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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.

APPELLANTS' BRIEF

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

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KEY TO TERMS, INDIVIDUALS, AND ABBREVIATIONS

Annie	Appellant Annie C. Porcello, now deceased
Deed of Trust	Deed of trust on Hayden Lake house
Evergreen	Evergreen Moneysource Mortgage Company
First Evergreen loan	Mortgage of $480,000 on Woodinville house issued by Evergreen
Hayden Lake house	House located in Hayden Lake, Idaho
Jennifer	Respondent Jennifer Porcello (now Maggard), ex-wife of Mark
Joe Mijich	Annie and Tony's attorney
Kalyn	Personal representative of Annie and Tony's estates, daughter of Mark, and granddaughter of Annie and Tony
Kim Parker	Joe Mijich's paralegal
Legacy Group	Legacy Group Capital, LLC
Legacy Group loan	Short-term loan of $648,500 issued by Legacy Group
Mark	Respondent Mark Porcello, son of Annie and Tony, father of Kalyn, and ex-husband of Jennifer
MPI	Mark Porcello, Inc., dba Porcello Estate Buyers
Note	Promissory note in the amount of $648,500, plus interest
Scott Rerucha	CEO of Legacy Group
Second Evergreen loan	Mortgage of $417,000 on Via Venito house issued by Evergreen
Tony	Appellant Anthony J. Porcello, now deceased
Via Venito house	House located in Indian Wells, California
Woodinville house	House located in Woodinville, Washington

I. STATEMENT OF THE CASE

A. Nature of the case.

In this case, the district court rewrote a promissory note for $648,500 (the Note) and a deed of trust that secured the Note (the Deed of Trust) based on a disputed oral representation. The district court found the Note and the Deed of Trust were latently ambiguous because the amount of the Note was more than the amount loaned, which "do[es] not make sense." But the district court identified no language in the contracts that could be reasonably read to mean something different. Nor did the district court offer a different interpretation to explain any ambiguity. Rather, using the alleged oral representation, the district court "interpreted" the Note and Deed of Trust to include new conditions that neither contract contained.

The district court's finding that the Note and Deed of Trust included conditions that were omitted from the contracts was significant. At trial, there was no dispute that Respondents Mark Porcello (Mark) and Jennifer Porcello (Jennifer) signed and agreed to pay the Note and did not pay it. Nonetheless, based on the new conditions, the district court concluded that Appellants Estates of Annie Porcello (Annie) and Anthony Porcello (Tony), the holders of the Note and beneficiaries of the Deed of Trust, had no right to foreclose on the deed because Mark and Jennifer had no obligation to satisfy the Note and were not in default.

Mark is Annie and Tony's son. Jennifer is Mark's ex-wife. While married, Mark and Jennifer agreed to buy a house in Hayden Lake, Idaho (the Hayden Lake house) for $360,000 but were unable to obtain financing. Annie and Tony agreed to loan Mark and Jennifer the money they need to close on the house, $312,044.32. But to loan money to Mark and Jennifer, Annie

and Tony had to borrow the money themselves. Mark arranged for Annie and Tony to obtain a short-term, high interest loan for $648,500 from Legacy Group Capital (Legacy Group).

Why was the Legacy Group loan so much more than the money Mark and Jennifer needed to purchase the Hayden Lake house? The Legacy Group would not accept the Hayden Lake house as security for the loan. To net the money Mark and Jennifer needed, Annie and Tony had to borrow against and cash out the equity they held in two houses, one they owned in Woodinville, Washington (the Woodinville house) and another in Indian Wells, California (the Via Venito house). Ultimately, the Legacy Group loan included the money provided to Mark and Jennifer to close on the Hayden Lake house, plus loan fees and the pay-off for the Woodinville house's existing mortgage.

Further complicating the matter was the Woodinville house. Annie and Tony bought the house as an investment and agreed to renovate it with Mark and Jennifer's help and then sell it. While there was a dispute over how much money the parties put into the Woodinville house and how much they should get out, there was no dispute that the parties meant to reconcile their respective contributions from the equity in the house once it sold. The district court found that the parties intended Mark and Jennifer to receive $150,000 from Annie and Tony's equity in the Woodinville house for the purchase of the Hayden Lake house.

Annie and Tony were concerned about the risk they were undertaking with the Legacy Group loan on Mark and Jennifer's behalf. They were cashing out their equity in the Woodinville and Via Venito houses to obtain the loan, and they wanted to ensure that Mark and Jennifer repaid them. Before providing them with the money from the Legacy Group loan, Annie and

Tony required Mark and Jennifer to sign the Note, which contained the same repayment terms as the Legacy Group loan. Annie and Tony also required that they sign the Deed of Trust on the Hayden Lake house, securing the Note and any future advances made to Mark and Jennifer while they owned the house. Mark and Jennifer signed the Note and Deed of Trust, and Annie and Tony provided them with $312,044.32 to close on the Hayden Lake house.

At trial, there was no dispute that Mark and Jennifer purchased the Hayden Lake house with money loaned by Annie and Tony, that they agreed to pay the Note, that they secured the Note (plus future advances) with the Deed of Trust, and that they paid none of the principal on the Note. But according to Mark and Jennifer, they had no obligation to pay the Note because Annie and Tony's attorney told them they would own the Hayden Lake house "free and clear" when the Woodinville house sold and the Legacy Group loan was repaid.

The Note and Deed of Trust, however, do not contain those conditions. Relying on Mark and Jennifer's self-serving testimony, the district court interpreted the contracts to include them anyway. The Legacy Group loan was ultimately repaid by Annie and Tony by taking out two additional mortgages, one on the Woodinville house and another on the Via Venito house. Later the Woodinville house sold. Because the house was sold and Legacy Group loan was repaid, the district court concluded Mark and Jennifer were not in default and Annie and Tony could not foreclose on the Deed of Trust. The district court did not consider what Mark and Jennifer owed.

The district court's use of parol evidence to add conditions to the Note and Deed of Trust was improper. A seemingly unfair contract does not create a latent ambiguity. There must be language that can be reasonably interpreted to have multiple meanings, and there is none in the

Note or Deed of Trust. The district court identified no such language and did not interpret the contracts to offer an alternative interpretation of any uncertain term. The district court simply added conditions under the guise of interpreting a latent ambiguity. That was error.

In addition, the district court's interpretation of the Note and Deed of Trust is not supported by substantial and competent evidence. The parties could not have intended for the Woodinville house, once sold, to satisfy the Legacy Group loan because, as the district court recognized, it could not. Further, Mark and Jennifer acquired the Hayden Lake house without paying any of the principal on the Note or the Legacy Group loan. That windfall is an implausible result because, as the district court also found, Annie and Tony were entitled to recoup their equity in the Woodinville house. They never did. Instead they were encumbered by more debt, while Mark and Jennifer got the Hayden Lake house for free.

Finally, the district court erred in finding that the Deed of Trust did not secure future loans and advances Annie and Tony made to Mark and Jennifer while they were record owners of the Hayden Lake house. The Deed of Trust expressly secured all such future loans and advances, no matter the purpose. The district court should have enforced the parties' intent and considered Annie and Tony's additional loans to Mark while he owned the Hayden Lake house in considering whether Annie and Tony were entitled to foreclose the Deed of Trust.

