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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 46443-2018

JENNIFER PORCELLO,

Plaintiff-Counterdefendant-Respondent,

vs.

The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO and KALYN M. PORCELLO, as Personal Representative

Defendants-Counterclaimants-Appellants.

The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO and KALYN M. PORCELLO, as Personal Representative,

Third Party Plaintiffs-Appellants,

vs.

MARK PORCELLO

Third Party Defendant-Respondent.

RESPONDENT JENNIFER PORCELLO'S BRIEF

Appeal from the First Judicial District for Kootenai County
Case No. CV-16-7343
The Honorable Cynthia C.K. Meyer, District Judge

For Appellant Estates of Anthony J. Porcello and Annie C. Porcello and Kalyn M. Porcello, as Personal Representative:

W. Christopher Pooser, ISB No. 5525
Anna E. Courtney, ISB No. 9279
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
Boise, Idaho 83702-7705

For Respondent Jennifer Porcello:

Terrance R. Harris, ISB No. 5484
Michael E. Ramsden, ISB No. 2368
RAMSDEN MARFICE EALY & HARRIS LLP
700 Northwest Blvd.
Coeur d'Alene, Idaho 83814

For Respondent Mark Porcello:

Peter J. Smith, ISB No. 6997
Jillian H. Caires, ISB No. 9130
Smith + Malek, PLLC
601 E. Front Ave., Suite 9130
Coeur d'Alene, Idaho 83814

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

Jennifer Maggard formerly Porcello ("Jennifer") filed a declaratory judgment action asking the district court to determine the amount owing on the Promissory Note at issue (the "Note") (Joint Exhibit F), because it is an unliquidated and disputed obligation, and Jennifer contends that the Note has been satisfied in full. Jennifer asked the district court for a judicial determination of her rights and duties under the Note and Deed of Trust. Jennifer also asked for a $150,000 setoff against any obligation the district court determined that Jennifer owed to the defendants, which are now The Estate of Anthony J. Porcello and The Estate of Annie C. Porcello, Kalyn M. Porcello, Personal Representative ("Tony" and "Annie"). *See generally* the Verified Complaint for Declaratory Judgment. R., pp. 23-50.

B. Statement of Facts and Course of the Proceedings.

Jennifer agrees with Tony and Annie's recitation of the course of proceedings. Appellants' Brief pp. 22-23.

Jennifer agrees with Tony and Annie's statement of the facts, subject to the following particulars:

Jennifer, Mark Porcello ("Mark") and Kalyn Porcello ("Kalyn") all testified consistently that the plan for paying off the hard money short-term Legacy Group Capital ("LGC") loan was to sell the Woodinville home as soon as possible and use the proceeds to pay off the LGC loan. Tr., Vol. I, p. 156, L. 11 – p. 157, L. 3; Tr., Vol. IV, p. 738, L. 5 – p. 739, L. 22; Tr. Vol. VII, p. 1156, L. 3-16.

Scott Rerucha testified that he talked to Annie, Tony and Mark about the plan to sell the Woodinville home to pay off the LGC loan. *Dep. of Rerucha*, p. 110, L. 14 – p. 111, L. 5.

The only person who apparently did not know the plan for paying off the LGC loan was Tony and Annie's lawyer Joe Mijich. *Dep. of Mijich*, p. 116, L. 18 – p. 118, L. 6. Mijich testified that he was concerned about how his clients Tony and Annie were going to repay the LGC loan. *Dep. of Mijich*, p. 118, L. 8 – p. 119, L. 11.

Kalyn, Kim Parker and Mijich all testified consistently that the Note Mijich drafted for Mark and Jennifer to sign was the mirror image of the note that Tony and Annie signed for the LGC loan. Tr., Vol V., p. 756, Ll. 2 -21; Tr., Vol. VI., p. 969, L. 19 – p. 97-, L. 6; p. 996, L. 22 – 997, L. 24; p. 999, L. 25 – p. 1000, L. 9; *Dep. of Mijich*, p. 110, L. 12 – p. 114, L. 14.

Jennifer and Mark went to Pioneer Title late in the afternoon of September 3, 2014, to sign the closing paperwork on the Hayden Lake home. This was the first time that Jennifer reviewed the Note and Deed of Trust prepared by Mijich. Prior to that, Jennifer thought she and Mark were borrowing the funds to close on the Hayden Lake home directly from LGC. Jennifer was shocked and upset that the Note was for $648,500 when all they were borrowing was $312,044.32. Jennifer refused to sign the Note and Deed of Trust and Jennifer and Mark left Pioneer Title shortly after 5:00 p.m. Tr. Vol. I, p. 158, L. 5 – p. 165, L. 11.

