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STATE OF MONTANA
Case Number: DA 21-0514

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' REPLY BRIEF

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Introduction and Summary of the Argument

The Appellees' argument ignores the text, structure, and purpose of the recording statutes, and their brief does not even mention the controlling statute explaining that an "abstract" of an instrument—here the NPI—is an expressly authorized recordable instrument that has the same legal effect as any other recorded conveyance. Perhaps worse, their argument is not limited to an NPI, but also appears to extend to the logical limit that a contract for deed itself can never constitute an actual conveyance.

And while the Appellees say over and over and over that an NPI is nothing like a conveyance, they never once address § 70–21–305, which provides that "an abstract of conveyance or encumbrance of real property," when recorded, "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."

Thus, when the District Court concluded—and the Appellees now argue—that an NPI is not a "conveyance" because § 70–21–301 "expressly limits the definition of 'conveyance' to certain recording statutes," both ignore the effect of § 70–21–305, which refers back to those same statutes and explains that a recorded NPI, as an "abstract" of a proper conveyance, has exactly the same legal effect as any other conveyance. The Appellees' failure to include even a single mention of

this statute or the concept of an "abstract" is baffling.[1]

Next, the Appellees are wrong about the quality of title that is passed via a contract for deed, and that error permeates all of their arguments. Contrary to their theory that a contract for deed is merely an executory contract that grants only a contingent future right, a contract for deed conveys almost every proverbial "stick in the bundle" of property rights to the buyer, including the right to exclude, the right of control, and the right of quiet enjoyment. Thus, a seller under a contract for deed retains only bare legal title to the property, and from the seller's perspective, the contract for deed functions as lien, with every other incident of ownership passing to the buyer. *See, e.g., Schultz v. Campbell*, 147 Mont. 439, 444, 413 P.2d 879, 882 (1966) (Collecting cases for the rule that "the interest of a vendor in a contract to sell real estate is intangible property. He holds the title of the real estate as security for the purchaser's obligation to pay the purchase price.") And, to be sure, this Court has long recognized that a contract for deed constitutes a conveyance of real property, so there is no good legal or policy reason that it should not satisfy the easement-by-reference doctrine's conveyance element.

Finally, the Appellees' argument that a contract for deed merges into the warranty deed goes too far, and an unequivocal holding to that effect would cause a cascading series of unintended consequences. As

[1] The term "abstract" appears zero times in the Appellees' brief.

will be shown below, it is also wrong as a matter of existing law, which expressly recognizes that a contract for deed is a conveyance just like any other, and so it can create encumbrances that are binding on future purchasers and mortgagors who have constructive notice of them, just like any other recorded conveyance.

I. The Appellees ignore the plain language of the Montana recording statutes that explain an NPI is an abstract of a contract for deed and equivalent for all purposes, along with consistent case law recognizing that contracts for deed are on equal footing with any other conveyance.

The Appellees' entire argument is premised on their theory that because a vendor retains bare legal title under a contract for deed, the purchaser's "ownership interest, whether equitable or otherwise, remains contingent[.]" (Appellees' Br. at 11.) Thus, they apparently contend that any contract for deed—and not just the NPI at issue here—is not a conveyance. But Montana law has long recognized that "a contract for the sale of land is a conveyance of real property within the meaning of the law." *Piccolo v. Tanaka*, 78 Mont. 445, 253 P. 890, 892 (1927). For this rule, *Piccolo* cited § 6936, R.C.M. 1921. That statute said: "The term 'conveyance,' as used in the two preceding sections, 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." This statute survives today, substantively verbatim, as § 70–21–301.

Thus, based on the plain language of § 70–21–301, and on 100

years' worth of Montana case law, a contract for deed is a conveyance just like any other. This idea is further supported by the concept of what the seller of a contract for deed actually retains, which is only a security interest, while the buyer under the contract is vested with "entire beneficial interest in the land." *First State Bank of Thompson Falls v. United States*, 92 F.2d 132, 134 (9th Cir. 1937) (applying and collecting Montana law).[2] This concept also forecloses the Appellees' argument that no easement could come into existence because there was unity of title of the two properties, because at minimum, the quality of their title was different.[3]

In any event, the Appellees' apparent theory that a contract for deed itself is not a conveyance is flat-out wrong, which leads to their next error, and that is the most fundamental flaw in their entire

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[2] The Court has held that if a purchaser dies while a contract for deed is in force and effect, his interest passes to his heirs "as real property." In contrast, if the seller dies during that time period, his interest passes "as personal property." *Kern v. Robertson*, 92 Mont. 283, 12 P.2d 565, 567 (1932). The Court has also held that a purchaser under a contract for deed has an equitable ownership interest sufficient for judgment liens to attach to the real property. *Hannah v. Martinson*, 232 Mont. 469, 471, 758 P.2d 276, 278 (1988).