Annie and Tony ask that the Court reverse the district court, vacate the judgment, and remand for the district court to apply the Note and Deed of Trust as written, to find Mark and Jennifer were in default under the Note, and decide what amount is owed to Annie and Tony.

B. Statement of facts and course of proceedings.

1. Annie and Tony had one son, Mark, who was married to Jennifer.

Annie and Tony were married 66 years. Tr. 760:2-3 (Tony).[1] Annie died in February 2017. Tr. 42:21-24 (Mark). Tony died after trial, in July 2018. They are now represented by their respective estates, and for ease of reference, we refer to them as Annie and Tony. Their granddaughter, Kalyn Porcello (Kalyn), is the personal representative of their estates.

Annie and Tony had one son, Mark. Tr. 760:4-10 (Tony). Mark had three children with his first wife, including Kalyn. Tr. 44:9-15 (Mark). As discussed later, Kalyn worked for Mark, assisted Annie and Tony, and was involved in the transactions that give rise to this case. Mark also has additional children with his third wife, Jennifer (now Jennifer Maggard). Tr. 44:23-46:3 (Mark). Mark and Jennifer were married twice, from 2003 to 2007 and again from November 2013 to December 2017. *Id.*; Tr. 435:21-436:15 (Jennifer); *see also* COE 509 (Ex. 12).

For many years, Annie and Tony operated a retail jewelry business in Bellevue, Washington. Tr. 760:11-19 (Tony); Tr. 63:1-5 (Mark). Annie handled the finances for the business, as well as their personal finances, until a few years before her death. Tr. 760:22-762:5, 815:19-817:23 (Tony); Tr. 1051:4-1052:9 (Kalyn). Mark also ran a business buying and selling second-hand jewelry and watches. Tr. 49:9-22, 61:25-63:5 (Mark). Mark's business operated under the name Mark Porcello, Inc., dba Porcello Estate Buyers (MPI). *Id.*

[1] The Clerk's Record on Appeal is cited as "R." The exhibits and deposition transcripts offered at trial are included in the Certificate of Exhibits, which is cited as "COE." All cites to COE are to the Certificate of Exhibits page number. The Transcript on Appeal is cited as "Tr."

2. Annie and Tony purchased the Woodinville house.

a. Annie and Tony purchased the house as an investment.

This case arises because Mark needed money to buy various residential properties and was unable to obtain financing himself. *See* Tr. 82:4-83:1 (Mark); Tr. 610:16-24 (Jennifer). He would ask Annie for the money he needed. *See* Tr. 82:4-83:1, 128:11-129:2, 270:6-20 (Mark); Tr. 610:16-24 (Jennifer); Tr. 822:16-824:8, 914:11-17 (Tony). Annie would provide the financing and acquire title to the property. *See* Tr. 76:19-77:12, 79:11-91:9 (Mark); Tr. 822:16-823:10 (Tony). Annie expected to be repaid. Tr. 817:9-818:19, 826:4-18 (Tony).

These arrangements included a house in Woodinville, Washington. Jennifer wanted to buy the house but could not obtain financing, and Mark turned to Annie. Tr. 104:1-12 (Mark); Tr. 442:18-445:9 (Jennifer). Annie agreed to purchase the Woodinville house and allow Mark and Jennifer to live there, so long as they covered the mortgage payments. Tr. 108:5-109:7, 311:14-312:23 (Mark); Tr. 1141:23-1143:9 (Kalyn).

In January 2012, Annie and Tony bought the Woodinville house for $401,000. COE 491 (Ex. 3). They placed $6,000 in escrow, made a down payment of $93,394.40, and obtained a 30-year conventional mortgage for the rest. *Id*.; Tr. 105:2-106:7, 108:5-13 (Mark); Tr. 818:20-819:4 (Tony); Tr. 1158:5-1159:2 (Kalyn). Title was in Annie and Tony's names. *See* COE 491 (Ex. 3). Yet, at trial, Jennifer claimed that "the house was mine." Tr. 445:20-22, 450:19-24 (Jennifer). Likewise, Mark testified that Annie helped buy the house "[f]or me." Tr. 104:7-12 (Mark).

In any event, Annie and Mark agreed to fix up the Woodinville house and eventually sell it. Tr. 134:19-135:10, 311:14-312:16 (Mark); Tr. 474:5-10 (Jennifer). They also foresaw settling

their respective contributions in the house and sharing in the proceeds once the house sold. According to Mark, their contributions were roughly equal, and they planned to split the profits once the Woodinville house sold. Tr. 150:18-151:8, 1483:8-1484:2, 1485:1-6 (Mark). According to Kalyn, the arrangement called for Annie and Tony and Mark and Jennifer to recoup the money they invested in the house. Tr. 1282:7-19, 1308:5-1309:4 (Kalyn).

b. The parties disputed their respective contributions to the purchase and renovation of the house.

Mark and Jennifer had reconciled, and they and their children moved into the Woodinville house in February 2012. Tr. 109:5-24 (Mark). But first the house needed work. Mark and Jennifer hired contractors to replace the carpet, update the bathrooms, paint, and put on a new roof. Tr. 110:25-114:9 (Mark); Tr. 451:3-453:4 (Jennifer). Jennifer also helped, planning the renovations and working in the house and yard. Tr. 453:12-454:22 (Jennifer).

At trial, there was no dispute that Annie and Tony put money into the Woodinville house, as did Mark and Jennifer. *See* Tr. 312:12-23, 1482:3-1484:7 (Mark); Tr. 1094:17-1095:17, 1274:4-7 (Kalyn). But how much was contested. For example, Mark thought he paid Annie for the escrow payment and "maybe close to 40,000" for a portion of the $93,394.40 down payment, perhaps in cash, jewelry, or diamonds, but he had no documentation for either payment. Tr. 105:2-107:11, 362:10-363:23, 1482:3-1484:7 (Mark). Jennifer thought, mistakenly, that Mark had paid the entire down payment. Tr. 619:3-12, 628 (Jennifer).

Kalyn never saw any documentation to support Mark's story. During this time, she was working closely with Mark, managing MPI's inventory, and supervising MPI's books. Tr.

1028:7-1047:21, 1074:8-11 (Kalyn); *see also* Tr. 308:13-310:3 (Mark). Mark's personal finances were intertwined with MPI, and she was familiar with both. Tr. 1032:13-23, 1036:10-25 (Kalyn). Kalyn never saw any personal or business record to reflect a $40,0000 payment to Annie. Tr. 1090:23-1092:1, 1092:7-1094:2, 1125:23-1126:20, 1394:15-1395:3 (Kalyn). The first time she heard Mark's claim was at trial. Tr. 1126:21-23 (Kalyn).

