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Page v. Pasquali Appellant's Reply Brief Dckt.  
36429

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JACKIE LEE PAGE and TERESA JOLENE  
PAGE,

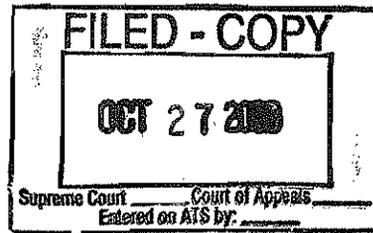
Plaintiffs-Appellants,

vs.

PETE PASQUALI, III, individually; FIRST  
AMERICAN TITLE COMPANY OF IDAHO,  
INC., an Idaho Corporation; THE RUPE  
COMPANIES, INC., an Oregon Corporation  
dba LANDAMERICA TRANSNATION; and  
DOES 1 THROUGH 10,

Defendants-Respondents.

Docket No. 36429



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APPELLANTS' REPLY BRIEF

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Appeal from a Final Judgment in Favor of Respondents Pasquali and The Rupe  
Companies and Against Appellants on a Summary Judgment Motion in the District  
Court of the Fourth Judicial District for Ada County.

Honorable Michael McLaughlin, District Judge presiding.

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## REBUTTAL ARGUMENT

In their argument, Respondents have argued that the November 2002 insurance proceeds were properly credited toward the Pages outstanding balance on the Pasquali Note. The argument proceeds to describe the method of first applying the payment to accrued interest and the balance applied to the outstanding principal balance. The argument advanced by the Pages has never questioned the allocation or division of this payment into interest and principal components. Nor do they contest this allocation on appeal. The Pages do not contest the allocation of any of the payments credited toward the Pasquali Note on the basis of interest versus principal.

The issue in this case is whether the Pages have failed to make payments when due. The issue in this case is how payment in excess of the monthly amount affects the amount due or the due date of future payments. Resolution of this precise issue can only come through analysis and interpretation of the contract language governing repayment in the Pasquali Note.

Respondents have suggested that the escrow instructions and the Pages payment history establishes some course of dealing or pattern that supports the conclusion that a payment of at least \$366.88 each and every month was required to keep the Note current and to avoid a default. Respondents further rely on information from a bankruptcy proceeding involving the Pages to support this conclusion, reasoning, apparently, that the Pages implicitly acknowledge the default by claiming a debt existing on the Note. None of these arguments, however, change the language of the Note.

It should be noted that the Pasquali Note was created in August of 1994 when Pete Pasquali sold the subject property to his son and daughter-in-law. This Note was assumed by William Taylor when he purchase the property in July of 1995. The Pages purchased the property in October of 1995 from Taylor, assuming the Note. It should appear evident that there was no direct negotiation of the terms of the Note between Pete Pasquali and the Pages. There was no course of dealing or pattern of conduct between these parties prior to the time the Note was created that would shed light on the meaning of terms in the Note. The Note existed in its present form on October 18, 1995 when the Pages assumed the rights, privileges and obligations therein.

The payment pattern shows nothing more than the date and amount of payments tendered by the Pages toward repayment of the Note. Each payment was received, divided into portions as interest, principal and fees and credited accordingly. There is nothing about any of the payments made that suggests a change in the language of the Note or the rights, privileges and obligations contained therein.

As a final argument, Respondents claim that the Pages having listed an outstanding debt owed on the Note in a bankruptcy proceeding is evidence that they believed they owed such a debt and that this is implicit recognition of some course of conduct or an admission that Respondents' interpretation of the repayment provisions of the Note is correct. However, it should be recognized that at the time the bankruptcy proceedings were initiated, Pasquali had claimed the Pages were in default and was demanding sums to cure such default. The Pages had filed the bankruptcy proceeding to forestall a foreclosure sale of

their property. They did not agree with the alleged default, but listed the claimed amount as a debt in order to gain protection from the bankruptcy court. The Pages have always disputed the default claimed by Pasquali in 2004 and continue to dispute such default. The Pages, like most people filing for bankruptcy protection, listed all possible creditors and their claims in order to insure protection from them.

The repayment provisions of the Pasquali Note are simple and straightforward: "Payable in monthly installments of \$366.88 each, with the first such payment due on the 8th day of September, 1994, and continuing to be paid in a like sum [the same amount] on or before [privilege of paying ahead of the scheduled date] the 8th day of each subsequent month, until August 1, 2024, at which date the entire then remaining principal balance and all accrued interest shall be paid in full [the amount is not identified here because the timing and amount of future payments cannot be known at the outset]." These provisions are entirely consistent with the escrow instructions which allowed for prepayments. The next paragraph of the Note makes it clear that all payments made shall be first credited toward interest and the remainder, if any, shall be credited toward principal. The testimony presented by Rupe and Weymouth regarding industry practices is entirely consistent with both the escrow instructions and the Note repayment provisions, but it misses entirely the issue of when payments must be considered past due.

The Note identifies an amount to be repaid every month, but it does not create the right for Pasquali to demand more than this amount every month, nor does it create the obligation or privilege for the Pages to pay more every month. The repayment provisions of

this Note can be viewed like a long staircase with the horizontal treads analogous to the monthly intervals described in the note and the vertical risers analogous to the described monthly payments. So long as the Pages total payments remained above the level of the staircase they could not be in default for failing to make payments when due. Only in the event that their total payments slipped below the level of the staircase could they be considered in default for failing to make payments when due. In October of 2004, simple addition shows the Pages' total payments far exceeded the level of the staircase and they were not in default as claimed for failing to make payments when due.

#### CONCLUSION

Respondents arguments regarding interpretation of the application of payments in this matter miss the mark. There is not a course of conduct or implicit admission in this case that alters the plain repayment provision language contained in the Pasquali Note. The *District Court's judgment entered below should be reversed and this matter remanded for further proceedings.*

DATED this 27th day of October, 2009.

GROVE LEGAL SERVICES, PLLC

A handwritten signature in black ink, appearing to read "Randall S. Grove", written over a horizontal line.

Randall S. Grove  
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of October, 2009, I caused two true and correct copies of the foregoing document to be placed in the U.S. Mail, postage prepaid, and delivered to:

Deborah M. Nessett  
Attorney at Law  
5509 East Stageline Drive  
Boise, Idaho 83716

  
\_\_\_\_\_  
Randall S. Grove  
Attorney for Respondents