9-15-2009

Page v. Pasquali Respondent's Brief Dckt. 36429

IN THE SUPREME COURT OF THE STATE OF IDAHO

JACKIE LEE and TERESA JOLENE PAGE,

Plaintiffs-Appellants,

vs.

PETE PASQUALI, III, *individually*;
THE RUPE COMPANIES, INC.,
an Oregon Corporation dba
LANDAMERICA TRANSNATION;
and DOES 1 through 10,

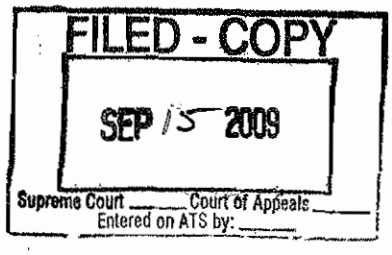
Defendants-Respondents,

and

FIRST AMERICAN TITLE COMPANY
IDAHO, INC., an Idaho Corporation,

Defendant.

Docket No. 36429



RESPONDENTS PETE PASQUALI III AND THE RUPE COMPANIES, INC.'S BRIEF

Appeal from a Final Judgment in Favor of Respondents Pasquali and The Rupe Companies and Against Appellants Jackie Lee Page and Teresa Jolene Page 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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STATEMENT OF THE CASE

A. Introduction

Respondent Pete Pasquali ("Pete" or "Pasquali"), as the holder of Appellants' (the "Pages" or "Teresa") promissory note and the loss payee on their homeowner's policy, used a $21,432.03 insurance payment to reduce the principal on the promissory note, in November of 2002. The terms of the promissory note, the escrow instructions, the custom and practice of the parties, the custom and practice of the escrow holders, and finally, the custom and practice of the escrow industry, permitted and called for advance or additional payments to be credited to interest then owing and the balance to be used to reduce the principal.

The deed of trust also specifically stated that the beneficiary of any fire or other insurance policy had the option to apply the amount collected under the policy as he or she deemed fit, and that such application would not cure or waive any default or notice of default. Pete actually received $29,432.03 in insurance proceeds, but allowed the Pages to keep $8000 and used the balance to reduce the principal on the promissory note as permitted by the deed of trust. The Pages agreed with Pete that the $21,432.02 insurance payment should be credited as a balloon payment against the principal on the note.

In June of 2004, almost two years after the insurance payment, the Pages were once again in default on the note, which ultimately led to the sale of the subject property in a foreclosure sale on July 20, 2005. The underlying lawsuit was filed by the Pages on July 19, 2007, and for the first time the Pages alleged that the $21,432.02 insurance payment credited to principal and interest was really an advance payment of 58 monthly payments and that they were never in default. The Pages had never taken this position or raised this concern before the filing of the complaint.

The Pages contend that the only issues before the court are purely legal pertaining to the interpretation and application of the contractual provisions of the note. However, the Pages fail to account for the interaction between and among the promissory note, the deed of trust, the escrow instructions, the custom and practice of the parties, the custom and practice

of the escrow holders and the escrow industry's custom and practice in interpreting the subject note. The district court granted summary judgment in favor of Pete and Respondent The Rupe Companies, Inc. ("Rupe") and against the Pages on all causes of action.

B. Pete Pasquali and the Subject Property

Pete Pasquali purchased a piece of property near Idaho City and built a home on the property. When his wife died, Pasquali sold the property to his son, Romano Pasquali and his wife on August 10, 1994. [Pasquali Decl.,¶¶2,3] The sale was secured by a deed of trust and a promissory note in the sum of $50,000 (the "Pasquali Note") [Pasquali Decl.,¶3, Exhibit A]. The interest rate on the note was 8%, with monthly payments of $366.88. Escrow instructions were signed, appointing Boise Title and Escrow as the escrow holder ("Original Pasquali Escrow Instructions") [Pasquali Decl., ¶3; Exhibit A]