The closing agent at Pioneer Title sent an email to Mijich and Kim Parker on September 3, 2014 at 5:15 p.m. advising them that Jennifer refused to sign the Note and Deed of Trust and that Mark would be calling Mijich to go over the Note. *Plaintiff's Ex. 8.*

Jennifer and Mark both testified consistently that after leaving Pioneer Title by car, they pulled over and made a couple of phone calls. The first call was to Tony who told them to talk to Mijich with any questions about the Note. The second call was to Mijich. When they asked Mijich why the Note was for $648,500 instead of the amount they were actually borrowing, Mr. Mijich told them that Tony and Annie wanted it for that amount since that was the amount of

the LGC note, but that it didn't matter because once the Woodinville home sold the proceeds would pay off the LGC note and Jennifer and Mark would own the Hayden Lake home free and clear. R., p. 166, L. 17 – p. 171, L. 5; r. p. 478, L. 5 – p. 483, L. 7; R., p. 979, L. 13 – p. 982, L. 15 (Kim).

Mijich testified that he only spoke with Mark one time on September 3, 2014 at 3:35 p.m., and he knew that because he reviewed a copy of his landline telephone records from Comcast for phone number 206-621-8691, and those records only showed the one call. Those records became unusable and Mijich has been unable to get additional copies of the Comcast phone records. *Dep. of Mijich*, p. 51, l. 7 – p. 61, l. 13. No Comcast phone records were offered at trial.

Mijich acknowledged that he had a cell phone in September 2014, and that his cell phone number was 206-412-9400. *Dep. of Mijich*, p. 125, l. 25 – p. 126, l. 21. Kim Parker also testified that Mr. Mijich had a cell phone with the number 206-412-9400. Tr., Vol. VI., p. 1015, Ll. 15-20.

Mark's cell phone records show that he called 206-412-9400 three times on September 3, 2014, and that the three calls combined were 25 minutes in duration. One of the calls was at 5:24 p.m. and lasted 10 minutes. This matches exactly the timeframe when Mark and Jennifer testified they spoke with Mr. Mijich after leaving Pioneer Title. *Plaintiff's Ex's. 20, 21 & 22.*

Jennifer and Mark spoke with Mijich on September 3, 2104 at 5:24 p.m. by calling him on his cell phone. Jennifer and Mark both testified clearly that Mijich told them in that conversation that when the Woodinville home sold, the proceeds would be used to pay off the LGC loan and they would own the Hayden Lake home free of any further obligation to Tony

and Annie. Mijich claims the call never happened, but he based that testimony on his review of Comcast phone records for his landline. Mijich never reviewed his cell phone records. The non-party documentary evidence consisting of the email from Pioneer Title and the Sprint records for Mark's cell phone all support the testimony of Jennifer and Mark that the call happened when they said it happened.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Whether Jennifer is entitled to a credit against any sums determined by this Court to be owing on the Note and Deed of Trust in the amount of $150,000 *(Plaintiff's Exhibit 6.)*

III. ATTORNEY FEES ON APPEAL

Jennifer claims attorney fees on appeal.

IV. STANDARD OF REVIEW

Jennifer agrees with Tony and Annie's recitation of the standard of review with the following additions.

Where an order of the district court is correct but based on an erroneous theory, the Idaho Supreme Court will affirm upon the correct theory. *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 577, 850 P.2d 724, 728 (1993); *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984). This doctrine is sometimes called the "right result-wrong theory" rule.

Issues not raised before the trial court will not be considered for the first time on appeal. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 429-430, 95 P.3d 34 (2004); *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 341, 986 P.2d 996 (1999) (citing *Schiewe v. Farwell*, 125 Idaho 46, 49, 867 P.2d 920, 923 (1993)).

V. ARGUMENT

A. After the district court decided Tony and Annie's motion for summary judgment, Tony and Annie waived the parol evidence rule defense to Jennifer's action and engaged in the fight over parol evidence to interpret the Note and the Deed of Trust.

Tony and Annie cannot be heard to complain that the district court weighed the parol evidence against them. Tony and Annie argued in the motion for summary judgment they filed that the Note and Deed of Trust were complete agreements and that parol evidence could not be considered to alter the terms of those agreements. R., p. 208. Although the district court did not determine the motion for summary judgment based on the parol evidence rule, the district court did address the arguments and points of law made by the parties "in the hope that it may aid the parties in resolving the declaratory judgment action." R., p. 216.

The district court's analysis of the parol evidence issue correctly determined that fraud in the inducement is always admissible to show that representations by one party were a material part of the bargain (*Thomas v. Campbell*, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984)) or to averments of fraud, misrepresentation, mutual mistake or other matters which render a contract void or voidable (*Tusch Enterprises v. Coffin*, 113 Idaho 37, 45 n.5, 740 P.2d 1022, 1030 n.5 (1987)). The court also observed that the Note did not contain a merger clause. R., p. 217.