There were also disputes over who paid the mortgage on the Woodinville house and who paid for the renovations. As for the mortgage, Mark and Jennifer claimed they paid all the mortgage payments. Tr. 108:14-19, 118:24-119:6 (Mark); *see also* Tr. 631:6-632:16 (Jennifer). The district court found that was not true. R. 460. At first, Mark paid Annie the mortgage payments. Tr. 380:23-381:4 (Mark); Tr. 1105:7-1106:18, 1141:23-1144:12 (Kalyn). But in early 2013, Jennifer obtained a no contact order against him, and Mark moved out of the Woodinville house. Tr. 114:13-20 (Mark); Tr. 459:5-25 (Jennifer).

From April to October 2013, Annie made the mortgage payments. Tr. 1142:5-1144:12 (Kalyn). In November 2013, Jennifer and Mark remarried. Tr. 121:1-7 (Mark); Tr. 466:12-23 (Jennifer). Mark resumed paying the mortgage, paying the bank directly from his MPI business account. Tr. 108:5-109:3, 214:14-217:2 (Mark); Tr. 1105:10-22, 1142:5-21, 1144:5-12, 1273:21-1274:3 (Kalyn). MPI's accounting ledgers confirm this. COE 545 (Ex. 19); COE 542 (Ex. 17).

As for the renovations to the Woodinville house, Mark paid for a lot of the work. Tr. 110:25-115:6 (Mark); Tr. 456:3-457:21 (Jennifer). Jennifer also claimed to pay "approximately $40,000" for the renovations but later stated she could not "recall the exact figure" and that "[i]t would probably be approximately 30, 40." Tr. 458:22-459:4, 522:4-8, 638:11-16 (Jennifer). But

as with Mark's alleged down payment on the house, there was no documentation to support her claim. Tr. 364:9-14 (Mark); Tr. 518:24-519:18 (Jennifer).

At trial, Mark and Jennifer also claimed that Annie did not reimburse them or contribute to the renovations. Tr. 114:21-115:13, 312:17-313:15 (Mark); Tr. 510:17-511:7 (Jennifer). Yet at the same time, Mark acknowledged that he and Annie put in approximately the same amount to remodel the house and that he and Annie planned to split the profits from the Woodinville house when it sold. Tr. 1483:8-1485:6 (Mark). The district court found that Annie reimbursed Mark for some of the cost of renovating the Woodinville house. R. 460.

c. An arbitrator found Jennifer had no interest in the Woodinville house.

The dispute over the parties' respective contributions to the Woodinville house came to a head after Mark moved out of the house in early 2013. Annie sent Jennifer an eviction notice because she was not paying rent. Tr. 1145:1-8 (Kalyn); *see also* Tr. 460:21-461:7 (Jennifer). During the same time, Mark and Jennifer were involved in custody issues in Washington state court, which were referred to formal arbitration before a retired King County, Washington superior court judge. Tr. 116:22-117:15 (Mark); Tr. 460:21-461:25 (Jennifer).

Annie's eviction notice became wrapped up in the arbitration, and Jennifer agreed to arbitrate that issue too. Tr. 462:1-10 (Jennifer). Jennifer made a claim for the Woodinville house and sought equitable reimbursement. Tr. 117:13-21 (Mark); Tr. 462:22-25 (Jennifer). Annie and Jennifer both submitted documentation to support their claims to the house. Tr. 518:9-23 (Jennifer); Tr. 1118:17-119:12, 1145:9-1146:2 (Kalyn). Kalyn attended the arbitration with

Annie; Mark was also present. Tr. 381:12-15 (Mark); Tr. 1118:17-1120:6 (Kalyn).

According to Kalyn, during the arbitration, Mark never claimed that he contributed $40,000 to the down payment on the Woodinville house, and he admitted that Annie reimbursed him for all the remodeling costs. Tr. 1125:12-1127:22, 1128:18-1132:17, 1393:25-1397:13 (Kalyn). In August 2013, the arbitrator issued an order requiring Jennifer to vacate the Woodinville house and denying "[a]ll equitable lien claims, all claims for reimbursement, and all other monetary claims of any nature by Ms. Maggard." COE 745-46 (Ex. AAA). Jennifer moved out of the house, and Annie and Tony listed the house for sale. Tr. 1343:19-1344:11 (Kalyn).

3. Mark and Jennifer contracted to buy the Hayden Lake house.

Mark and Jennifer remarried in late 2013 and decided to move to Idaho. Jennifer found a house in Hayden Lake, Idaho. *See* Tr. 121:21-122:2 (Mark); Tr. 467:13-24 (Jennifer); COE 499 (Ex. 4). In April 2014, they entered into a purchase and sale agreement to buy the house for $360,000. COE 494-500 (Ex. 4). Mark paid $20,000 in non-refundable earnest money. COE 494-95 (Ex. 4); Tr. 125:5-18 (Mark). Closing was scheduled for July 31, 2016. COE 499 (Ex. 4). They moved into the Hayden Lake house and began paying rent. COE 501 (Ex. 4). The earnest money and a portion of the rent were applied as a down payment. COE 495 (Ex. 4).

4. Mark and Jennifer prepared the Woodinville house for sale.

Around the same time, Annie discussed with Mark making another push to sell the Woodinville house. Tr. 134:12-135:5 (Mark). In the summer of 2014, Mark and Jennifer returned to Woodinville to update the house for sale. *See* Tr. 135:11-14, 138:18-23 (Mark); Tr. 474:1-13 (Jennifer). But before agreeing to work on the house, Jennifer insisted on some type of

agreement from Annie to ensure she received something for the new work that needed to be done. Tr. 475:18-477:8, 494:6-17 (Jennifer).

Jennifer testified that Annie wrote her a note. Tr. 475:19-477:22 (Jennifer). The note, dated July 1, 2014, is addressed "To Whom It May Concern" and reads: "When the house in Woodinville sells …[,] I will have $150,000.00 transferred for the purchase of the home at 1663 Northwood Dr., Hayden, Idaho 83835." COE 503 (Ex. 6). Jennifer viewed Annie's note as a promise to provide $150,000 towards the purchase of the Hayden Lake house. Tr. 475:22-24 (Jennifer). Mark testified the note was Annie's calculation of what Mark had invested in the Woodinville house. Tr. 150:18-151:8 (Mark).

Mark and Jennifer had the kitchen renovated, the floors repaired, the interior repainted, and the concrete driveway redone. Tr. 135:19-136:8 (Mark); Tr. 494:18-495:25 (Jennifer). Jennifer worked on the yard. Tr. 136:9-15 (Mark). Mark and Jennifer testified they paid for all this additional work. Tr. 114:21-115:13 (Mark); Tr. 495:10-25, 526:11-17 (Jennifer). Jennifer claimed they paid "between thirty and forty-five thousand" or "[t]hirty-eight, 40 something like that" for the renovations. Tr. 644:16-645:1 (Jennifer). Mark never stated how much he contributed to the new renovations, but all together, he thought he "had, let's say, 240 or 50 thousand into it." Tr. 208:9-11 (Mark); *see also* Tr. 115:14-116:3 (Mark). As before, their claims were not documented. Tr. 364:9-14 (Mark).