About a year later, Romano sold the property to his wife's uncle, William Taylor, on July 31, 1995. [Pasquali Decl., ¶4] As part of the sale, William Taylor assumed the Pasquali Note and the original escrow instructions.[Pasquali Decl.,¶4; Exhibit B] Soon after, William Taylor sold the property to the Pages, on October 18, 1995. [Pasquali Decl., ¶5] The Pages assumed the Pasquali Note and the original escrow instructions. In addition, they signed a promissory note in the sum of $7000 in favor of William Taylor. [Pasquali Decl., ¶5; Exhibit C] At the time the Pages assumed the Pasquali Note, the remaining principle balance was $48,909.56. [Pasquali Decl., ¶5; Exhibit O] The monthly principle and interest payment was $366.88, with a $2 escrow fee charge, for a total of $368.88. The Pages were also responsible for maintaining a homeowners' liability policy on the property in favor of Pasquali, as the loss payee. [Pasquali Decl., Exhibit C, Escrow Instructions, ¶14]

Sometime in 1995 the Pasquali escrow account was transferred from Boise Title and Escrow Company to Transnation Title and Escrow Company ("Transnation"). [Pasquali Decl., ¶6; Weymouth Decl., ¶3, Exhibit R] Transnation was responsible for collecting payments from the Pages and disbursing the funds to Pasquali until 2003. [Weymouth Decl., ¶3] Transnation was not named a party to this action.

C. The Rupe Companies, Inc., Escrow Holder

Rupe is an Oregon corporation that operated long term escrow companies in both Oregon and Idaho. Ann Rupe was the principle of the company. Ann had over 18 years of experience owning and working in the long term escrow industry. In 2003, Rupe acquired over 400 escrow accounts from Transnation. Rupe was not the escrow holder who handled the November 2002 insurance payment. [Rupe Decl., ¶¶3,5]

D. The Pages' History of Defaults and Note Payments

The Pages began to default in payments beginning in 1996. They were consistently late or they made no payments at all for several months at a time. [Pasquali Decl.,¶8; Exhibit Q] In February of 1998 the Pages were behind in their payments to Pasquali in the amount of $3,319.92. A demand was made on the Pages to pay on February 3, 1998. [Pasquali Decl., ¶8, Exhibit E] At the same time, the Pages were also in default on their note to Taylor for $1000 and had failed to pay property taxes for 1996 and 1997, for a total delinquency of $1294.51. Taylor filed a notice of default on February 4, 1998. [Pasquali Decl., ¶6, Exhibit D] The language in the Demand letter dated February 3, 1998 stated:

> "THE TOTAL [OWED] TO BRING LOAN CURRENT IS $3552.26, PLUS PAID RECEIPTS. . . THE HISTORY OF THIS ACCOUNT REFLECTS THAT PAYMENTS ARE BEING MADE CONSISTENTLY LATE EVERY MONTH, WHICH IS IN DIRECT CONFLICT WITH THE TERMS OF YOUR NOTE AND DEED OF TRUST. YOUR NOTE REFLECTS THAT THE PAYMENTS ARE DUE ON OR BEFORE THE 8TH DAY OF EACH AND EVERY MONTH. . . **ADDITIONAL AMOUNTS ADDED TO THE MONTHLY PAYMENTS MADE ARE APPLIED TO THE PRINCIPAL BALANCE AS REFLECTED IN YOUR ESCROW AGREEMENT, NOTE AND/OR DEED OF TRUST, AND *ARE NOT APPLIED TO THE NEXT MONTHS PAYMENT.*"** (All caps in the original, emphasis added) [Pasquali Decl., ¶8, Exhibit E] the This language is significant because it shows that as early as 1998 the Pages were aware of how the principal and interest were being allocated by the escrow holders and that

additional amounts added to any monthly payment would be applied to the principal and not applied to the next month's payment, contrary to the position now taken by the Pages.

