Unity of title was not severed, and so no easement could arise, until Rose conveyed the purported dominant estate to Stanzak's predecessor via a series of delivered and recorded warranty deeds. Appellants' App. 8; *see also Ruana*, 275 Mont. at 449, 913 P.2d at 1253 (deeds severing common ownership decisive). The deeds severing unity of title, however, convey Parcels A, B, C of COS 2233 and C-1 of COS 2276, not property described by reference to COS 569. COS 2233 and COS 2276 do not describe or depict the claimed easement originally shown on COS 569. The conveyance deeds severing common ownership of the Rose and Stanzak properties are decisive.[6] *See Ruana*, 275 Mont. at 449, 913 P.2d at 1253. Because these deeds reference COS 2233 and COS 2276—which do not describe or depict the claimed easement—the claimed easement does not exist.

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[6] Stanzak has cited no legal support for any argument that the contingent, equitable interest acquired by a contract for deed purchaser during the term of the contract sufficiently severs unity of title for purposes of the easement-by-reference doctrine, and a survey of the cases addressing this doctrine do not reflect the existence of any such authority. On the contrary, the cases addressing this doctrine reflect the severance of unity of legal title by deed or comparable instrument. *See O'Keefe*, ¶ 18 (citing cases); *see also Tungsten Holdings*, ¶ 19.

4. Rose enjoyed the right to locate, relocate, or eliminate easements while she commonly owned the COS 569 and COS 648 parcels prior to any sale contract.

Finally, Stanzak mistakenly argues that Rose could not unilaterally relocate or eliminate the easement depicted on COS 569, contending that neither Stanzak nor their predecessors in title were parties to, or benefitted from, COS 648. Rose, of course, had effectively vacated the easement shown on COS 569 by expressly replacing it with another easement on the subsequent COS 648—long before the subject contract for deed or NPI for the COS 569 parcel.

As an initial matter, as Stanzak correctly observes, the District Court's Order on Cross Motions for Summary Judgment did not address the parties' arguments regarding the interplay between COS 569 and COS 648. Because the District Court did not address these arguments, Stanzak's assertions are premature and beyond the scope of this appeal. Should this Court conclude that the NPI is an instrument of conveyance for purposes of the easement-by-reference doctrine, this cause should be remanded for further proceedings to address, in the first instance, the impact of the subsequent recording of COS 648 on the easement depicted on COS 569, amongst other assertions of the parties not addressed by the District Court's Order.

In any case, Stanzak's argument is flawed. The record demonstrates that, at the time COS 648 was recorded, Rose commonly owned the parcels described and

depicted on COS 569 and COS 648, and the NPI and underlying contract for deed were still several years away. Appellants' App. 15-18. When Rose owned both parcels, she enjoyed every right to modify the surveys of either parcel. Furthermore, as discussed, the mere recording of the surveys could not, as a matter of law, give rise to the existence of any easements depicted thereon. *See* § 70-17-105, MCA (servitude cannot be held thereon by owner of servient estate). "If the owner of two parcels attempts to create an express easement over one of the parcels in favor of the other, the purported interest is a nullity[.]" *Broadwater Development*, ¶ 36. This situation prevails at least until the common owner contracts to convey title. As a result, at the time COS 648 was recorded and before the subject contract for deed, the easement depicted on COS 569 did not yet exist and Rose retained complete authority to relocate or eliminate it.

Moreover, contrary to Stanzak's argument that their predecessors in title were not party to COS 648, Rose is one of Stanzak's predecessors in title and COS 648, as adjacent property also owned by Rose, was in the chain of title of COS 569 when the parties executed their contract for deed, particularly because the claimed COS 569 easement traversed what became COS 648. *See Earl v. Pavex, Corp.*, 2013 MT 343, ¶¶ 22-24, 372 Mont. 476, 313 P.3d 154 (constructive notice encompasses conveyances of other parcels by the common grantor; "a prospective purchaser is on constructive notice not only of conveyances *to* the prior owners of

the parcel, but also of conveyances *from* the prior owners of the parcel during each of their respective periods of ownership. … [Therefore], a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the record of deeds or other muniments of title of his grantor."). While holding title to both the purported servient and the dominant parcels to the easement depicted on COS 569, Rose recorded COS 648—which plainly describes a "replacement" easement for COS 569. Because the easement depicted on COS 569 did not yet exist at the time COS 648 was recorded, and because Rose owned all of the real property subject to COS 569 and COS 648 at that time, Stanzak's argument that Rose could not "unilaterally" alter the easement depicted on COS 569 is simply incorrect.

Stanzak's argument is based on the flawed assumption that the easement depicted on COS 569 existed at the time COS 648 was recorded. It did not. It could not arise until the conveyance of the COS 569 parcel—which never happened. Because Rose owned all of the real property encompassed by COS 569 and COS 648, at the time both COS 569 and COS 648 were recorded the easement depicted on COS 569 had not come into being by severance and Rose was free to unilaterally relocate or eliminate it. *Broadwater Development*, ¶ 36.

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VII. CONCLUSION

The easement described and depicted on COS 569, and claimed by Stanzak, never arose and does not exist because the NPI is not an "instrument of conveyance" triggering the easement-by-reference doctrine. The District Court correctly concluded that the NPI does not contain language of conveyance and the recording statutes do not govern the definition of "conveyance" in this context. Appellants' position also is contrary to the merger doctrine, the requirement that unity of title be severed before an easement can arise, and a property owner's right to reconfigure commonly-owned parcels. The District Court correctly granted, on undisputed facts, Rose's motion for summary judgment and quieted title to the disputed easement area in Rose. The District Court's decision should be affirmed.

DATED this 27th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) and (e), Mont. R. App. P., I certify the foregoing Response Brief of Appellees Jim L. Towsley and Betty Smith Towsley is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is 7,556, excluding the covers, table of contents, table of authorities, certificate of compliance, and Appellees' supplemental appendix.

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CERTIFICATE OF SERVICE

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