Considering all of the evidence, the district court found that the amounts Annie and Mark invested in the Woodinville house in the summer of 2014 were "roughly equal," that Jennifer contributed sweat equity in the renovations, and that Annie wrote the July 1, 2014 note

"intending to repay Mark and Jennifer for their equity in the Woodinville home and designating that the $150,000 go toward payment of the Hayden home." R. 464-65.

5. Mark extended the closing date on the Hayden Lake house.

In the meantime, Mark and Jennifer were unable to close on the Hayden Lake house by July 31, 2014. Tr. 126:19-24 (Mark). In August 2014, Mark payed another $15,000 in earnest money and $5,000 in additional rent to extend the closing from July 31 to September 4, 2014. COE 502 (Ex. 5); Tr. 127:20-128:10 (Mark). As before, the additional earnest money and rent were non-refundable and credited to the purchase price. COE 502 (Ex. 5).

By the time of closing, Mark and Jennifer would owe $312,044.32 on the Hayden Lake house. *Id.* Mark, however, could not secure financing. Tr. 128:11-24 (Mark). Neither could Jennifer. *See* Tr. 100:25-102:6 (Mark); Tr. 472:6-19 (Jennifer). Mark spoke to his friend Scott Rerucha at Legacy Group Capital, LLC (Legacy Group), to no avail. Tr. 128:11-24 (Mark). Mark and Jennifer risked losing the down-payment monies he had paid on the house. *See* Tr. 1156:22-1157:19, 1321:6-16 (Kalyn). Mark, then, did "[w]hat I always did. I'd go talk to my mom." Tr. 128:25-129:2 (Mark).

6. Annie and Tony obtained the Legacy Group loan to reloan Mark and Jennifer money to buy the Hayden Lake house.

Annie agreed to help Mark and Jennifer get financing for the Hayden Lake house. Tr. 129:14-24 (Mark). To acquire financing, Mark arranged for Annie and Tony to obtain a loan from Scott Rerucha at Legacy Group. Tr. 130:11-132:2 (Mark). Legacy Group is a private lending company operating in Washington. COE 10:18-25 (Rerucha Dep.). But the company did not operate in Idaho and would not lend money on the Hayden Lake house. Tr. 156:3-4 (Mark);

COE 112:3-10 (Rerucha Dep.).

Needing the Legacy Group to close the loan quickly, Mark devised a plan for Annie and Tony to cash out the equity in the Woodinville house and for the Legacy Group to obtain a first lien position on the house. Tr. 155:8-156:10 (Mark); *see also* Tr. 839:1-14 (Tony). The mortgage on the Woodinville house was just over $270,000. Tr. 152:3-23 (Mark). But even after paying the mortgage off, there was not enough equity in the Woodinville house to obtain the money Mark and Jennifer needed to buy the Hayden Lake house. Tr. 155:8-156:10 (Mark); COE 111:18-112:15 (Rerucha Dep.).

Mark called Annie and Tony's attorney, Joe Mijich, about a property Annie owned in Indian Wells, California (the Via Venito house). COE 179:24-180:11 (Mijich Dep.); Tr. 968:19-969:2 (Parker). Joe is an estate planning attorney. COE 172:15-20 (Mijich Dep.); Tr. 966:1-5 (Parker). Joe had placed the Via Venito house in a trust for Annie and Tony's benefit. COE 173:14-178:16 (Mijich Dep.); *see also* Tr. 74:20-23, 87:19-23, 301:11-17 (Mark).

Mark wanted to know if the Via Venito house, being in a trust, could be used as collateral for a loan. COE 179:24-181:9 (Mijich Dep.); Tr. 298:9-14 (Mark). Joe told Mark it could. COE 180:7-9 (Mijich Dep.); *see also* Tr. 298:9-22 (Mark). Annie held no debt on the Via Venito house. *See* Tr. 297:1-7 (Mark); *see also* Tr. 1189:23-1190:4 (Kalyn). Ultimately, Mark arranged for Annie and Tony to obtain a $648,500 loan from the Legacy Group, cross-collateralized by the Woodinville house and the Via Venito house. Tr. 155:8-156:10 (Mark).

Kalyn was still working for MPI and was helping Mark facilitate the purchase of the Hayden Lake house and working with Scott Rerucha. Tr. 1149:22-1154:16 (Kalyn). She was also

assisting Annie and Tony with their finances. Tr. 1051:4-1059:14 (Kalyn). As Annie's health began to decline, Kalyn became more involved in Annie and Tony's finances, taking them over by 2015. *Id.* Kalyn helped them with the application for the Legacy Group loan and closing on the loan. Tr. 1149:22-1154:16, 1325:23-1326:10 (Kalyn).

The Legacy Group loan was $648,500 because that is what it took to net enough money for Mark and Jennifer to buy the Hayden Lake house. COE 111:18-112:15 (Rerucha Dep.). The loan included: (1) $17,315.50 in settlement charges; (2) $270,462 to pay off the Woodinville house mortgage; (3) $312,044.32 for Mark and Jennifer to purchase the Hayden Lake house; and (4) $48,677.62 to be distributed to Annie and Tony. COE 692-698 (Ex. V). The loan was distributed on September 2, 2014, and due in 90 days. *Id.*; Tr. 1327:1-14 (Kalyn). Interest was set at 12% and interest-only payments were due monthly. Tr. 1327:1-14 (Kalyn).

7. Annie and Tony required Mark and Jennifer to sign the Note and Deed of Trust before receiving money from the Legacy Group loan.

a. Joe Mijich prepared the Note and Deed of Trust.

Before agreeing to the Legacy Group loan, Annie and Tony spoke with Scott Rerucha at the Legacy Group. COE 101:12-24 (Rerucha Dep.). They were concerned about the level of risk they were undertaking on Mark and Jennifer's behalf and wanted to ensure Mark and Jennifer paid them back. COE 101:25-102:21, 103:9-104:6 (Rerucha Dep.); Tr. 817:9-818:19, 832:11-19 (Tony). Scott Rerucha told them they needed to speak with their attorney. COE 101:25-104:7 (Rerucha Dep.). Annie and Tony called Joe Mijich. COE 179:15-19 (Mijich Dep.).

Annie and Tony asked Joe to draft a promissory note for Mark and Jennifer to sign with the same terms as the Legacy Group loan (the Note) and a deed of trust on the Hayden Lake

house (the Deed of Trust), as security for the Note. COE 182:17-183:15, 187:4-188:6, 190:16-191:16 (Mijich Dep.); Tr. 967:13-968:17 (Parker). Mark and Jennifer were due to close on the Hayden Lake house on September 4, 2014. Joe drafted the Note, dated September 3, 2014, to mirror the Legacy Group loan. *See* COE 609 (Ex. F); COE 190:16-191:16 (Mijich Dep.).

In it, Mark and Jennifer would, jointly and severally,

> promise to pay to the order of Anthony J. Porcello and Annie C. Porcello, husband and wife ("Holder"), the principal sum of Six Hundred Forty-Eight Thousand Five Hundred Dollars and No Cents ($648,500.00) in lawful money of the United States of American [sic] with interest thereon at the rate of twelve percent per annum from August 29, 2014, computed on a 365/360 basis.