E. Insurance Proceeds and Pete, the Loss Payee

In 2002, the roof of the Pages' house collapsed after a heavy snow. Pasquali learned from the Pages' insurance company investigator that the Pages had removed roof supports in their effort to add a second story to the house, causing the roof to collapse. [Pasquali Decl., ¶10] The collapse of the building diminished Pasquali's interest in the property and he was the loss payee on the Pages' homeowners' policy. [Pasquali Decl., ¶11, Exhibit F] The Pages told Pasquali that they had hired an attorney to sue their insurance company, Allstate, as it was denying coverage. [Pasquali Decl.,¶11]. The attorney working on the matter was Kevin Dinius of White, Peterson law firm. Attorney Dinius was successful in obtaining a partial settlement from Allstate on the Pages' claim, in the sum of $29,432.03. On October 11, 2002, a check was mailed to Pasquali from Attorney Dinius in the sum of $29,432.03. [Pasquali Decl., ¶11, Exhibit F]

Pasquali intended to use the entire proceeds to pay down the principal of the Pasquali Note. However, Teresa Page called Pasquali and asked him if he would give her $8000 from the $29,432.03 settlement proceeds to use to pay debts and other living expenses. She also agreed that the $21,432.03 should be used as a balloon payment on the Pasquali note. Teresa told Pasquali that she expected to get a lot more money from the insurance company and that when she did, she would pay off the balance of the note. [Pasquali Decl., ¶11; Exhibit G]

Pasquali agreed to Teresa's request with the understanding that the balance of $21,432.03 be disbursed to him. [Pasquali Decl.,¶12] This is confirmed by Attorney Dinius, who, in a letter to the Pages and Pete, states: "Today (Monday, November 19, 2002) I issued a check in the amount of $21,432.03, made payable to Pasquali Pasquali, III. This check is being forwarded to Transnation Title, to be paid into account number 946862 for the benefit of Pasquali Pasquali, III." [Pasquali Decl., ¶12, Exhibit G]

On November 21, 2002, Pasquali sent a handwritten note to Transnation asking that they apply the $21,432.03 to his account. [Pasquali Decl., ¶12, Exhibit G] Rupe was not the escrow

company at this time. The Pages never objected to this.

Transnation credited the Pasquali account with $21,432.03 on November 20, 2002, allocating $201.80 to interest then owed and $21,228.32 to principal, pursuant to the terms of the Pasquali note and custom and practice for long term, simple interest notes. [Pasquali Decl., ¶¶3, 16, Exhibit A; Weymouth Decl., ¶7; Rupe Decl., ¶8].

The Pasquali Note specifically states in the fourth paragraph:

> **"Unless otherwise specified hereinabove; each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited."**

The Note further states in the second to last paragraph:

> "Interest on the debt evidenced by this note shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged or received under law; any interest in excess of that maximum amount shall be credited on the principal of the debtor or, if that has been paid, refunded. ***On any acceleration or required or permitted prepayment, any such excess shall be cancelled automatically as of the acceleration or prepayment or, if already paid, credited on the principal. This provision overrides other provisions in this and all other instruments concerning the debt.***

The original escrow instructions state in relevant part:

> **All payment shall be credited first to the interest then due, and the balance to the principal.** [¶10]
>
> **Buyers may prepay at any time.** [¶8] [Pasquali Decl., Exhibit A]

As was their custom and practice, Transnation sent receipts to both Pasquali and the Pages showing this payment and how interest and principal was credited. [Weymouth Decl.,¶12] Further, in December 2002, Transnation provided the Pages with a 1098 Mortgage Interest Statement which showed that $21,228.32 was credited to the Pasquali note as principal and that $201.80 was credited to interest. [Weymouth Decl.,¶13, Exhibit P] Prior to the $21,432.03 payment, the balance on the Pasquali note was approximately $44,130. The 1098 showed that the

principal on the Pasquali Note, as of December 31, 2002, was reduced to **$22,630.08**.

