IN THE SUPREME COURT OF THE STATE OF NEVADA

PEAKE DEVELOPMENT, INC., A NEVADA CORPORATION; AND SIERRA ASSOCIATED INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellants,
vs.
R.B. PROPERTIES, INC., A NEVADA CORPORATION; MARINER'S VIEW, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND SOUTHPOINTE PROPERTIES, INC., A NEVADA CORPORATION,
Respondents.

No. 60775

FILED

FEB 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court's grant of summary judgment in a real property action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

I.

The facts underlying this case are fairly straightforward, although the procedural history is tortuous. Because the parties are familiar with the history and their arguments, we address only that information directly relevant to this appeal.

Respondent RB Properties, Inc. (RB) owned four adjoining parcels (Parcels 1, 2, 3, and 7 for purposes of this appeal), and respondent South Point Properties, Inc. (SPP) owned three adjoining parcels (Parcels 4, 5 and 8.2) directly to the south. Because of market conditions, RB

decided to forgo paying the special improvement district assessments on Parcel 2 and lose the property to a tax sale. However, in an attempt to reserve drainage, roadway, and utility access across that and other parcels to roadways on the outer boundaries of both groups of parcels, RB and SPP executed an easement document on January 22, 2002, seven days before the tax sale. Robert P. Bilbray, the owner and president of both RB and SPP, executed the document on behalf of both parties. It read:

GRANT OF PERPETUAL EXCLUSIVE EASEMENT FOR ROADWAY, UTILITIES AND DRAINAGE

> I (WE) SOUTH POINT PROPERTIES, INC., a Nevada corporation and RB Properties Inc., a Nevada corporation . . . for One Dollar and other valuable consideration, do hereby grant and convey to RB Properties Inc., . . . and its assigns, the perpetual and exclusive easement for roadway, drainage and utility purposes over, under, and across that portion of [the properties]. Together with the right to construct, to operate, to add to, to maintain, to remove any and all improvements of every kind and nature and the right of ingress and egress to and over said parcel(s), together with the right to clear and keep cleared any obstruction from the surface or subsurface as may be deemed necessary to insure the safe and proper operation of said roadway, utilities and/or drainage under this grant of easement.

The grant document incorporated by reference an Exhibit A, which described the easement as 80 feet wide and as running across both RB's and SPP's properties. The easement's placement created a point of access between two roadways located on the northern border of RB's properties and the southern border of SPP's properties.

The easement was recorded the next day. On January 29, appellant Peake Development purchased Parcel 2 at the tax sale. After

Parcel 7 was later foreclosed upon, appellant Sierra Associated Investments purchased it at a tax sale on September 23, 2003. RB later sold Parcel 1 to H&R Acquisitions. As part of the sales agreement, H&R required RB to relinquish its rights to the easement over Parcel 1. RB purported to relinquish the 40-foot half of the easement that ran across Parcel 1, triggering the underlying lawsuit for declaratory relief as to easement rights. Respondent Mariner's View, LLC, later purchased Parcel 1 from H&R.

Peake and Sierra argued before the district court that they had an appurtenant easement across the RB and SPP parcels and that the easement survived the tax sale. The district court did not address the tax-sale aspect; instead, it declared the easement to be in gross—that is, personal to RB as opposed to an appurtenant easement attached to the land. On this basis, the district court denied summary judgment to Peake and Sierra and granted summary judgment in respondents' favor. The district court also pronounced the easement invalid ab initio under the doctrine of merger, reasoning that four of the parcels were already owned by a grantor, RB, at the time of the easement's creation, making the grant a nullity. Peake and Sierra appeal this decision.

II.

A.

This court reviews a grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. NRCP 56(c). We likewise review the district court's interpretation of a written easement de novo because a written easement is a contract. *City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. ___, ___, 293 P.3d 860,

863 (2013); *Richardson v. Ga. Power Co.*, 708 S.E.2d 10, 12 (Ga. Ct. App. 2011).

B.