COE 609 (Ex. F). It was payable in full on November 29, 2014, with interest-only payments due monthly. *Id.* The Note was "secured by a Deed of Trust of even date executed by the undersigned on certain real estate property described therein." *Id.*

The Deed of Trust incorporates the Note and states as its purpose to secure "payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by Grantor in the sum of Six Hundred Forty-Eight Thousand Five Hundred Dollars and No Cents ($648,500.00), with final payment due November 29, 2014." COE 610 (Ex. G). In addition, the Deed of Trust secures "payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them, while record owner of the present interest, for any purpose." *Id.*

Joe also prepared instructions for the title company and had Annie and Tony sign them. COE 269:21-270:23 (Mijich Dep.); Tr. 993:13-994:4 (Parker). The instructions informed the title

company that Annie and Tony were providing "$312,044.32 for title purchase of the above reference property on behalf of Mark Porcello and Jennifer Porcello." COE 608 (Ex. E). Also the title company could deliver the funds to the seller "only after the Note and Deed of Trust previously sent to you by our attorney are signed by both parties, Mark and Jennifer Porcello; after which you are to record the Deed of Trust." *Id*.

b. Mark signed the Note and Deed of Trust and closed on the Hayden Lake house on September 3.

On September 3, Mark and Jennifer went to the title company to close on the Hayden Lake house. Mark signed the Note and the Deed of Trust. COE 609 (Ex. F); COE 610-614 (Ex. G); Tr. 164:1-19 (Mark). But Mark had not informed Jennifer of the Note and Deed of Trust; she thought they were borrowing money directly from the Legacy Group and borrowing only $312,000. Tr. 478:14-479:24, 733:1-12 (Jennifer). She refused to sign the documents. *Id*.; Tr. 536:12-24 (Jennifer); COE 504 (Ex. 8). She and Mark left the title company.

c. Jennifer signed the Note and Deed of Trust and closed on the Hayden Lake house on September 4.

Jennifer and Mark testified they called Joe Mijich. Tr. 165:25-166:19 (Mark); 481:7-19 (Jennifer). Mark thought Joe was acting as his attorney. Tr. 170:7-13 (Mark). According to Mark, Joe told him the Note had to be $648,500 because his parents were responsible for the Legacy Group loan and that "as soon as you pay off the $648,500 loan with the Legacy Group … the house in Idaho is yours free and clear, no question about it, your parents have already stated that to me." Tr. 168:1-22 (Mark). Whether it was true that the Hayden Lake house would be Mark's if he paid off the Legacy Group loan was disputed, but no matter, it did not happen. As

explained later, Annie and Tony paid off the Legacy Group loan.

Mark then testified that Joe told him there was another way he would own the Hayden Lake house free and clear. According to Mark, Joe said: "when the Woodinville house sells, that will pay off the $648,500 and you will owe nothing else on the loan." Tr. 169:11-15 (Mark). Jennifer testified similarly: "Joe said that the amount needed to match the loan from Legacy, and when the Woodinville house sold, the Legacy loan would be paid for in full and the house would be ours free and clear." Tr. 481:20-482:9 (Jennifer).

While Joe recalled speaking with Mark earlier on September 3, 2014, he denied this telephone call occurred. COE 214:7-215:25 (Mijich Dep.). He also denied saying Mark and Jennifer would own the Hayden Lake house outright once the Woodinville house sold and the Legacy Group loan was repaid. COE 233:7-234:9, 242:3-243:10 (Mijich Dep.). Such an arrangement was also news to Kim Parker, Joe's paralegal. Tr. 981:17-982:15, 983:25-984:24 (Parker). Kalyn too. Tr. 1162:7-19, 1164:16-1165:14, 1206:16-21 (Kalyn). According to Kalyn, the parties expected the amount due under the Note to eventually be adjusted. Tr. 1164:16-1165:14, 1329:10-1330:4 (Kalyn). Joe testified the same. COE 261:25-268:19 (Mijich Dep.).

The next day Jennifer signed the Note and Deed of Trust, and she and Mark closed on the Hayden Lake house. *See* COE 609 (Ex. F), 613 (Ex. F), 688 (Ex. U). To do so, they accepted $312,044.32 from Annie and Tony. COE 688 (Ex. U); Tr. 160:22-161:10 (Mark). A warranty deed in Mark and Jennifer's names was recorded the same day. COE 506 (Ex. 10). So was the Deed of Trust. COE 610 (Ex. G).

d. Annie and Tony gave Mark the $48,677 distributed from the Legacy Group loan.

According to Mark, after the closing, he remembered Annie and Tony paying him the $48,677 distribution they received from the Legacy Group loan. Tr. 157:11-22 (Mark). Kalyn also confirmed that Annie and Tony gave Mark the distribution because the Legacy Group loan was taken out for his and Jennifer's benefit and they were liable for the loan through the Note, so the funds went to them. Tr. 1167:19-1169:14, 1370:21-1371:11, 1392:3-15 (Kalyn).

At trial, there was also evidence that Mark received two checks totaling $45,000 from Annie as reimbursement for the down payment on the Hayden Lake house. Tr. 1167:19-1168:14, 1392:3-15 (Kalyn); COE 700 (Ex. W). Mark denied that. Tr. 325:1-4 (Mark). The district court believed Mark and found that Annie and Tony never repaid Mark for the down payment on the Hayden Lake house. R. 468-469. But at trial, there was no evidence to refute Mark's admission that he received a $48,677.62 distribution from Annie and Tony.

8. Mark arranged for Annie and Tony to take out two additional loans to pay off the Legacy Group loan.

a. Annie and Tony obtained a $480,000 mortgage on the Woodinville house to pay down the Legacy Group loan.

November 29, 2014, the due date for the Note, came and went without the Note being repaid. Tr. 421:1-7 (Mark); Tr. 501:12-14, 751:22-24 (Jennifer). The Legacy Group loan had been extended. Tr. 421:5-13 (Mark). Mark and Jennifer separated again, and Mark moved out of the Hayden Lake house. Tr. 484:9-17 (Jennifer). In April 2015, Jennifer filed for divorce. Tr. 484:25-485:3 (Jennifer). The Woodinville house still had not sold. Tr. 179:6-8 (Mark).

According to Mark, he paid all the interest-only payments on the Legacy Group loan and

Note. Tr. 181:11-20, 217:11-219:11 (Mark). But Mark also testified that the payments were documented in a MPI accounting ledger. Tr. 217:11-219:11 (Mark). From his MPI business account, Mark made interest payments from October 2014 to March 2015, failed to pay in April, May, and June, and made a payment in July 2015. COE 543 (Ex. 18); *see also* Tr. 1274:17-21 (Kalyn); Tr. 220:7-225:14 (Mark).

Needless to say, Mark was having difficulty paying the extremely high interest payments. Tr. 1177:3-1178:7, 1189:2-18 (Kalyn); Tr. 179:6-16 (Mark). Mark arranged for Annie and Tony to refinance the Woodinville house with a new loan issued by Evergreen Moneysource Mortgage Company (Evergreen) to pay down the Legacy Group loan. Tr. 179:9-180:7 (Mark); COE 114:6-115:9 (Rerucha Dep.). Kalyn was still working for MPI and helped Annie and Tony obtain the loan. Tr. 1176:16-1177:6 (Kalyn).