Thereafter, the Pages made 17 payments between November 20, 2002 and June 11, 2004.[1] Payments stopped after June of 2004. [Rupe Decl.,¶¶9, 10; Exhibit O] The Pages never once objected or stated that they had actually made 58 advance monthly payments in November of 2002, nor did they object to the reduction of the principal on the Pasquali Note, until the Complaint was filed on October 17, 2007, almost five (5) years after the November 2002 payment.

F. Final Default and Sale of Property

On October 6, 2004, a Notice of Default was served on the Pages for their failure to make payments after June 11, 2004, and for delinquent 2003 property taxes. The Pages were also in default for failing to provide evidence of homeowner's liability insurance on the property. [Pasquali Decl.,¶¶14,18; Exhibit H; Exhibit A, Escrow Instructions] On January 8, 2003, Allstate had sent Transnation a Notice of Non-Renewal on the Pages' property (Transnation mailed the letter to the Pages and Pasquali). [Pasquali Decl.,¶18; Exhibit H] The Pages never provided any evidence that they obtained any other liability insurance.

The Pages did not cure their default for nonpayment, delinquent taxes, or failure to maintain a homeowner's policy. Sale of the property was scheduled for February 24, 2005. [Pasquali Decl., ¶18, Exhibit H] However, on February 24, 2005, the Pages, represented by an attorney, filed a Chapter 13 bankruptcy proceeding, for the purpose of stopping the sale. The Pages were successful in stopping the sale of the property that day. [Pasquali Decl.,¶19; Exhibit I] The Pages hired an attorney to file their bankruptcy proceedings. [Pasquali Decl., Exhibit I] They also acknowledged their debt to Pasquali in the Chapter 13 Plan.[2] [Pasquali Decl., Exhibit I] On May 18, 2005, the bankruptcy trustee dismissed the Pages' bankruptcy proceeding for the Pages'

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1 From December of 2002, the Pages made the following payments: December 9, 2002 - $370, February 5, 2003- $370, March 3, 2003 - $370, April 21, 2003 - $370, May 5, 2003 - $370, July 7, 2003 - $1110- $302.17 was credited to interest, $804.08 was credited to principal, August 19, 2003 - $370, September 16, 2003 - $370, October 23, 2003 - $370,November 21, 2003 - $375- the Pages were once again informed that they were in default as their payments were due on or before the 8th of each month, in a letter dated November 26, 2003 from LandAmerica Transnation. [Rupe Decl.,¶9; Exhibit Q], December 23, 2003 - $373, February 5, 2004 –$ 375- the Pages were again informed that they were in default [Rupe Decl.,¶9; Exhibit Q], March 9, 2004 - $380, March 25, 2004 - $370.63, April 12, 2004 - $370, May 5, 2004 - $370, June 11, 2004 - $370.

2 Creditor: Pasquali Pasquali; Regular Payment: $373.63; Total in Default: $3779.93; Frequency of Payments: 48, at ¶4.2.2.

failure to make Ch.13 payments. On May, 31, 2005, the sale was rescheduled for July 20, 2005. [Pasquali Decl.,¶19; Exhibit H; Exhibit J]

On July 20, 2005, the Pages filed another Chapter 13 bankruptcy case, filed 8 minutes after the sale of the property to a third party.[3] Again, the bankruptcy proceeding was intended to stop the sale, but did not because the bankruptcy proceeding was untimely. [Pasquali Decl., ¶21; Exhibit K] On September 1, 2005, this bankruptcy proceeding was also dismissed by the bankruptcy trustee for the Pages' failure to appear at the meeting of creditors. [Pasquali Decl.,¶22; Exhibit L][4]

The Pages were represented by an attorney in the first bankruptcy, but never once argued that they had purportedly made 58 advance payments on the note. In fact, the Pages acknowledged that they were in arrears in the amount of $3779.93.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondents assert the issues in this appeal are as follows:

1. The Pages did not submit any evidence that created a genuine issue of fact that the November 2002 payment should have been credited toward 58 future monthly payments.
2. The District Court did not err in determining that the insurance lump sum payment was properly credited first to interest and then to principal based on the Pasquali Note, escrow instructions, deed of trust and the practice and procedure of the escrow industry.
3. Respondents are entitled to an award of attorney's fees and costs on appeal against the Pages and their Attorney as the appeal is not supported by any facts or warranted under existing law and cannot be supported by a good faith argument for an extension,

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3 Once again, in the Chapter 13 Plan, ¶4.2.2, Pasquali was named as a creditor, with the total amount in default at $4879.93.