The central dispute on this appeal is whether the easement is appurtenant or in gross. An appurtenant easement has a dominant estate to which the easement is attached and which benefits from the enjoyment of that easement; an easement in gross has no such dominant estate. *Wilson v. Brown*, 897 S.W.2d 546, 548 (Ark. 1995). This is the key difference between the two. *See id.*; *Sunset Lake Water Serv. Dist. v. Remington*, 609 P.2d 896, 899 (Or. Ct. App. 1980).

The appellants argue the easement is appurtenant and the respondents argue the easement is in gross, and each points to the granting instrument's language as support. The parties' reliance on the grant's language is well-placed. Whether an easement is appurtenant or in gross ultimately is a question of the parties' intentions, and the language of the instrument granting the easement right informs our understanding of them. *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246 (2001). A contract is not ambiguous "simply because the parties disagree on how to interpret their contract." *Galardi v. Naples Polaris, LLC*, 129 Nev. ___, ___, 301 P.3d 364, 366 (2013). The parties' interpretations must be objectively reasonable as discerned from the granting language; a party's unreasonable subjective interpretation, especially where not reflected by the instrument's terms, will not prevail. *See generally id. Cf. AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 575 (7th Cir. 1995) (distinguishing objective evidence from subjective interested party testimony).

Here, the grant's language requires a finding that the easement was appurtenant, making it unnecessary to consider evidence beyond the document itself. The grant document does not expressly state that the easement is appurtenant, but several aspects of the granting language unmistakably demonstrate that it is. First, the instrument grants the easement to RB "and its assigns." Although language granting power to assign an easement does not automatically make an easement appurtenant,[1] it does indicate a benefit that runs with the land rather than to the original grantee. The language labeling the easement as "perpetual" also suggests that it runs with the land and transfers to subsequent owners.

Further, the type of easement granted—for "roadway, drainage and utility purposes"—benefits adjacent parcels, but would not benefit a non-adjacent parcel holder. *See* Restatement (Third) of Prop.: Servitudes § 4.5(1)(a) (1998) (an easement is appurtenant when it would be more useful to a successor than to the original owner after that owner has transferred its property interest to the successor). This, too, is characteristic of an appurtenant easement. And the easement designates particular portions of the properties for the placement of the roadway and utilities and gives the holder the right to construct and maintain the roadway, drainage, and utilities; this further demonstrates a benefit that is physically tied to the land and runs to the property owners. Finally, the

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[1]For instance, commercial easements in gross or easements in gross that expressly permit assignment may be assignable. *See Sunset Lake*, 609 P.2d at 899; *Grady v. Narragansett Elec. Co.*, 962 A.2d 34, 42 (R.I. 2009); *Gressette v. S.C. Elec. & Gas Co.*, 635 S.E.2d 538, 540-41 (S.C. 2006).

language "the right of ingress and egress to and over said parcel(s)" demonstrates that the easement was intended to run with the land as it gives a right of access across the land to and from existing roadways. *See Meade v. Ginn*, 159 S.W.3d 314, 321-22 (Ky. 2004) (access easements generally are appurtenant if reasonably necessary to reach the benefitted parcel).

The law favors easements appurtenant, and if an easement fairly can be construed as appurtenant, it should be so construed. *Id.* at 320-21; Restatement (Third) of Prop.: Servitudes §4.5(2) (1998). The grant's language, together with this policy, leads us to conclude that the grant document created an appurtenant easement.

C.

We next consider whether the easement appurtenant also was reciprocal, as this issue affects the merger issues presented in this case.[2] "Reciprocal or cross easements are created by contract between adjacent landowners for the common use of property to enhance the usefulness and value of both properties, usually with respect to ingress and egress." *Meade*, 159 S.W.3d at 317. "The result is the creation of easements appurtenant to both properties enforceable by subsequent grantors of each original owner." *Id.* Thus, if the grant document creates a reciprocal easement, then the easement appurtenant to RB's properties would not

[2]The parties' merger arguments are like ships passing in the night, because Peake and Sierra assert the easement is reciprocal, while RB assumes it is not. Although not adequately briefed, we address reciprocity here because it is necessary to do so to assess the parties' competing positions on merger.

have merged into RB's fee and would be enforceable by subsequent owners.