From that time forward through the trial and the written closing arguments, Tony and Annie made no mention of the parol evidence rule as a bar to any of the evidence. Instead, Tony and Annie spent their trial time attempting to show that Mijich did not have a

conversation with Mark and Jennifer; that he did not say what they say he did; that the statement attributed to Mijich was impossible as the sale of the Woodinville house could not pay off the LGC loan. This tactical decision and offer of substantial evidence on the issue is a waiver of their objection based on the parol evidence rule. *Cf. Kraly v. Kraly*, 147 Idaho 299, 303, 208 P.3d, 281, 285 (2009) (failure to object to parol evidence is a waiver). This was not lost on the district court at the time of the memorandum decision. R., p. 472.

B. The district court properly considered parol evidence to interpret the Note and the Deed of Trust.

1. Parol evidence was admissible to show that Tony and Annie through Mijich misrepresented the Note and Deed of Trust as an inducement for Jennifer to sign them and close.

Tony and Annie argue that the district court improperly relied on Mijich's statement that Mark and Jennifer would own the Hayden Lake house "free and clear" when the Woodinville home sold and the LGC loan was paid in full. R. p. 473-478. They argue that this evidence added "new conditions" to an unambiguous note and deed of trust that were prohibited by the parol evidence rule. *Appellants' Brief at 25-26.*

First, Tony and Annie do not attempt to address the availability of parol evidence to show fraud or misrepresentation in the inducement, presumably because the district court did not state this as a basis in the memorandum decision. However, the evidence certainly supported that Jennifer was not going to sign a note and deed of trust that obligated her to borrow more than 200% of the amount she expected to finance on the Hayden Lake house without some explanation. Mijich's explanation, as an agent of Tony and Annie, induced her to sign and close the transaction. Parol evidence certainly was admissible for this purpose. That Tony, Annie and Mijich disavow this statement reveals its materiality and that it

worked as an inducement to Jennifer to sign and close. Jennifer was going to obligate herself for $648,500, an amount coterminous with the LCG loan that encumbered the Woodinville house. This was the house in which Annie and Tony had previously contested Jennifer's interest and had received an arbitration award confirming that she had no interest in the Woodinville house.

2. Tony and Annie argue that the district court did not justify using parol evidence because the contracts were not integrated agreements and did not find fraud or mutual mistake.

Parol evidence is admissible where a written contract is not final or integrated. *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971). It doesn't make sense when the maker of a note and the grantor on a deed of trust obligates herself to more than 200% of the amount she borrowed to finance a house. That's a pretty clear signal that the agreements are neither final nor integrated. Thus, the district court made the observation in the determination that parol evidence was admissible, "It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate for the Court to consider extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed. All of the parties presented extrinsic evidence of the parties' intent." R. p. 472 (Emphasis added).

Testimony at trial amply supports the proposition that the agreements were neither final nor integrated. Mijich testified that he expected that the amount of the Note and Deed of Trust would be adjusted by the sale of the Woodinville house and the payment of the LGC loan encumbering it. Dep. Mijich, p. 97, L. 10 – p. 103, L. 25. Kalyn's testimony was to the same effect. Tr., Vol. VIII, p. 1329, L. 2 – p. 1330, L. 4. This was a loan, consisting of a

note and deed of trust signed by Tony and Annie. Jennifer was a stranger to this note and deed of trust that encumbered real property in which she had no interest. *Defendants' Exhibit AAA.*

It is obvious that the agreements "do not make sense" to the district court, because they were not complete. Tony and Annie struggle with a false premise: that because the district court did not find that the contracts were unintegrated and not final, they weren't. Indeed, the contracts were unintegrated because they specifically were acknowledged by Tony and Annie to be mirror images of the note and deed of trust Tony and Annie had signed with the LGC for the Woodinville house. It stands to reason that if the LGC loan, which would include the loan by Tony and Annie to Mark and Jennifer on the Hayden Lake house were paid, Mark and Jennie would receive the Hayden Lake house free and clear.

It was only the intervening loans that changed this complexion: the new loan on the Woodinville house through Evergreen; the new loan on the Via Venito house. However, there was just no attempt to inform Jennifer of these transactions; indeed, she found out when she received the notice of default and notice of sale in the nonjudicial foreclosure in the first quarter of 2016. Tr., Vol. IV, p. 573, Ll. 1-12; Tr. Vol. V, p. 753, Ll. 1-6.

3. The district court properly interpreted the Note and Deed of Trust as latently ambiguous.

It was obvious to the district court that the Note and Deed of Trust were not the entire agreement between Mark and Jennifer as borrowers and Tony and Annie as lenders. As the district court concluded the transaction did not make sense. Tony and Annie seek to narrow the district court's opportunity to find a latent ambiguity, whether the contracts are an integrated whole, to a term contained in the contracts that has different but reasonable

meanings. Tony and Annie construe *Knipe Land Co. v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011) and *Cool v. Mountainview Landowners Co-operative Association*, 139 Idaho 770, 86 P.3d 484 (2004) to limit latent ambiguities to those situations where a term is susceptible of more than one reasonable meaning. That is not so. *Knipe* states the test for latent ambiguity as follows:

> As provided by this Court in *Potlatch Education Ass'n v. Potlatch School District No. 285*:
>
> > When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.
>
> 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (internal citations and quotations omitted).