On May 15, 2015, Evergreen issued the new loan to Annie and Tony (the First Evergreen loan), which was a $480,000 conventional mortgage on the house. COE 534-536 (Ex. 14). After paying closing costs ($7,979.55), Annie and Tony used the proceeds to pay down the Legacy Group loan to $193,398.12. COE 537 (Ex. 14); Tr. 180:22-181:10 (Mark); COE 115:17-116:21 (Rerucha Dep.). Had Mark not missed interest payments and late fees, the principal balance would have been reduced to $176,500. Although still married to Mark, Jennifer was not involved in this loan. *See* Tr. 600:8-601:22 (Jennifer).

b. Annie and Tony obtained a $417,000 mortgage on the Via Venito house, which paid off the Legacy Group loan.

During this time, Mark was trying to purchase a property in Bellevue, Washington, Tr.

182:11-25 (Mark), that he believed he could turn around for a substantial profit, Tr. 785:12-787:3 (Tony); Tr. 1181:18-1182:3, 1203:10-1206:13 (Kalyn). Mark had invested a lot of money in the property and needed around $400,000 to complete the purchase. *See* Tr. 182:11-25, 185:16-186:3, 314:22-315:1, 356:20-357:12 (Mark); Tr. 1181:15-1182:9 (Kalyn). Once he sold the Bellevue property, Mark planned to pay Annie and Tony back all the money he owed them. Tr. 1182:10-23, 1185:25-1187:15, 1190:5-10, Tr. 1284:7-18, 1309:5-1310:1, 1408:22-1409:4 (Kalyn); Tr. 784:17-788:22, 853:7-865:10 (Tony).

Mark convinced Annie and Tony to take out a second loan from Evergreen, this one a $417,000 mortgage on the Via Venito house (the Second Evergreen loan). Tr. 181:21-183:3 (Mark); Tr. 790:7-792:3 (Tony). By this time, Annie and Tony had found a buyer for the Woodinville house, and Mark hoped the house would sell before the Second Evergreen loan closed; that did not happen. Tr. 183:20-25 (Mark). The Second Evergreen loan closed first, and the conditions required that Annie and Tony's debts be paid. Tr. 183:20-184:4 (Mark).

With Kalyn's assistance, Annie and Tony obtained the loan. Tr. 1185:24-1186:18 (Kalyn); COE 538 (Ex. 15). After closing costs, the loan paid off the mortgage on Annie and Tony's personal residence, their credit card, and a credit card held by Mark that Annie had cosigned. COE 538 (Ex. 15); COE 711 (Ex. AA); Tr. 790:7-792:3 (Tony); Tr. 241:23-243:18 (Mark); Tr. 1194:2-14, 1195:6-1197:5 (Kalyn). The loan also paid off the rest of the Legacy Group loan, which by that time amounted to $198,020.17. COE 712 (Ex. AA); Tr. 183:14-16 (Mark). Jennifer was not involved in this loan either. *See* Tr. 600:8-601:22 (Jennifer).

Because Mark needed the money from the Second Evergreen loan for the Bellevue

property, Annie and Tony transferred the remainder of the loan—$116,494—to Mark, as well as $52,382.07 for the proceeds used to pay off Annie and Tony's mortgage and credit card. Tr. 188:21-189:6, 191:17-192:5, 241:23-244:18, 314:1-13 (Mark); Tr. 791:2-792:18 (Tony); Tr. 1198:2-15, 1285:10-24, 1358:23-1359:7 (Kalyn); COE 616 (Ex. O); COE 711 (Ex. AA). COE 717 (Ex. FF); COE 617 (Ex. P). Mark arranged for the Legacy Group to hold that money for the seller of the Bellevue property. Tr. 1486:14-23 (Mark); Tr. 1209:14-17, 1359:8-15 (Kalyn).

By this time, Annie and Tony had moved from a single $270,000 conventional mortgage on the Woodinville house to a high interest, short-term loan of $648,500 (the Legacy Group loan), then to two conventional mortgages of $480,000 (the First Evergreen loan on the Woodinville house) and $417,000 (the Second Evergreen loan on the Via Venito house) to pay the Legacy Group loan off. Annie and Tony still expected Mark and Jennifer to repay the loan they received from the Hayden Lake house and the associated fees. Tr. 846:2-850:16 (Tony).

9. The Woodinville house eventually sold for $690,000.

Two weeks later, the Woodinville house finally sold for $690,000.00. *See* COE 731 (Ex. NN). Of the proceeds, just under $49,000 were sales commissions and other fees and $483,957.00 was distributed to Evergreen to pay off the First Evergreen loan. COE 732-733 (Ex. NN). That left a check for $157,157.40, which Mark convinced Tony to transfer to him to complete the purchase of the Bellevue property. COE 716 (Ex. EE); Tr. 204:18-205:2 (Mark); Tr. 768:21-770:9, 785:12-787:3, 860:11-861:19 (Tony); Tr. 1201:24-1204:12 (Kalyn). Kalyn deposited the check into Mark's MPI business account. Tr. 1207:19-1209:6 (Kalyn).

The $157,157.40 was added to the previous amounts the Legacy Group had already

collected—$116,494.25 and $52,382.07—for Mark to buy the Bellevue property. COE 615 (Ex. N); Tr. 313:23-315:4 (Mark); Tr. 1209:18-1210:24, 1212:21-1213:17 (Kalyn). According to Tony, none of that money was a gift, and Mark "indicated at the outset that he would definitely pay us." Tr. 770:10-19, 775:7-12, 781:8-783:5 (Tony). Kalyn testified the same. Tr. 1288:4-1289:15 (Kalyn).

But when Mark sold the Bellevue property for nearly $1.6 million, he did not repay them. Tr. 416:9-417:10 (Mark); Tr. 1289:23-1290:20, 1366:8-1367:4 (Kalyn). Mark never repaid any of the principal on the Note. Tr. 417:4-7 (Mark). Nor did Jennifer. Tr. 501:12-14, 751:22-24 (Jennifer). The mortgage on the Via Venito house also remains outstanding. Tr. 245:19-25 (Mark); Tr. 1293:1-10 (Kalyn). Mark and Jennifer's divorce was finalized in December 2017. COE 509 (Ex. 12). Jennifer was awarded the Hayden Lake house, and Mark was ordered to pay all the community obligations. *See* COE 532 (Ex. 12).

10. Tony and Annie commenced non-judicial foreclosure proceedings against the Hayden Lake house.

In 2015, Mark called Joe Mijich asking that his parents foreclose on the Hayden Lake house because Jennifer had not repaid the Note. COE 310:17-311:6, 311:22-312:5 (Mijich Dep.). While Mark denied this, Tr. 257:7-17 (Mark), Kim Parker testified to having a similar conversation with Mark. Tr. 985:18-987:5 (Parker). Joe called Tony, who gave the go-ahead to foreclose. COE 313:3-16, 315:20-316:7 (Mijich Dep.).