We again turn to the grant document's language to determine whether, properly construed, it demonstrates that the parties intended a reciprocal easement. *S.O.C., Inc.*, 117 Nev. at 408, 23 P.3d at 246-47. And, to ascertain the parties' intentions, this court must read the grant document as a whole and avoid negating any of its provisions. *Rd. & Highway Builders v. N. Nev. Rebar, Inc.*, 128 Nev. ___, ___, 284 P.3d 377, 380-81 (2012).

The grant document states that "I (we) [SPP and RB] . . . do hereby grant and convey to RB" the easement. Read by itself, this language could indicate a unilateral easement grant solely for the benefit of the properties owned by RB, as RB in fact assumes. However when read with the grant document's description of the easement's placement, it shows that the easement reciprocally benefits both the RB and SPP properties. As RB's merger argument illustrates, a contrary reading makes it pointless to have included RB as a grantor. Furthermore, the grant document maps out the easement. It is 80 feet wide and runs across both RB's and SPP's parcels, creating a point of access between two roadways on either side of these parcel groupings. That the easement ran across all the parcels and created a continuous point of ingress and egress between the properties and the surrounding roadways demonstrates that a reciprocal easement was intended. *See Meade*, 159 S.W.3d at 316-18 (concluding that the parties intended a reciprocal easement when the easement was a continuous roadway across the properties that provided points of access from and between the properties to the surrounding roadways).

We conclude that the grant document, read as a whole, demonstrates that the parties intended a reciprocal appurtenant easement that would both benefit and burden all the properties at issue. This means that RB did not grant an easement across its property solely to itself, and therefore the easement did not merge with RB's fee. *See id.* at 324 n.5 ("A person may not have an easement in his or her own land because an easement merges with the title, and while both are under the same ownership the easement does not constitute a separate estate." (internal quotations omitted)). The easement on RB's properties thus may be enforced by subsequent owners.[3] *See Sluyter v. Hale Fireworks P'ship*, 262 S.W.3d 154, 157-59 (Ark. 2007) (recognizing that once an agreement to create reciprocal easements on adjoining parcels was entered into, the reciprocal easements bound the successor owners of the adjoining parcels).

III.

In sum, the district court erred in finding the easement was in gross and void ab initio. We reverse the district court's grant of summary judgment in respondent's favor and remand for proceedings consistent with this order.[4]

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[3]This reading is further supported because if the easement were not reciprocal, then the easement appurtenant grant from RB to RB would have no discernible purpose. *Cf.* 11 Richard A. Lord, *Williston on Contracts* § 32:9 (4th ed. 2012) (stating that "the court will seek to interpret the contract in a way that will at least effectuate the principal or main apparent purpose of the parties").

[4]RB and SPP also argue on appeal for the first time that the easement was void under NRS 271.420 and NRS 271.600. Because this issue was not raised below, we decline to address it. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. ___, ___, 245 P.3d 542,

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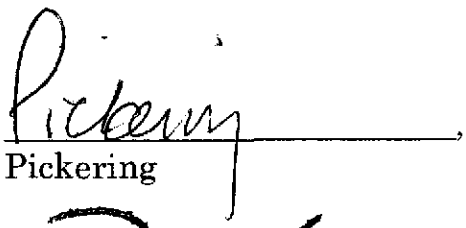
Accordingly, we

ORDER the district court's judgment REVERSED and REMAND this matter.



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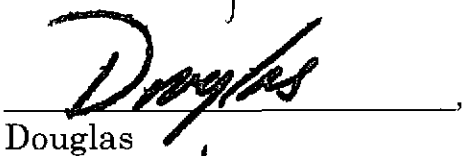

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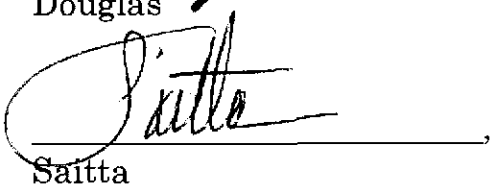

_____, J.
Saitta

cc: Hon. Nancy L. Allf, District Judge
Leonard I. Gang, Settlement Judge
Carbajal & McNutt, LLP
Law Offices of Steven Serle, P.A.
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Eighth District Court Clerk

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544 (2010) ("[A] de novo standard of review does not trump the general rule that a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." (internal quotations omitted)).