Knipe Land Co. v. Robertson, 151 Idaho 449, 454-455 (2011). Under the *Knipe* test, "A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical."

An example of a case where the language of the contract is nonsensical is *Canyon County Highway Dist. No. 4 v. Canyon County*, 107 Idaho 995, 695 P.2d 380 (1985). In that case, the county commissioners divided the county into four highway districts. The county abolished the road and bridge department in favor of the highway district. During the existence of the road and bridge department, all taxes levied for the purpose of secondary road maintenance within the county were maintained in a separate dedicated fund.

Supported by an attorney general opinion, the county reasoned that the highway district was not created until January 1, 1981 and laid claim to all monies remitted to the county from the sales tax fund before that date. The highway district filed a complaint seeking its proportionate share of sales tax refund moneys for 1979. On summary judgment, the district court determined that the highway district essentially replaced the road and bridge department, merely an administrative change, and that the highway district should be entitled to a portion of the sales tax refund monies. The county appealed and based its appeal on the interpretation of a statute that each taxing district's share of sales tax moneys for 1979 should be distributed to the county for distribution to each taxing district. The trial court determined:

> "[Although] the wording of I.C. § 36-3638, as amended, appears unambiguous on its face, the court concludes that there is a latent ambiguity when that section is applied to the facts of this case. Canyon Highway District No. 4 took over substantially the same secondary road system that had been administered by Canyon County through its Road and Bridge Department. After its formation, Canyon Highway District No. 4 took charge of the same equipment, employees and budget that had been used by Canyon County in the operation of the Road and Bridge Department. The same people and the same government function are served by Canyon Highway District No. 4, as had been served by Canyon County."

Id. at 997, 383. The district court then concluded that the electorate's decision to reorganize a governmental function merely resulted in a change of administration, and that the latent ambiguity should permit the interpretation of the statute to remit the money to the highway district. The Idaho Supreme Court agreed, holding, "It would not be reasonable to assume that the legislature intended to allow the county commissioners to turn the responsibility for road maintenance over to the highway district while retaining the sales tax moneys which were used by the county commissioners when they were discharging that responsibility. The

more reasonable interpretation is that the sales tax money should follow the responsibility." *Id.*

So, a latent ambiguity need not only be based on the existence of a term in the contract that is susceptible of more than one reasonable meaning. The district court applied the correct test. There is another basis for finding a latent ambiguity. The terms of the Note and Deed of Trust, applied to the known facts, do not make sense. R., p. 471. That is what the district court did in this case. It is a proper application of the latent ambiguity doctrine. "It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate for the Court to consider extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed. All of the parties in this litigation presented extrinsic evidence of the parties' intent." R., p. 472.

4. Tony and Annie argue that the district court erred in relying on the perceived unfairness of the Note and Deed of Trust to find a latent ambiguity.

In *Knipe Land Co.*, the Court determined that where the language of employment agreements that defined a real estate agent's commission when the buyer forfeited the earnest money gave the real estate agent a higher percentage of the forfeited earnest money than he would earn if the transaction closed and the commission were split between the buyer's and seller's agent, no latent ambiguity was created.

In this case, the district court did not rely on the perceived unfairness of the Note and Deed of Trust; instead, the district court observed that the principal amount due under the Note was more than double the amount needed to purchase the Hayden Lake house. The district court didn't say this was unfair. Rather the district court felt that the Note and Deed

of Trust "do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense." Therefore, the rejection of the unfairness argument in *Knipe Land Co.* is unavailing to Tony and Annie here.

5. Tony and Annie argue that the district court erred in using parol evidence to interpret the Note and Deed of Trust to include new conditions.

Tony and Annie read the district court's interpretation of the Note and Deed of Trust too narrowly when they argue that the district court relied on parol evidence to include new conditions. The court determined that the Note and Deed of Trust did not reflect the entire agreement of the parties. The parol evidence rule does not apply to unintegrated agreements. *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 47 (1991). The Note and Deed of Trust were not integrated agreements and contemplated separate agreements to make sense.

So, when the district court relied on the Mijich telephone call, the Mijich deposition testimony, Kaylin's testimony that the amount of the Note and the Deed of Trust would be adjusted by payment on the LGC note, it makes consistent Jennifer and Mark's testimony that when the Woodinville house sold and the LGC note was paid they would receive the Hayden Lake house "free and clear." R., p. 1164. May 23, 2018, p. 54. When the LGC loan was paid, it paid for the Hayden Lake house debt. R., p. 1184. 5/23 p. 74.