[3] In *Mularoni v. Bing*, the Court addressed the concept of merger in a similar context, and reiterated the rule that to extinguish an easement by merger, "there must be unity of title or ownership, coextensive in validity, quality, and all other circumstances of right." Thus, an easement is not extinguished by merger when the merged title constitutes only a "fractional part of the other estate." *Mularoni v. Bing*, 2001 MT 215, ¶ 29, 306 Mont. 405, 34 P.3d 497.

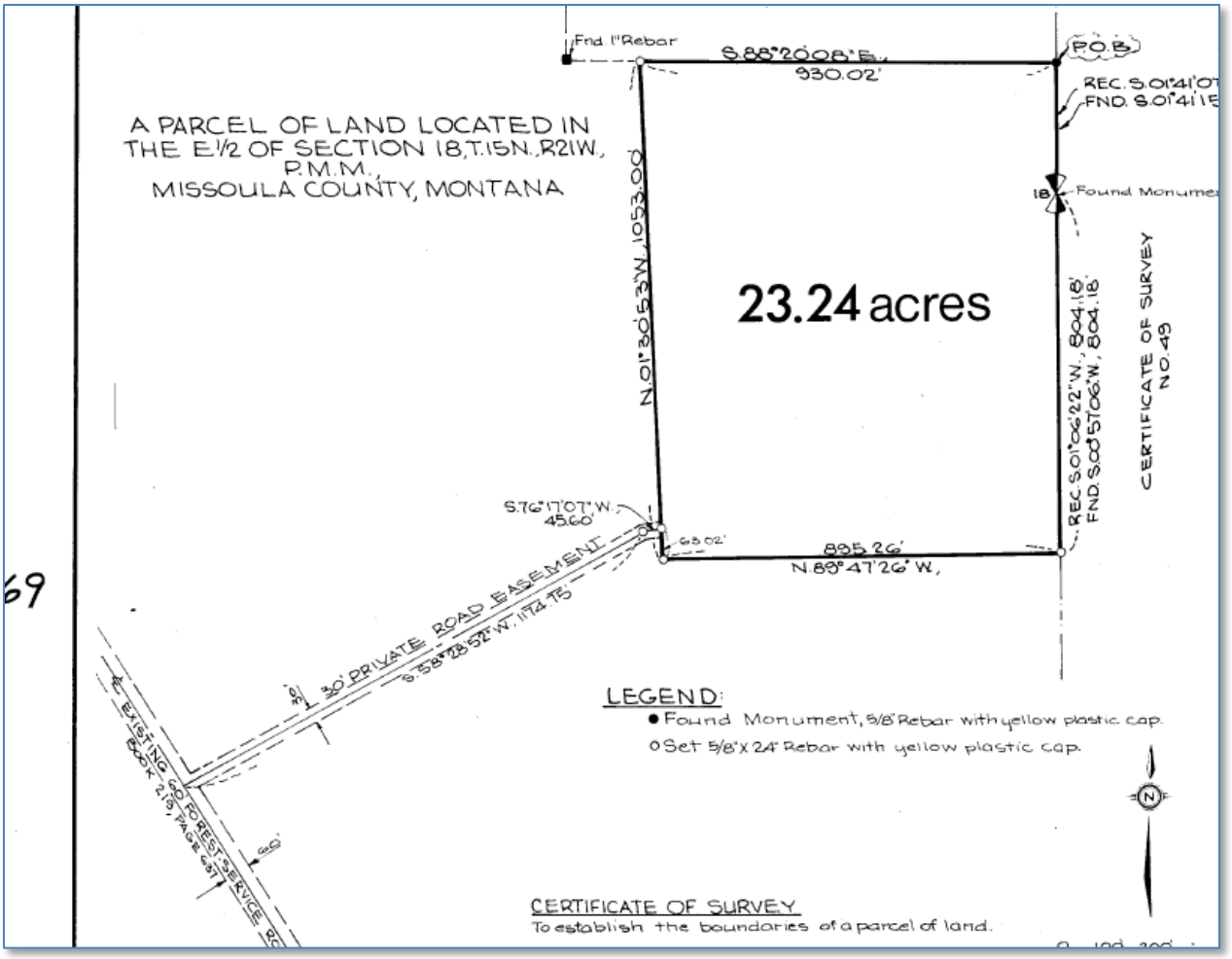
argument—and in the District Court's holding. That error is their failure to recognize, address, or in any way analyze the effect of § 70–21–305 and its relationship with § 70–21–301, *et seq*.

