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### Mulberry v. Burns Concrete, Inc. Appellant's Reply Brief Dckt. 45184

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IN THE SUPREME COURT OF THE STATE OF IDAHO

NORA A. MULBERRY and TN PROPERTIES  
LLC, an Idaho limited liability company,

Plaintiffs-Respondents,

v.

BURNS CONCRETE, INC., an Idaho corporation,  
and COVE DEVELOPMENT COMPANY, LLP,  
an Idaho limited liability partnership,

Defendants-Appellants.

Supreme Court Docket No. 45184-2017

Bonneville County Case No. CV-2016-3413

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APPELLANTS' REPLY BRIEF

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Appeal from the District Court of the Seventh Judicial District for  
Bonneville County,  
the Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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## I. INTRODUCTION

The dispute between Appellants Burns Concrete, Inc. (“Burns Concrete”), and Canyon Cove Development Company, LLP (“Canyon Cove,” and together with Burns Concrete “Defendants”), and Respondents Nora A. Mulberry (“Mulberry”) and TN Properties LLC (jointly with Mulberry “Plaintiffs”) arises out of the Undivided Right of First Refusal to Acquire Interest in Real Property (the “ROFR”) attached as Exhibit A to Appellants’ Brief.

None of the factual statements contained in either the Summary of the Proceedings in the District Court or the Summary of Facts, which are set forth at pages 2-8 of Appellants’ Brief, are disputed by Plaintiffs, except to the following limited extent:

Mulberry disagrees with paragraph 6 to the extent it contains a selection of provisions from the Right of First Refusal (“ROFR”) which Appellants deem material, with selective highlighting. Appellants’ Brief, p. 5. The remainder of the paragraph consists of argument.<sup>[1]</sup> *Id.* Mulberry contends that the ROFR is a document which speaks for itself.

As to paragraph 13, Mulberry agrees that the Kirk Burns affidavit contains the language set forth in Appellants’ Brief, p. 7. However, Mulberry disagrees that such affidavit contains only facts. The last sentence of the second paragraph and the entire

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<sup>1</sup> The remainder of “paragraph 6” referenced by Plaintiffs provides:

Thus, the ROFR is a stand-alone contract that does not refer to any other transaction or property, states that it is based on adequate consideration, provides for its renewal or continuation in the event the encumbered property is not sold, and provides for notices to be given through recordation in the real property records – which together establish that the ROFR was intended to bind both Mulberry and her property.

Appellants’ Brief 5.

third paragraph (as copied into Appellants' Brief) consistent of opinion and/or argument, with which Mulberry disagrees.<sup>[2]</sup>

Respondent's Brief 6.

Plaintiffs, however, point to nothing in the record and provide no explanation establishing how or why the summary quoted in note 1 is not factually accurate. Nor do Plaintiffs point to anything in the record or provide any explanation establishing how or why the summary quoted in note 2 below is not factually accurate. Moreover, Kirk Burns establishes in his affidavit that, as the president of Burns Concrete, he is competent to provide the opinions quoted in note 2.<sup>3</sup> *Cf. Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.*, 132 Idaho 295, 306, 971 P.2d 1119, 1130 (1998) (holding that the plaintiff's president was competent to testify as to damage valuations based on "the rule that the owner of property is qualified to testify to its value").

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<sup>2</sup> The portion of "paragraph 13" referenced by Plaintiffs provides:

For these reasons, there is no requirement for or benefit in the consistent use of the two properties, whether for farming, residential development, mining of aggregate materials, or otherwise.

For the foregoing reasons, neither the value nor the use of the Purchased Property (or, for that matter, any of Burns Concrete's additional acreage) would in any manner be enhanced by Burns Concrete's ownership of the ROFR Property, nor would the Purchased Property otherwise be benefitted by common ownership of it and the ROFR Property.

Appellants' Brief 7.

<sup>3</sup> Second Affidavit of Kirk Burns, filed February 15, 2017 ("*2d Burns Aff.*") [R, pp. 63-65].

Plaintiffs' quoted criticisms of the summaries provided in notes 1 and 2 are thus without factual or legal basis.

Accordingly, because the factual contentions set forth in Appellants' Brief are not at issue and Plaintiffs present no additional factual contentions in support of their argument, the pending appeal should be decided by this Court's determination of the law applicable to the facts presented by Defendants in their opening brief.