4 The Pages filed a Chapter 7 bankruptcy proceeding on January 5, 2006. [Pasquali Decl.,¶23; Exhibit M] On February 13, 2006, it was dismissed by the Trustee for the Pages' failure to appear at the meeting of creditors. [Pasquali Decl.,¶24; Exhibit N]

modification, or reversal of existing law. This appeal was brought and maintained frivolously, unreasonably, and without foundation or merit.

ARGUMENT

A. Introduction

The Causes of Action stated against Pasquali and Rupe were: (1) Negligence against Rupe, (2) Breach of Contract against Rupe, (3) Breach of Contract against Pasquali, (4) Breach of Fiduciary Duty Against Rupe, and (5) Infliction of Emotional Distress against Pasquali and Rupe. The gravamen of all of the Pages' claims was that *they* made a lump sum payment of $21,432.03 on November 20, 2003, and that the lump sum was not credited to future monthly payments as it should have been under the terms of the Pasquali Note.

The district court confirmed that the Pages conceded that Rupe did not owe a fiduciary duty to the Pages and thus granted summary judgment on the Breach of Fiduciary Duty cause of action outright. The district court also found that since there was no showing of any physical injury as a result of Pasquali or Rupe's actions, summary judgment was summarily granted as to the Infliction of Emotional Distress against Pasquali and Rupe.

As to the balance of the causes of action, the district court ultimately found that there was no genuine issue of material fact regarding the November 2002 payment, holding that no evidence had been submitted by the Pages that would support their claim that the November 2002 payment should have been credited toward 58 future monthly payments. Further, the Pages failed to submit any evidence that the November 2002 payment was not credited as dictated by the Pasquali Note and escrow instructions. Finally, the Pages failed to provide any substantive, admissible evidence supporting the contention that other payments were not properly recorded or applied to the Pasquali Note. [Clerk's Record ("CT"):86-87] The district court did not address

the other arguments raised by Pasquali and Rupe, in light of its decision concerning the application of the lump sum payment. [CT:87]

On appeal from the grant of a summary judgment, this Court's standard of review is the same standard used by the district court originally ruling on the merits. *BMC West Corp. v. Horkley*, 174 P.3d 399,402 (ID 2007). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56. The burden of establishing the absence of a genuine issue of material fact is on the moving party. *Hayward v. Jack's Pharmacy, Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005). However, if the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving parties. *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006).

The non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case in which that arty will bear the burden of proof at trial. *BMC* at 402. Moreover, the non-moving party cannot withstand summary judgment when there is only a "slight doubt as to the facts," as "there must be sufficient evidence upon which a jury could reasonably return a verdict resisting the motion." *Id* at 402.

The Pages failed to submit any admissible evidence in opposition to the summary judgment motion and now solely rely on their interpretation of the contractual language of the promissory note. The Pages fail to acknowledge the language of their promissory note, in conjunction with the language of the escrow instructions, the accepted practice and procedure for a long term escrow note, the fact that the $21,423.03 payment was made by Pete, not the Pages, and most

importantly, that in 2002 the Pages agreed that the $21,423.02 insurance payment should be used as a balloon payment against the principal of the Pasquali note.

Not until five years after the insurance payment was made, and three years after the sale of the property, did the Pages first contend, by way of their complaint, that the $21,423.03 was a payment made by them to cover 58 monthly payments. The Pages cite only out of state legal authority to support this contention, which was rejected by the district court when submitted by the Pages in a motion for reconsideration. The district court denied the motion, holding that although the cases exhibited some similarities to the issues faced by the court, none of them were factually similar to the present case and did not provide controlling authority to grant reconsideration. [CT:93]

There should be no doubt, upon a review of the facts and case law, that the district court's summary judgment should be confirmed.