6. Idaho Code § 28-3-117 was properly employed by the district court to interpret the agreements.

Tony and Annie argue that because the parol evidence rule applies to bar evidence of prior or contemporaneous agreements to interpret the Note and Deed of Trust, the first clause of Section 28-3-117 applies to bar it too. This brief has shown the Court that Tony and

Annie abandoned their argument about the parol evidence rule after the decision on summary judgment, never mentioned it again to the trial court during or after trial. Tony and Annie waived the parol evidence rule argument. This brief also has shown the Court that the district court did not consider the Note and Deed of Trust to be integrated agreements, because they did not make sense. Thus, the parol evidence rule did not apply. This brief has shown the Court that the district court correctly applied the latent ambiguity analysis to the Note and Deed of Trust and received parol evidence about the parties' intent.

For these reasons, the first clause of Section 28-3-117 does not apply. Therefore, the section explicitly allows the supplementation or nullification by a separate agreement "if the instrument issued or the obligation is incurred in reliance on the agreement as part of the same transaction giving rise to the agreement." The separate agreement under this section is a defense to the obligation. Idaho Code § 28-3-117.

Tony and Annie also argue that the district court misapplied Section 28-3-117 because it didn't find a separate agreement to be a defense to their obligation to pay the Note. The district court was clear. The statement attributed to Mijich as Tony and Annie's agent that the Note and Deed of Trust would be paid upon the payment of the LGC loan was consistent with the cross-collateral scheme, with Jennifer and Mark's understanding, and with Kalyn's understanding of what was going on. The district court placed stock in the consistency of Jennifer and Mark's reports of this. R., pp. 458, 473.

7. The statute of frauds does not preclude an oral, separate agreement under Idaho Code § 28-3-117.

For the first time on appeal, Tony and Annie raise the statute of frauds as a defense to the "separate agreement" encompassed in Mijich's statement that the Note would be paid

upon the sale of the Woodinville house and the payment in full of the LGC loan. Tony and Annie have waived the defense.

Before trial, Tony and Annie raised the statute of frauds as a defense to Plaintiff's Exhibit 6, Annie's $150,000 note. R., p. 220 – 222. While not the basis for denying Tony and Annie's motion for summary judgment, the district court dispatched of the statute of frauds objection to Plaintiff's Exhibit 6.

Thereafter, Tony and Annie argued in their trial brief that the statute of frauds would negate a gift of the Hayden Lake home or bar Plaintiff's Exhibit 6. R., p. 285 – 286. Tony and Annie took up the application of the statute of frauds to Plaintiff's Exhibit 6 again in their written closing argument. R., pp. 392 – 394; 399 – 402.

Nowhere did Tony and Annie raise the statute of frauds as a defense to the statement by Mijich. The statute of frauds was not even mentioned in the trial transcript. Tony and Annie did not raise the statute of frauds before the trial court to exclude the Mijich statement. They cannot raise it for the first time on appeal. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 429-430, 95 P.3d 34 (2004); *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 341, 986 P.2d 996 (1999) (citing *Schiewe v. Farwell*, 125 Idaho 46, 49, 867 P.2d 920, 923 (1993)).

8. The district court properly utilized Idaho Code § 28-3-117 to take evidence of separate agreements.

The Note at issue is a negotiable instrument as defined by Idaho Code § 28-3-104(1). As such, it is governed by the Uniform Commercial Code ("UCC") § 28-1-101 *et seq.* and, to the extent that the UCC does not displace it, principles of common contract law and equity. Idaho Code § 28-1-103.

Particularly relevant is Idaho Code § 28-3-117, which provides as follows:

> 28-3-117. Other agreements affecting instrument. Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented or nullified by an agreement under this section, the agreement is a defense to the obligation.

The official comment to Idaho Code § 28-3-117 clearly illustrates the concept:

> 1. The separate agreement might be a security agreement or mortgage or it might be an agreement that contradicts the terms of the instrument. For example, a person may be induced to sign an instrument under an agreement that the signer will not be liable on the instrument unless certain conditions are met. Suppose X requested credit from Creditor who is willing to give the credit only if an acceptable accommodation party will sign the note of X as co-maker. Y agrees to sign as co-maker on the condition that Creditor also obtain the signature of Z as co-maker. Creditor agrees and Y signs as co-maker with X. Creditor fails to obtain the signature of Z on the note. Under Sections 3-412 and 3-419(b), Y is obliged to pay the note, but Section 3-117 applies. In this case, the agreement modifies the terms of the note by stating a condition to the obligation of Y to pay the note. This case is essentially similar to a case in which a maker of a note is induced to sign the note by fraud of the holder. Although the agreement that Y not be liable on the note unless Z also signs may not have been fraudulently made, a subsequent attempt by Creditor to require Y to pay the note in violation of the agreement is a bad faith act. . . .