## II. RESPONSE TO PLAINTIFFS' LEGAL ARGUMENT

### A. Plaintiffs Have Failed To Address Essential Legal Arguments In Appellants' Brief.

As Defendants argue in their opening brief:

Defendants respectfully submit that there are but the following three alternative possibilities here in play, none of which support the conclusion that the ROFR was extinguished by its assignment to Burns Concrete:

- If the ROFR is not "personal" to Canyon Cove, then Burns Concrete may exercise the ROFR irrespective of whether it is "appurtenant" to the Purchased Property, which Burns Concrete owns.
- If the ROFR is "personal" to Canyon Cove but not "appurtenant" to the Purchased Property, then Canyon Cove may exercise the ROFR if either (a) Canyon Cove's attempted assignment of the ROFR was void<sup>4</sup>, or (b) if it was effective, Burns Concrete assigns the ROFR back to Canyon Cove by the deadline for its exercise.
- If the ROFR is both "personal" to Canyon Cove and "appurtenant" to the Purchased Property, then Canyon Cove may exercise the ROFR if both (a) Canyon Cove's

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<sup>4</sup> Plaintiffs contend that "the assignment of the ROFR to Burns Concrete is void[,] and not "extinguished." Respondent's Brief 13.

attempted assignment of the ROFR was void or, if it was effective, Burns Concrete assigns the ROFR back to Canyon Cove by the deadline for the ROFR's exercise, and (b) Canyon Cove reacquires the Purchased Property by the deadline for the ROFR's exercise.

In sum, irrespective of whether the ROFR is held to be personal to Canyon Cove or appurtenant to the Purchased Property, it may yet be exercised in accordance with each of its express and implied terms. And that the ROFR is not “extinguished” under such circumstances is made manifest by the fact that there is but one known state or federal opinion deciding that a legal contract may be held void while it may yet be exercised in accordance with all of its applicable terms – an outlier opinion discussed and distinguished in part A(iv) below that the district court itself ruled was “insufficient to conclude that a personal ROFR is extinguished upon its invalid assignment.” *2nd MSJ Decision 7* [R, p. 80].

Appellants' Brief 12-13 (underscoring added) (footnote omitted).

Although Plaintiffs argue that the ROFR is both “personal” to Canyon Cove and “appurtenant” to the property sold by Mulberry and her deceased husband to Canyon Cove, and then subsequently re-sold to Burns Concrete (which is defined as the “Purchased Property” in Appellants' Brief) – and if so the first two of the quoted alternatives would be inapplicable – Plaintiffs wholly fail to even mention the third alternative or the remainder of Defendants' argument quoted above. Thus, as also argued in Appellants' Brief and not disputed by Plaintiffs:

The law in Idaho relating to the treatment of a right of first refusal for the purchase of land as being a personal contract or servitude, or as being appurtenant to real property, or as running with the land has not been addressed by either of Idaho's appellate courts. But no matter whether this Court determines the ROFR to be personal to Canyon Cove and/or appurtenant to the Purchased Property, the ROFR may yet be exercised in accordance with each of its expressed and implied terms if and when notice is given by Plaintiffs of their intent to sell the ROFR Property. And for this



elemental reason, this Court should reverse the district court's ruling that the ROFR was "extinguished" by Canyon Cove's assignment to Burns Concrete.

Appellants' Brief 29 (underscoring added).

Plaintiffs also fail to even mention, let alone rebut, *any* of the arguments or authorities discussed at pages 20-29 of Appellants' Brief<sup>5</sup> establishing why the district court erred in holding that the ROFR was "extinguished" by Canyon Cove's assignment of it to Burns Concrete.

Based on the Plaintiffs having failed to address the foregoing arguments, this Court could reverse the district court's determination that the ROFR was extinguished without addressing the arguments that were raised by Plaintiffs and are rebutted below. Even so, because the questions of whether the ROFR is personal to Canyon Cove and appurtenant to the Purchased Property have been fully briefed by the parties, and because this Court's determination of these two questions will end the litigation over the questions without a future appeal to this Court, Defendants respectfully request that the Court decide both the "personal" and "appurtenant" questions.

**B. Rebuttal Of Plaintiffs' Legal Argument.**

Plaintiffs' opposition to the arguments made in Appellants' Brief are centered on the following contention:

The district court held that (1) the *burden* of the ROFR constituted a servitude on the *ROFR Property* that runs with the land; and (2)

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<sup>5</sup> See Appellants' Brief at part IV.A(iii) (titled, Legal Principles Applicable to Rights of First Refusal and Their Assignment) and part IV.A(iv) (titled, Discussion and Analysis of Known Adverse Authority).

the *benefit* of the ROFR was personal to Canyon Cove and was appurtenant to the *Purchased Property*. (R., pp. 58 & 92).

Respondent's Brief 7 (emphasis in original). Defendants, however, have read and reread the cited pages of the district court's two memorandum decisions and found no articulated "holding" in them supporting Plaintiffs' contention.

Nevertheless, the district court, Plaintiffs, and Defendants all concur that the burden of the ROFR constitutes a servitude on the ROFR Property that runs with the land, leaving the questions of whether the benefit of the ROFR was personal to Canyon Cove and/or appurtenant to the Purchased Property for this Court to decide.