B. The November 20, 2002 Insurance Payment

The facts are undisputed that the Pages knew or should have known by the end of December 2002 how the interest and principal were credited on the $21,423.03 insurance payment and they never objected. They did not object until they filed their complaint on October 17, 2007.

The truth is and the facts show that the Pages knew that the principal and interest were properly credited in November of 2002 and they accepted the benefits of the reduction in principal. In fact, the Pages admit that they knew that the $21,432.03 insurance payment would be used to reduce the principal on the note. [Teresa Page Decl., ¶4] Moreover, the Pages made 17 mortgage payments ***after*** the November 2002 payment. The Pages also saw the interest and principal credited in their receipts, were told by their own lawyer that the $21,432.03 was being made on Pasquali's behalf, and in their discussions with Pasquali. [Pasquali Decl., ¶11] The Pages also knew as early as 1998 that any monthly payment in excess of interest due would be used to reduce the principal owed on the note at that time of payment. The Pages never objected.

C. Payments Were Properly Credited to Principal and Interest

Transnation, not a party to the action, credited the principal and interest in November of 2002. As stated in both the Rupe and Weymouth Declarations, their practice and procedure, as well as that of the escrow industry, was to apply a payment to first reduce the interest than owing and then apply the balance to reduce the principal, unless the escrow instructions stated differently.

D. The Insurance Proceeds were Properly Credited to Principal and Interest

The specific terms of the original deed of trust granted Pete the contractual right to use the $21,432.03 insurance payment to reduce the principal. [Pasquali Decl., Exhibit A] The original deed of trust, which was assumed by the Pages when they purchased the subject property, stated in relevant part:

"A. To protect the security of this Deed of Trust, Grantor Agrees:

* * * *

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy *may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine*, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Grantor. *Such application or release shall not cure or waive any default or notice of default* hereunder or invalidate any act done pursuant to such notice." (Emphasis added)

Thus, no matter the theory promulgated by the Pages, the $21,432.03 insurance payment was properly applied to principal as Pete had the right to determine that it should be used to pay down principal. The deed of trust also states that such monies will not cure any default. Clearly, none of the $21,432.03 could be considered advance payments made by Pages.

E. Cases Cited By The Pages Are Not Applicable

The cases cited by the Pages are not factually or legally relevant to the facts of the case before the Court.

In the first case cited by the Pages, *Northern Savings & Loan Ass'n v. Casey*, 143 Wash. 596, 255 P. 659 (1927), the specific facts are not clearly spelled out, but what can be ascertained is

that defendant made irregular payments and was declared in default. However, defendant made late payments after default, which payments were accepted by the plaintiff. The court simply noted that defendant's payments were in excess of what was due on the note because payment was accepted after default was declared.

In *Bradford v. Thompson*, 470 S.W. 2d 633 (Texas 1971), the plaintiffs assumed the payment of two liens secured by promissory notes. They paid off the first lien ahead of maturity date. Plaintiffs then began increasing their payments on the second note with the intent to pay it off ahead of its maturity date, but were denied the right to prepay the second lien note in its entirety. The note specifically stated that the payments on the note could be made on or before a certain day of each month. Plaintiff stopped making payments on the second note. When defendant attempted to hold the plaintiffs in default, the court found that in this instance it was not a question of application of payments, but rather whether an excess payment in one month should be applied to satisfy a required payment in a subsequent month when an obligation calls for payments "on or before" a certain day of each month. Because the plaintiffs could make a payment for a subsequent month in an earlier month under the terms of the note, the plaintiffs were found not to be in default because they had made advance payments.