Section § 70–21–305 provides that "an abstract of conveyance or encumbrance of real property," when signed and recorded, "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.) The Appellees do not acknowledge the existence of this statute, and therefore, they do not contest that the NPI here is a proper abstract of the contract for deed, or that § 70–20–115(a)(ii) expressly contemplates that abstracts of contracts for deed can be recorded "in accordance with Title 70, chapter 21."

There is more. An "abstract" is specifically defined and its required content is enumerated in § 70–21–101. Those elements include the names and addresses of the parties, "a description of the real property affected," a reference to the actual document, a short statement of abstracted document, and a reference to where the full document is located. *Id.* Notably, what is *not* required to be in the abstract is specific language of conveyance—because that language is in the referred-to document. Here, the NPI contains all of those items, and the Appellees offer no argument to the contrary.

Here, the NPI identifies the parties as buyer and seller, contains

an extensive legal description, including a reference to COS 569 *and the easement shown* on it. (App. 15.) And the COS could not be any clearer about the purpose of the easement, which is plainly for access to the parcel the Benjamins were buying under the contract for deed, across property that the seller was retaining:



(App. 17.)

If a warranty deed referred to this COS, then each element of the easement-by-reference doctrine would be satisfied, and there would be an express easement for the benefit of the 23.24 acre parcel shown

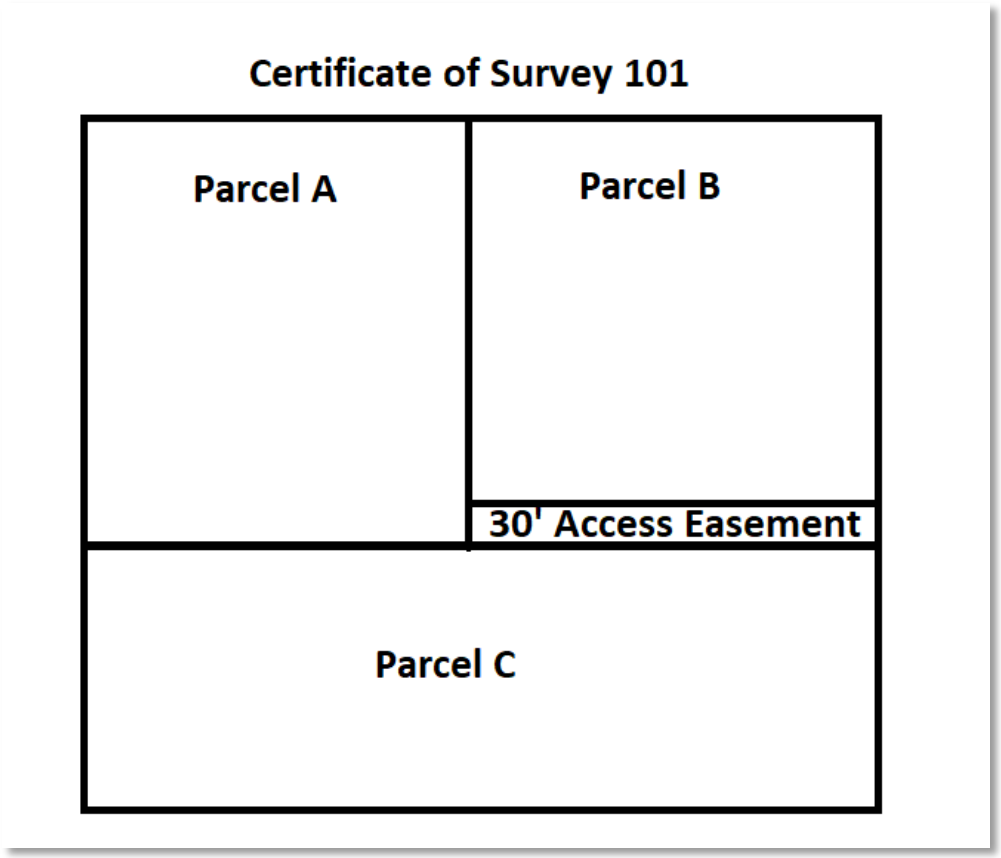
above. Because the NPI is a statutorily authorized abstract of a conveyance, the same rule should apply here, and the Court should conclude that an easement was created via the duly recorded NPI, and there is no evidence the easement was ever abandoned or otherwise extinguished.