In June 2016, Annie and Tony issued a notice of default, commenced non-judicial foreclosure proceedings against the Hayden Lake house, and scheduled the sale of the property

for October 2016. COE 747 (Ex. NNN). On October 5, 2016, Jennifer commenced this action, seeking to enjoin the foreclosure and a declaratory ruling that she was not in default under the Note. R. 23-35. The parties stipulated to terminate the non-judicial foreclosure, proceed with a judicial foreclosure, and dismiss Jennifer's claim for injunctive relief. R. 144.

Annie and Tony answered and filed a counterclaim against Jennifer and a third-party complaint against Mark, seeking judicial foreclosure on the Hayden Lake house because the payments required by the Note were past due. R. 146-156. Jennifer and Mark answered that claim. R. 166, 173. Annie and Tony filed a motion for summary judgment, which the district court denied. R. 207-216. Later, the district court partially granted Annie and Tony's motion to reconsider a ruling made on summary judgment. R. 260-261.

The district court held an eight-day court trial on April 23-26 and May 21-24, 2018, and issued a decision in favor of Mark and Jennifer in August 2018. R. 453-478. The district court found the Note and Deed of Trust were latently ambiguous and that Mark and Jennifer had no obligation under the Note once the Woodinville house sold and the Legacy Group loan was paid. R. 471-478. From there, the district court concluded that Mark and Jennifer were not in default under the Note and Annie and Tony could not foreclose on the Deed of Trust.

The district court entered a judgment on September 6, 2018. R. 480-482. On October 12, 2018, Annie and Tony appealed. R. 484-488. On December 10, the district court granted Mark and Jennifer their attorney fees. R. 505-517. The district court entered an amended judgment on December 19, R. 519-521, and a corrected amended judgment on December 21, R. 523-525. On December 31, 2018, Annie and Tony filed an amended notice of appeal. R. 527-535.

II. ISSUES PRESENTED ON APPEAL

This appeal ultimately asks whether the district court erred in concluding that Mark and Jennifer satisfied their obligations under the Note and that Annie and Tony were not entitled to foreclose on the Deed of Trust. Within that overreaching issue are the following issues:

1. Did the district court err in considering parol evidence to interpret and add conditions to the Note and Deed of Trust when the contracts were not latently ambiguous?

2. Is the district court's interpretation of the parties' intent under the Note and Deed of Trust supported by substantial and competent evidence when Mark and Jennifer's windfall leads to an implausible result and is inconsistent with the court's findings of fact?

3. Did the district court err in finding that the Deed of Trust does not cover future advances when it expressly secured future loans and advances made to Mark and Jennifer while they owned the Hayden Lake house?

4. Are Annie and Tony entitled to attorney fees on appeal?

III. STANDARD OF REVIEW

When reviewing a trial court's decision following a court trial, the Court's review is limited to determining "whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 714, 330 P.3d 1067, 1072 (2014) (citation omitted). As the trier of fact, the trial court weighs conflicting evidence and judges witnesses' credibility. *Id*. The trial court's findings of fact "will be liberally construed on appeal in favor of the judgment entered," *id*. (citation omitted), and will not be set aside unless "clearly erroneous," I.R.C.P. 52(a)(7).

To determine if the district court's findings are clearly erroneous, the Court "inquires whether the findings of fact are supported by substantial and competent evidence." *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258, 1261 (2002) (citation omitted). "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven." *Id*. It has also been stated that "a factual finding will not be deemed clearly erroneous unless, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *State, Dep't of Health & Welfare v. Roe*, 139 Idaho 18, 21, 72 P.3d 858, 861 (2003).

The Court exercises free review over the trial court's conclusions of law. *Pocatello*, 156 Idaho at 714, 330 P.3d at 1072. In doing so, the Court determines "whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Id*. Thus the Court can draw its own conclusions from the facts. *Hunter v. Shields*, 131 Idaho 148, 151, 953 P.2d 588, 591 (1998).

IV. ARGUMENT

A. The district court erred in considering parol evidence to interpret the Note and Deed of Trust and to add entirely new conditions.

Mark and Jennifer repaid none of the principal owed on the Note. Nevertheless, the district court concluded they were not in default because the parties intended the Note and Deed of Trust to be satisfied, and for Mark and Jennifer to own the Hayden Lake house "free and clear," when the Woodinville home sold and the Legacy Group loan was paid in full. R. 473-478. The Note and Deed of Trust, however, contain no such conditions. COE 609 (Ex. F), 610-614 (Ex. G). The district court's legal analysis was wrong.

The district court justified adding the new conditions because the Note and Deed of Trust were latently ambiguous. But there is no uncertainty in Mark and Jennifer's promise to pay $648,500. To be sure, the district court did not interpret or explain the meaning of any language in the Note and Deed of Trust. It simply added entirely new conditions that the parties did not include in their writings. The district court's use of parol evidence to add conditions under the guise of interpreting an ambiguous contract defies Idaho law.

1. The district court sought to interpret the Note and Deed of Trust on the basis that the contracts were latently ambiguous.

Under the parol evidence rule, the writing supersedes all previous understandings, negotiations, and agreements, and the parties' intent must be ascertained from the writing. *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991). Thus, when a contract has been reduced to writing and is intended to be a complete agreement, any other understandings or written or oral agreements are not admissible to vary, contradict, or enlarge the terms of the written contract. *Id*. The parol evidence rule, however, does not apply where an ambiguity is present, where the writing is not completely integrated, or where fraud or mutual mistake is alleged. *Id*.; *see also Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011); 11 Williston on Contracts § 33:2, Westlaw (4th ed., database updated July 2019).

Here the district court considered parol evidence after finding the Note and Deed of Trust were latently ambiguous. R. 472. The district court did not justify using parol evidence because the contracts were unintegrated agreements. *Compare* R. 471-473 *with Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971) ("Whether a particular subject of negotiation is

embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances."). Nor did the district court find fraud or mutual mistake. *See* R. 471-473. Rather, the district court sought to interpret the Note and Deed of Trust to resolve a perceived ambiguity to determine the parties' intent. *See* R. 471-477. It did not find that the parties entered into a separate agreement modifying the contracts. *See id.*

2. The Note and Deed of Trust are not latently ambiguous.

a. The district court pointed to no language in the Note or Deed of Trust that is reasonably susceptible to a conflicting interpretation.

The interpretation of a contract begins with its language. *Knipe Land*, 151 Idaho at 454, 259 P.3d at 600. In the absence of an ambiguity, determining the contract's meaning and legal effect is a question of law, and the contract "must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording." *Id.* Whether an ambiguity exists in a contract is also a question of law for the Court. *Id*. at 455, 259 P.3d at 601.

A contract term is ambiguous if it is reasonably susceptible to conflicting interpretations or if there are no reasonable interpretations (*i.e.*, the language is nonsensical). *Id*. There are two types of ambiguity: patent and latent. *Id*. "A patent ambiguity is an ambiguity clear from the face of the instrument in question." *Id*. "A latent ambiguity exists where an instrument is clear on its face but loses that clarity when applied to the facts as they exist." *Id*. A mere difference in the parties' interpretation of the contract, however, does not create an ambiguity. *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 63-64, 175 P.3d 748, 752-53 (2007).