This appears to be a codification of the common law of contracts as illustrated in *Thomas v. Campbell*, 107 Idaho 398, 690 P.2d 333 (1984), and *Mikesell v. Newworld Dev. Corp.*, 122 Idaho 868, 840 P.2d 1090 (1992). In *Thomas*, the Court stated:

> The dispute is not over the meaning of certain terms in the Thomas-Campbell agreement, but rather concerns the representations of a seller made to a buyer to induce the buyer to purchase the land in question. Fraud in the inducement is always admissible to show that representations by one party were a material part of the bargain. *Glenn Dick Equipment Co. v. Galey Construction, Inc.*, 97 Idaho 216, 223, 541 P.2d 1184, 1191 (1975); *Utilities Engineering Institute v. Criddle*, 65 Idaho 201, 141 P.2d 981 (1943); *Kloppenburg v. Mays*, 60 Idaho 19, 34, 88 P.2d 513, 519 (1939); *Wollan v. McKay*, 24 Idaho 691, 135 P. 832

> (1913). Hence, the trial court erred in ruling that the parol evidence rule would preclude admission of evidence which the Thomases offered to establish representations allegedly made fraudulently with the purpose of inducing them into the transaction.

Thomas v. Campbell, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984).

> Likewise, in *Mikesell* the Court stated that:
>
> "When fraud induces a variance between a written contract and the agreement between the parties, the latter will prevail and the trial court is empowered to reform the written instrument to conform to the agreement." *Nab v. Hills*, 92 Idaho 877, 883, 452 P.2d 981, 987 (1969) (quoting *McKelvie v. Hackney*, 58 Wash.2d 23, 360 P.2d 746 (1961)). In this case, the trial court found that the fraudulent representations of Rockland Judd induced a variance between the written deed and the agreement of the parties. That finding is supported by substantial competent evidence and will not be disturbed. Based on that finding the trial court had authority to reform the deed to conform to the agreement actually reached between the Burgesses and Judd.

Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 876-77, 840 P.2d 1090, 1098-99 (Ct. App. 1992).

That modification of the Note is based on representations made by Mijich–instead of representations made directly by Tony and Annie–is of no moment. It is well-settled in Idaho that a principal can be liable for the contract made by his or her agent. See *Wolford v. Tankersley*, 107 Idaho 1062, 1066, 695 P.2d 1201, 1205 (1984), citing *General Motors Acceptance Corp. v. Turner Insurance Agency, Inc.*, 96 Idaho 691, 535 P.2d 664 (1975). Here, Mijich was acting as the authorized agent of Tony and Annie when he made the representations to Jennifer and Mark. In fact, Jennifer and Mark called and spoke to Mijich after 5:00 p.m. on September 3, 2014, based on Tony telling them to talk to Mijich with any questions about the Note. Tr., Vol. I, p. 165, L. 25 – p. 166, L. 10. The district correctly determined that Mijich's statements bound Tony and Annie. R., p. 474.

The representations may not have been fraudulent when Mijich prepared the Note in September 2014. Mijich, Tony and Annie may have all intended at that time that when the Woodinville home sold, its proceeds would pay off the LGC loan and that would satisfy the Note. But, those representations became fraudulent when as the circumstances developed, the Woodinville house did not sell. Mark reached out to Tony and Annie to obtain new financing.

Jennifer had no involvement in these subsequent transactions. When the Woodinville home finally sold in July 2015, Mark needed $400,000 to complete his contract to purchase the Bellevue home from Darrel Bohner. Mark convinced Tony and Annie to borrow $417,000 from Evergreen using the Via Venito home as collateral, and to provide Mark the loan proceeds for the Bellevue home transaction. The Woodinville sale was supposed to close before the Via Venito transaction. Tr., Vol. I, p. 205, Ll. 3-15. The Woodinville home closing was delayed, which resulted in the $417,000 loan from Evergreen closing before the Woodinville home closed. As a result, $198,000 of the Evergreen loan proceeds went to pay off the LGC loan. Tr. Vol. I, p. 188, L. 10 – p. 189, L. 6; Vol II, p. 313, L. 23 – p. 315, L. 7. As a result, Mark was short of the $400,000 he needed to close on the Bellevue home. Mark then convinced Tony to pay him the $157,000 proceeds from the sale of the Woodinville home so he could use that for the Bellevue home. Tr., Vol. II, p. 313, L. 23 – p. 315, L. 7.

According to Kalyn and Tony, Mark's agreement with Tony for the $417,000 loan from Evergreen and the $157,000 proceeds from the Woodinville home was that he would pay all of that back when he sold the Bellevue home. Mark also agreed that he would pay Tony and Annie back the money they had put into the Woodinville home when he sold the Bellevue home. Mark sold the Bellevue home for $1.6 million in 2017. Mark allegedly did

not repay Tony or Annie any of the money they loaned him to purchase the Bellevue home or the money that Tony and Annie put into the Woodinville home. There is no explanation in the record why Tony and Annie did not secure Tony's obligation on these other transactions.