**(i) The ROFR Should Not Be Held to Be a Personal, Nonassignable Contract.**

Neither of Idaho's appellate courts has decided the question of whether a right of first refusal is a personal contract that may not be assigned by the person granted a right to purchase. And although Defendants acknowledge that the majority of courts having decided the question have held for a variety of reasons that such rights are personal to the grantee, the principles adopted by Idaho's appellate courts and discussed in part IV.A(iii) of Appellants' Brief support this Court holding that a right of first refusal should be assignable unless the right of first refusal were to state otherwise. Plaintiffs' concurrence that the ROFR in this dispute runs with the ROFR Property supports such a holding here, for the elemental reason that parties to contracts that run with the land understand that such contracts are not personal to the contracting parties absent express language to the contrary. Indeed, this Court now holding otherwise will likely surprise numerous other parties holding their own rights of first refusal.

(ii) **The ROFR Should Not Be Held to Be Appurtenant to the Purchase Property.**

As also quoted in Appellants' Brief, the factual basis for the district court's holding that the ROFR is appurtenant to the Purchased Property was limited to the following *argument*: "Though the properties are not contiguous, the proximity between the Purchased Property and the ROFR Property, makes the use of the ROFR Property arguably more useful to the owner of the Purchased Property than to an independent party who does not own nearby property." R, p.91 (underscoring added). And just as the district court cited nothing in the record to support its ruling, Plaintiffs also *argue* without citing anything in the record or identifying any of their alleged "numerous ways": "There are numerous ways in which property across the street and one parcel over from a person's own property would be 'more useful' to that person than to someone not owning any property nearby." Respondent's Brief 12. Thus, although both the district court and Plaintiffs *argue* that the ROFR Property may be more useful to the owner of the Purchased Property than to other persons, neither the district court nor Plaintiffs point to any specific reasons or evidence in the record to support their argument.

Conversely, Defendants cite to the following specific reasons and undisputed facts in the record to establish that the ROFR is no more useful to Burns Concrete, as the current owner of the Purchased Property, than the ROFR would be to its former owner Canyon Cove<sup>6</sup>:

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<sup>6</sup> See Respondent's Brief 12 ("A servitude is appurtenant 'if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of the interest to a successor.'" (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) § 4.5(1)(a)).

- That the Purchased Property is located between and adjacent to two additional parcels (one 50 acres and the other 35 acres) owned by Burns Concrete, with all of the Purchased Property being *on the north side of 81st South* in Bonneville County and with four residential properties constructed along 81st South lying between the road and the Purchased Property.
- That the ROFR Property is located across the road from Burns Concrete's 50-acre parcel *on the south side of 81st South* and to the west of the Purchased Property.
- That not only is the ROFR Property not in any manner adjacent or physically "connected" to (nor directly across the road from) the Purchased Property, but the two properties share no common irrigation system or other utilities, have no common means of ingress or egress, and are subject to no common easements or restrictions by which one of the properties benefits the other – and for these reasons, there is no requirement for or benefit in the consistent use of the two properties, whether for farming, residential development, mining of aggregate materials, or otherwise.
- And that for all the foregoing reasons, neither the value nor the use of the Purchased Property (or, for that matter, any of Burns Concrete's additional acreage) would in any manner be enhanced by Burns Concrete's ownership of the ROFR Property, nor would the Purchased Property otherwise be benefitted by common ownership of it and the ROFR Property.

Appellants' Brief 15-16 (underscoring added) (citations to *2d Burns Aff.* omitted).

Moreover, and as previously mentioned, Kirk Burns, as the president of Burns Concrete (the owner of the Purchased Property), is competent under Idaho precedent to establish each of the factual matters quoted above. *Empire Lumber Co., supra*, 132 Idaho at 306, 971 P.2d at 1130.

Accordingly, based on the authorities set forth in Appellants' Brief at part IV.A(ii) (titled, The ROFR Is Not Appurtenant to the Purchased Property), this Court should rule that the ROFR is not appurtenant to the Purchased Property and that the ROFR may therefore be exercised by its lawful holder, whether that be Canyon Cove (because its assignment of the ROFR is void as it pertains to Plaintiffs) or Burns Concrete (because the ROFR may be assigned under Idaho law).

### III. CONCLUSION

For the reasons discussed above and in Appellants' Brief, Defendants request this Court (a) to reverse the district court's determination that the ROFR was extinguished and that Plaintiffs were the prevailing parties in the proceedings below, together with the district court's award of attorney fees and costs to Plaintiffs, and (b) to award Defendants their attorney fees and costs on appeal.

DATED this 7th day of May 2018.

PARSONS BEHLE & LATIMER

By 

Robert B. Burns

Attorneys for Defendants-Appellants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of May 2018, I caused two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** to be served by the method indicated below and addressed to the following:

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Robert B. Burns