Concluding that the language in the NPI created an easement does not require breaking new trail, because the Court has previously recognized that contracts for deed can be sufficient to establish an easement. For example, *Reichle v. Anderson*, the Court expressly affirmed the district court's "determination that the language in the [parties'] contract for deed created an easement" when it included language sufficient to reserve an easement. 284 Mont. 384, 387, 943 P.2d 1324, 1326 (1997). There is no reason to depart from this settled principle when an NPI is a direct stand-in for the contract for deed, and where it is recorded in the grantor/grantee index, and therefore provides constructive notice to all future purchasers of both properties. *See, e.g., Earl v. Pavex, Corp.*, 2013 MT 343, ¶ 36, 372 Mont. 476, 313 P.3d 154 ("[A] prospective purchaser is on constructive notice of recorded servitudes and encumbrances granted by the existing and prior owners of the parcel in question during the respective periods when each owner held title to the parcel.").

II. The Appellees' theory that a contract for deed, or an NPI, cannot effect a conveyance would result in significant unintended consequences.

If a contract for deed is not a conveyance, and if a recorded NPI does not provide constructive notice of that conveyance and its contents, then both buyers and sellers under a contract for deed would be placed in untenable positions.

Consider a situation much like this case, where a buyer enters into a contract for deed to buy Parcel A of COS 101. The seller also owns Parcel B, and the contract for deed is not recorded, but the NPI is. The NPI specifically refers to COS 101, and includes language specifically "granting to the buyer of Parcel A a permanent 30-foot access easement over Parcel B as shown on COS 101." COS 101 looks like this:



Next, while the buyer is still making payments on Parcel A and before the fulfillment deed is released from escrow and recorded, the owner of Parcel B sells that parcel to a third party. Under the Appellees' theory of the case, the owner of Parcel A either (a) never had or (b) just lost her access easement. And a valid easement could not be established later upon recording of the fulfillment deed, because the seller and original owner of Parcel B has no power to grant an easement over property they no longer own. Thus, A would lose the legal access that was part of their bargain with the seller under the contract for deed. That can't be right—but it is exactly the outcome the Appellees' argument would produce.

The same problem arises for any encumbrance that might be placed on the property if an NPI is a not recognized as a direct stand-in for a contract for deed, or if a contract for deed is not treated as a conveyance. One can imagine innumerable problems that might arise under the Appellees' theory, but all of those problems are alleviated by the plain application of the recording statutes and this Court's holding in *Earl v. Pavex*, which adopted the broad notice rule, which places future buyers on constructive notice of recorded servitudes and encumbrances granted by the existing and prior owners of the parcel in question. *Earl*, ¶ 36.

A similar problem would occur under the Appellees' theory that a contract for deed does not sever unity of title for easement purposes. As

their theory goes, because a seller under a contract for deed retains bare legal title, no easement can *ever* be created via a contract for deed. But again, this theory is inconsistent with the Court's recognition *Reichle* that conveyances of less than fee simple absolute are sufficient to establish express easements. It is also inconsistent with long-standing case law that a buyer under a contract for deed has a real property interest in the property conveyed, while the seller under the same contract retains only a security interest. *E.g., Kern*, 12 P.2d at 567. In sum, treating a contract for deed as something that is not a conveyance is not only inconsistent with existing Montana law, but it would also create the likelihood of unintended consequences.