Tony and Annie now argue that all of the additional transfers of cash to Mark so that he could purchase the Bellevue home are somehow linked together with the original Note Jennifer and Mark signed back in September 2014. The district court determined that Tony and Annie failed to develop this argument during trial or in their written closing argument. R., p. 476. As Annie and Tony seek to enforce the Note in violation of the prior agreement that it would be satisfied upon the sale of the Woodinville house and the satisfaction of the LGC loan, *Tony and Annie's actions have become both fraudulent and a "bad faith act."* Idaho Code § 28-3-117, Comment 1.

It took longer than anticipated for the Woodinville home to be sold. Mark was paying all of the interest only payments on the LCG loan while they were attempting to sell the Woodinville home. The $480,000 borrowed from Evergreen in May 2015, and the net proceeds of $472,000 were used to pay down the LGC loan. Kalyn described this as simply transferring part of the LGC loan to Evergreen. The $480,000 Evergreen loan was paid off when the Woodinville home closed. Approximately $198,000 was used from the second Evergreen loan to pay off the LGC loan. The LGC loan was paid in full at that time (July 2015). Mark continues to make the monthly payments on the second Evergreen loan (and is living in the Via Venito property which is the collateral for the second Evergreen loan). The purpose for that loan was to provide Mark money for the Bellevue home.

The agreement that the Woodinville home would be sold and the proceeds used to pay off the LGC loan; which in turn would satisfy any obligation owing by Mark and Jennifer on the Note, became part of the bargain that underlies the Note by operation of Idaho Code § 28-3-117 and the common law of contracts. Accordingly, since the Woodinville home has sold and the LGC loan has been paid off, the Note was satisfied. The subsequent loans Tony and Annie made to Mark to purchase the Bellevue home have nothing to do with the Note. Tony and Annie's argument to the contract demonstrates that they induced Mark and Jennifer to sign the Note and Deed of Trust based on fraud. The district court properly weighed the substantial and competent evidence and supported its decision after finding that the parties agreed that the Note and Deed of Trust were discharged upon sale of the Woodinville house.

9. The district court did not err in finding that Mark and Jennifer were not in default.

Tony and Annie argue that Mark and Jennifer were in default on the Note, which by its terms came due 90 days after closing. The Note was interest only. After the Note matured, Mark continued to make the interest payments until the Woodinville house sold and the LGC loan was paid in full. Tony and Annie did not declare the loan in default until after Mark and Jennifer were divorced and Mark prompted them to declare a default and give notice of trustee's sale. Mijich testified that it happened. Mark denied it. Tr., Vol. II, p. 255, L. 6 – p. 257, L. 12. There is no merit in the argument that Mark and Jennifer were in default at any time before the Woodinville house sold and the LGC loan was paid in full.

C. The district court's interpretation of the parties' intent under the Note and Deed of Trust is supported by substantial and competent evidence.

Tony and Annie posit that the district court did not have substantial evidence to conclude that they were not out of pocket on the Hayden Lake house but borrowed money to

allow Jennifer and Mark to purchase the Hayden Lake house and the loan Annie and Tony obtained was paid. R., p. 477. The parties intended for the Woodinville house, once sold, to satisfy the debt owed on the LGC loan. Implicit in this argument, Tony and Annie take the position that the equity in the Woodinville house was insufficient to pay of the LGC loan. Tony and Annie's calculations of the equity in the Woodinville house and the amount necessary to repay the LGC loan, leaving aside Mark's later requests for refinance and new loans involving the Woodinville and Via Venito houses ignores the acquittal by Tony and Annie of $150,000 at the time the Woodinville house sold. *Plaintiff's Exhibit 6.* It was properly admitted and the failure of Tony and Annie to calculate it into their analysis is fatal to their position that the district court's conclusion is not supported by substantial and competent evidence.

D. The district court did not err in finding the Deed of Trust does not cover future advances.

Tony and Annie claimed that all of the additional loans from Tony and Annie to Mark so that he could acquire the Bellevue home are somehow linked together with the original Note Jennifer and Mark signed back in September 2014.

The following testimony and exhibits were produced at trial:

- Kalyn testified that prior to September 4, 2014, in her meetings with Mark, Annie, Tony and Scott Rerucha about the LGC loan; there was no discussion about refinancing the LGC loan. Tr., Vol. VIII, p. 1351, L. 6-25.

- Kalyn testified that prior to September 4, 2014, in her meetings with Mark, Annie, Tony and Scott Rerucha about the LGC loan; there was no discussion about loaning Mark additional funds to purchase the Bellevue home. *Id.*

- Kalyn testified that Jennifer was not present at any of the meetings she attended with Mark, Annie, Tony and Scott Rerucha to discuss the LGC loan and repayment of the same. *Id.*

- Mijich testified that there was no discussion about refinancing the LGC loan during the 90 day maturity period of the Note. *Dep. of Mijich*, p. 119, l. 13-15.