In the present case, the Pages had the right to prepay the note and the terms of the note provide how an excess payment is to be applied. There is no discussion in the *Bradford* case as to how the note handled excess principal or interest. The Pages argue that the inclusion of the phrase "on or before" in the Pasquali note allowed the Pages to pay early each month, but that they could not pay more than the monthly stipulated sum given the absence of the phrase "or more", but at the same time they also contend that Pasquali could not demand additional payment or claim a default if the total number of payments exceeded the amount then due under the note. However, the Pages did not make excess payments and Pete did not demand any additional payments not yet due.

Isaacs v. Bishop, 249 S.W. 3d 100, 112 (Texas 2008) presented rather unique circumstances, where each party was accused of wrongdoing and they each established, through trial, recoveries against each other. The trial court offset the recoveries against each party and

they both appealed stating this was in error. Plaintiff had sued for foreclosure on a note against the defendant, and defendant had sued for fraud (plaintiff's attorney had inserted a "surprise a-hair-trigger" default provision after defendant reviewed the note, but before he signed it) and intentional infliction of emotional distress. Defendant prevailed and was awarded a large judgment. However, he owed more on the note than the judgment award, so the trial court offset the tort damages against the contractual monies owed on the note. The appellate court found that it was error to offset the tort damages against the unmatured note, citing *Bradford* as authority that a payment made above the scheduled amount, unless specifically directed to be applied to principal only, applies to future installments to be paid on or before scheduled due dates. There was no analysis of the actual terms of the note and it obviously was inequitable to accelerate the payment of the note under the circumstances of the case. Defendant was being forced to make a principal payment by the offset when he was the one defrauded on the note! There was also reference to the fact that there was no allowed acceleration of the note, as in *Bradford.* In the present case, the payment was made by Pete and he was allowed under the terms of the note to use the funds to reduce the principal on the note. Again, this case bears no factual resemblance to the present case.

Finally, in *Smith v. Renz*, 122 Cal.App.2d 535, 265 P.2d 160 (1954) the decedent, prior to his death, was a shareholder of Hotel Corporation of America. He was given a note by Hotel Corporation secured by a deed of trust for $148,000. He then purchased 235 shares of stock in Hotel Corporation for $23,500 and paid for these shares by reference to the $148,000 note held in his favor. After his death, a dispute arose as to how the $23,500 payment for his shares should be applied on the note.

The court looked at the note's language and determined that the "practical and ordinary interpretation must undoubtedly be that payment is to be applied to the part first coming due to be paid. In the absence of agreement to the contrary, it is undoubtedly the rule in installment cases providing for payment of a specific amount or more at fixed intervals, that an excess payment made prior to or on one installment date is not effective to reduce the amount or obviate the necessity of paying subsequent installments as they fall due according to the agreed schedule."

(Emphasis added) The court found that the $23,500 was one payment and that it did not in any way affect the remaining schedule of installments provided in the note, other than to lessen the principal sum by that amount and consequently reduce the number of installments remaining to be paid.

In the *Smith* case, the payee of the note (decedent) owed $23,500 to the payor of the note (Hotel Corporation) and acknowledged in a receipt that his $148,000 note should be reduced by $23,500. The court did not dwell on or make any ruling on the word "more" in the note, but rather looked to California's civil code in determining how payment should be made.

F. A Course Of Conduct Was Established By The Parties

When interpreting a contract provision, the court must view the entire agreement and the conduct of the parties as a whole to discern the parties' intentions. *Panike & Sons Farms, Inc. v. Smith*, 2009 ID 0710.188 (Supreme Court July 9, 2009).

Pasquali and Rupe established a course of performance by the parties, which is defined by I.C. §28-1-303(a) as a sequence of conduct between the parties to a particular transaction that exists if (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection. The evidence clearly showed that ***every*** party in this matter accepted the method of allocation of interest and principal used by Transnation in November of 2002, since at least 1998, when the Pages were informed of the method of allocating excess monthly payments.