III. The merger doctrine is inapplicable in this context, and the likely results of a contrary holding would upend settled principles related to easements and to constructive notice in general.

The Appellees' argument that the merger doctrine extinguished the easement relies on cases that are factually distinguishable. For example, in *Urquhart*, the Court concluded that covenants in the contract for deed merged into the title—but that case had nothing to do with an easement—and the word does not appear even once in the case. *Urquhart v. Teller*, 1998 MT 119, 288 Mont. 497, 958 P.2d 714. Likewise, the contingent and vague promises of future access in *Richman* were dependent on a series of events that never took place, and the documents identified no specific easement. *Richman v. Gehring*

Ranch Corp., 2001 MT 293, ¶ 5, 307 Mont. 443, 37 P.3d 732.

In contrast, the Court has recognized an exception to the merger doctrine where there are "collateral" agreements, and the distinction creating a collateral agreement is where the seller's obligation can only be performed *after* delivery of the deed. *Tungsten Holdings, Inc. v. Olson*, 2002 MT 158, ¶ 18, 310 Mont. 374, 50 P.3d 1086. In that case, the Court held that easements referenced in a contract for deed *did* merge into the warranty deed, but only because the easements were for the benefit of the *buyer* over lands the seller still retained. Once the buyer owned all of the properties within the subdivision, it no longer had any need for the easements. The easements were also extinguished at that time, because they were vested in a common owner. *Id.*, ¶ 19.

The Court *has* applied this exception to the doctrine of merger where a warranty deed was silent as to future use of an apartment building, but the contracts for the sale of the apartments contained specific stipulations on that future use. *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 99, 405 P.2d 432, 438 (1965), *overruled on other grounds by Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984).

Here, where a property is conveyed with reference to a certificate of survey in a way that otherwise satisfies the easement-by-reference doctrine, that easement is collateral to the actual sale of the land, and should be enforced. More importantly, the easement shown on COS 569 was of no utility until *after* the contract was underway, and the fact

that the parties had entered into a years' long contract for deed shows that the purchaser could reasonably expect to make use of that access in the future. Finally, because the NPI here was a conveyance, and because it was properly recorded, the easement came into being at the time the parties entered into the contract, and the fact that the warranty deed does not mention it does not somehow remove it from the grantor/grantee index, and therefore all future buyers were and are on constructive notice of its existence.

IV. A party cannot unilaterally terminate an express easement by recording a so-called "replacement easement" when the original easement came into existence as a matter of law when the parties entered into the contract for deed and recorded the NPI.

Finally, the Appellees argue that Rose had the "unilateral" right to create a replacement easement. The fact of the matter is that Rose created and recorded a veritable cornucopia of certificates of survey, showing different easements to different parcels. But the relevant conveyance is to the Benjamins in 1977, where the contract for deed specifically conveyed the parcel shown on COS 569.

That contract for deed, and the NPI, specifically referenced the easement, and it is plainly shown on COS 569. This case is really that simple. To the extent that the Appellees claim that the subsequent owners of the properties shown on COS 569—or the Benjamins themselves—had other access, or perhaps never used the easement shown on that COS, it is irrelevant. There is no evidence showing an

express abandonment of that easement, and "[i]mplicit within an express easement by reservation is the idea that the easement is reserved until such time the easement's use is requested." *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶ 49, 298 Mont. 52, 993 P.2d 688. Therefore, non-use, even for an extended period of time, will not terminate an express easement, and the owner of the dominant tenement is not required to make use of the easement as a condition to retaining his interest in the easement. *Halverson v. Turner*, 268 Mont. 168, 175, 885 P.2d 1285, 1290 (1994). Thus, whatever alternative accesses may have been available, and regardless of whether additional easements were granted via different conveyances, the easement came into existence when the property was conveyed with express reference COS 569, and it remains in place today. To the extent any questions remain, they concern only the scope of the easement, and those issues can be addressed on remand.

Conclusion

The district court should be reversed.

June 24, 2022.

/s/ Jesse C. Kodadek

Certificate of Compliance

The undersigned hereby certifies that the body of this brief contains 2988 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 Reply to the following on 06-24-2022:

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