- Mijich testified that there was no discussion about Tony and Annie making future loans to Mark and Jennifer. *Dep. of Mijich*, p. 136, L. 14 – p. 137, L. 21.

- The Note by its express terms does not provide for any future advances of loan funds or any additional loans to be made in the future. *Joint Exhibit F.*

It wasn't until July 2015–approximately ten months after the Note was signed and seven months after the Note matured–that Mark convinced Tony and Annie to borrow funds from Evergreen using the Via Venito property as collateral, and to loan those funds to Mark to be used to purchase the Bellevue home. *Defendants' Exhibit Z. This transaction had nothing to do with the Hayden Lake home or the Woodinville home.* Due to a delay in closing of the Woodinville home, the Evergreen loan closed first and $198,000 of the loan proceeds were unexpectedly used to pay off the LGC loan. Mark then convinced Tony to provide him the $157,000 proceeds from the sale of the Woodinville home to make up for the missing $198,000 because he needed that money to purchase the Bellevue home. These were new loans, completely unrelated to the Note at issue, for which Mark allegedly promised to repay Tony and Annie from the proceeds of the sale of the Bellevue home.

The district court correctly observed that Tony and Annie's attempts to link all of these loans together and relate them back to the Note Jennifer signed on September 4, 2014 did not make sense. The district court correctly observed that there was no evidence of intent to cover future advance in the mortgage, particularly when Jennifer had no inkling of them and the loans were for Mark's own interests. The trial court correctly distinguished *Biersdorff v. Brumfield*, 93 Idaho 569, 572, 468 P.2d 301, 304 (1970), citing the lack of

credible evidence that the Hayden Lake house would be used to secure subsequent refinances of the Via Venito or Woodinville properties for Mark's own interest. There were no discussions regarding refinancing the LGC loan before the closing on the Hayden Lake Home, nor after the 90 day repayment period had expired and Mark had made interest payment for many months. Tr., Vol. VIII, p. 1351, L. 6-25. The district court also observed that during trial and in written closing argument, Tony and Annie failed to develop the advancement argument, other than to make a conclusory statement that Mark and Jennifer failed to satisfy the terms of the Note and Deed of Trust. R., p. 476. The district court also distinguished *Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 272, 371 P.3d 322, 327 (2016), where the Court took up an erroneous deed of reconveyance and whether it would unjustly enrich the borrower if he were to retain title to the property. The district court observed that the Hayden Lake house was not a refinance; the Note and Deed of Trust matched the amount due on the LGC loan, which was paid in full. The court determined that Jennifer would not be unjustly enriched by receiving the deed to the Hayden Lake house after the LGC loan was paid in full. R., pp. 476-477.

E. Additional issue on appeal.

As to the written note from Annie and Tony to pay off $150,000 toward the mortgage on the Hayden Lake house, in the event that the Court determines that Jennifer owes Tony and Annie money for the purchase of the Hayden Lake house, Jennifer is entitled to a credit against any such sum in the amount of $150,000. *Plaintiff's Exhibit 6.* The evidence of Tony and Annie's obligation was properly admitted and Jennifer should be credited that amount.

F. Jennifer is entitled to costs and attorney fees.

Jennifer claims attorney fees on appeal based on the attorney fee provision in the Note and Idaho Code § 12-120(3). Jennifer is entitled to an award of attorney's fees under Idaho Code § 12-120(3), as her action seeking declaratory and injunctive relief arises directly out of Tony and Annie's attempt to enforce a promissory note and negotiable instrument against Jennifer. Jennifer defended against the judicial foreclosure claim which was necessarily based upon the enforcement of a promissory note.

"Attorney fees are awardable under Idaho Code § 12-120(3) for successfully defending against an action to recover on a note." *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003) (*citing Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct.App. 1986)).

V. CONCLUSION

Jennifer requests that this Court affirm the trial court in all respects and that she be awarded her costs and attorney fees on appeal.

DATED this 18th day of October, 2019.

RAMSDEN, MARFICE, EALY & HARRIS, LLP

By _____
Michael E. Ramsden, Of the Firm
Attorney for Respondent Jennifer Porcello

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2019 I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

W. Christopher Pooser
Anna E. Courtney
Stoel Rives, LLP
101 S. Capitol Blvd., Ste. 1900
Boise, Idaho 83702-7705

____ US Mail
____ Overnight Mail
____ Hand Delivered
____ Facsimile (208) 389-9040
__✓__ iCourt christopher.pooser@stoel.com
anna.courtney@stoel.com

Peter J. Smith IV
SMITH + MALEK, PLLC
601 E. Front Avenue
Coeur d'Alene, ID 83814

____ US Mail
____ Overnight Mail
____ Hand Delivered
____ Facsimile (208) 214-2416
__✓__ iCourt: peter@smithmalek.com

Michael E. Ramsden