Pasquali and Rupe established "usage of trade" through the testimony of Ann Rupe and Weymouth. This is defined in I.C. §28-1-303(c) as any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such usage must be proved as facts. Ann Rupe and Weymouth testified that in their years of experience with long term escrows, it has been the practice and procedure that unless a long term escrow note specifically states otherwise, a payment is first used to reduce the interest then owing and the balance of the payment is then used to the reduce the principal. [Rupe Decl., ¶8; Weymouth Decl.,

¶10]

Ann Rupe further testified that the position taken by the Pages made no sense in the escrow world. "In essence, the Pages are arguing that they should receive future interest credit. To do this, Transnation would have been required to post phantom payments and deduct a value for interest. We can't 'make up' payments, they're reported to the IRS and they get pretty cranky about such matters." [Rupe Decl., ¶14] The Pages presented ***no*** evidence that the allocation of principal and interest as understood and performed by the escrow holders in this matter was improper or incorrect.

G. Attorney's Fees should be Awarded to Pasquali and Rupe on Appeal

The Pages have failed to present any viable argument on appeal. Thus, Pasquali and Rupe request that costs and attorney's fees be awarded to them by this court. Idaho Appellate Rule 40(1) states that "Costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court. Pasquali and Rupe are also entitled to an award of attorney's fees under Idaho Code §§12-117, 12-121 and 12-123, as the appeal is not supported by any facts or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. Further, the Pages have brought this lawsuit and appeal without reasonable basis in fact or law. They are simply making a stab in the dark hoping that something might stick.

CONCLUSION

The district court's judgment should be affirmed and attorney's fees awarded to Pasquali and Rupe as no admissible evidence was submitted by the Pages that the $21,432.03 insurance payment was not properly credited to principal and interest, nor have the Pages shown that as a matter of law the insurance payment must be treated as 58 monthly payments. It is undisputed and uncontroverted that:

1. **In 2002, Pete was a loss payee** under an Allstate insurance policy maintained by the Pages

and was distributed funds under the terms of the policy when the roof of the home on the subject property collapsed.

2. **Pete made a principal payment of $21,228.32 and an interest payment of $201.80** from the proceeds of the $21,432.03 insurance payment on or about November 20, 2002, on the Pasquali note;
3. **The Pages did not make the $21,432.02 payment**. The deed of trust specifically allowed Pete to determine how the insurance proceeds should be applied to the note;
4. **The deed of trust specifically states** that the application of insurance proceeds by the beneficiary of the note shall not cure any default;
5. **The principal and interest were properly credited** pursuant to the terms of the Pasquali Note, the escrow instructions, the deed of trust, and the custom and practice of the industry for long term, simple interest notes;
6. **The Pages agreed** that the $21,432.03 insurance payment should be used as a balloon payment against the Note;
7. **The Pages had notice no later than December 2002**, that the $21,432.03 was used to pay down principal and never objected to the reduction of principal;
8. **The Pages made 17 mortgage payments until they defaulted in July 2004**, without any objection that they had made "future" payments in November 2002. This objection was never made until the filing of the lawsuit on July 19, 2007, almost five years after the November 20, 2002 payment;
9. **The Pages admitted in their February 24, 2005 bankruptcy proceeding** that they owed Pete $3779.93 in interest and principal payments on the note;
10. **The Pages were in default for failure to make payments** that were due and owing, failure to pay 2003 taxes, and failure to maintain a liability insurance policy on the property; thus, regardless of the interpretation of payment on the note, the Pages were in default on the note for two other reasons in addition to non-payment and the foreclosure was proper.

DATED: September 15, 2009

Deborah M. Nesset
Attorney for Respondents Pasquali Pasquali III and The Rupe Companies, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September 2009, I caused two true and correct copies of the foregoing document to be place in the U.S. Mail, postage prepaid, and delivered to:

Randall Grove
Grove Legal Services, PLLC
1038 South River Stone Drive
Nampa, ID 83686

Deborah Nesset
Attorney for Respondents Pasquali and The Rupe Companies