While a latent ambiguity can be found to arise under the facts of a case, the contract must still contain a term that has different but reasonable meanings. *See, e.g.*, *Snoderly v. Bower*, 30

Idaho 484, 166 P. 265 (1917) (finding term "government rule" was latently ambiguous in contract that required hay "to be measured according to government rule"). An example of a latent ambiguity is "[w]here a writing contains a reference to an object or thing, such as a pump, and it is shown by extrinsic evidence that there are two or more things or objects, such as pumps, to which it might properly apply." *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952) (finding "a ten inch pump" was latently ambiguous).

Another example of a latent ambiguity is found in *Cool v. Mountainview Landowners Co-operative Association*, where a written easement allowed certain landowners to use a beach area "for swimming and boating only." 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). The landowner subject to the easement interpreted "swimming" strictly "to propel oneself through water," while the benefiting landowners argued the term was ambiguous. *Id*. at 773, 86 P.3d at 487 (citation omitted). Under the facts of the case, the Court found "swimming" latently ambiguous because interpreting the term strictly would lead to illogical results. *Id*. It would preclude activities that accompany swimming, such as resting on the beach, standing in the water, or monitoring swimming children. *Id*.

Here the district court found the Note and Deed of Trust contained a latent ambiguity. R. 472. But unlike in *Snoderly*, *Williams*, and *Cool*, the district court did not identify any term in the contracts that objectively held more than one meaning. *See id*. Instead, it concluded the Note and Deed of Trust were latently ambiguous "because the principal amount due under the Note is more than double the amount Mark and Jennifer needed to purchase the subject property." *Id*. That, according to the district court, "did not make sense." *Id*. The district court erred in finding

the contracts were ambiguous on that basis. It pointed to no term that was uncertain or that was reasonably susceptible to differing interpretations. *Id.*

The only term that may be inferred to have been ambiguous was Mark and Jennifer's promise to pay $648,500. But even assuming that was the district court's finding, the court still erred. Under the Note, Mark and Jennifer agreed to the following:

> For value received, the undersigned ("Marker"), jointly and severally, promise to pay to the order of Anthony J. Porcello and Annie C. Porcello, husband and wife ("Holder"), the principal sum of Six Hundred Forty-Eight Thousand Five Hundred Dollars and No Cents ($648,500.00) in lawful money of the United States of America with interest thereon.

COE 609 (Ex. F). The Deed of Trust also references the Note and Mark and Jennifer's indebtedness "in the sum of Six Hundred Forty-Eight Thousand Five Hundred Dollars and No Cents ($648,500.00)." COE 610 (Ex. G).

The parties are presumed to have intended what the terms clearly state. *Swanson*, 145 Idaho at 64, 175 P.3d at 753. There is nothing uncertain about Mark and Jennifer's promise to pay $648,500. The natural and ordinary meaning of a promise to pay $648,500 is a promise to pay $648,500. That language is plain and only one interpretation is possible. *See Charles R. Tips Family Tr. v. PB Commercial LLC*, 459 S.W.3d 147, 154 (Tex. App. 2015) ("The phrase 'one million seven thousand and no/100 dollars' has a plain, unambiguous meaning, namely the sum of $1,007,000.00."). As a result, the Note and the Deed of Trust must be given their plain meaning. *See Knipe Land*, 151 Idaho at 456, 259 P.3d at 602.

b. The perceived unfairness of the Note and Deed of Trust cannot be the grounds for finding a latent ambiguity.

Knipe Land illustrates the district court's error. There, a property broker entered into an employment contract with the owners of agricultural land to sell the land. *Id*. at 452-53, 259 P.3d at 598-99. The broker was entitled to a 5% commission after closing a sale. *Id*. The employment contract also included the following provision: "Should a deposit or amounts paid on account of purchase be forfeited, one-half thereof may be retained by you, as the Broker, as the balance shall be paid to me [the owners]." *Id*. at 452, 259 P.3d at 598. Another provision stated "[t]he Broker's share of any forfeited deposit or amounts paid on account of purchase, however, shall not exceed the commission." *Id*.

Two contracts for sale of the land fell through, which resulted in the prospective buyers forfeiting earnest money. *Id*. at 452-53, 259 P.3d at 598-99. When the owners failed to pay the broker its share of the forfeited funds, the broker sued to enforce the employment contract. *Id*. at 453, 259 P.3d at 599. The owners argued the contract was latently ambiguous because the broker's share of the forfeited funds would result in an absurd or unjust result. *See id*. at 456, 259 P.3d at 602. The owners pointed to evidence that the broker would have to split the 5% commission evenly with the buyer's broker after closing a sale. *Id*. They argued that it made no sense for the broker to earn more under a forfeiture (*i.e.*, a failed sale) than under a successful sale, where the broker had to split the commission. *Id*.

The Court concluded that such a result did not render the employment contract absurd or latently ambiguous and that the district court should have ruled that the contract was

unambiguous as a matter of law. *Id*. The split of commissions between the broker and a buyer's broker was a third-party agreement, and the broker's entitlement to forfeited money "does nothing to suggest that the parties intended for the provision of the [employment contract] to mean anything other than what it plainly says." *Id*. Further, the Court noted that the resulting "absurdity" alleged by the owners was different than the absurdity in *Cool* (if "swimming" had been strictly interpreted). *Id*.

Knipe Land illustrates that latent ambiguities do not arise simply because a contract does not seem reasonable or fair. Adults are presumed capable of managing their affairs, and "whether a bargain is smart or foolish, or economically efficient or disastrous, is not ordinarily a legitimate subject of judicial inquiry. If freedom of contract means anything, it means that parties may make even foolish bargains and should be held to their terms." 11 Williston on Contracts § 31:5 (footnote omitted). Simply because a contract is "unfair under the circumstances" does not give the court "the roving power to rewrite contracts in order to make them more equitable" under a claim of ambiguity. *Howard v. Perry*, 141 Idaho 139, 143, 106 P.3d 465, 469 (2005) (finding contract was not ambiguous and was properly interpreted by its terms despite inequity of term).

The circumstances here align with those in *Knipe Land*, where a latent ambiguity did not arise, not those in *Cool*, where a latent ambiguity did arise. The broker's ability to earn more on a failed sale than a successful sale did not mean the employment contract could be read more than one way. *Knipe Land*, 151 Idaho at 456, 259 P.3d at 602. Likewise, the district court's view that the amount of the Note did not make sense or was unjust does not suggest that the parties intended the Note and Deed of Trust to mean anything other than what the contracts plainly say.

c. The district court erred in using parol evidence to interpret the Note and Deed of Trust to include new conditions.

The district court's error can also be shown another way. The court did not offer any different meaning to Mark and Jennifer's promise to pay "the principal sum of Six Hundred Forty-Eight Thousand Five Hundred Dollars and No Cents ($648,500.00) in lawful money of the United States of America with interest thereon" or any other term in the Note or Deed of Trust *See* R. 472. Rather, under the guise of interpreting the contracts, the district court added conditions that released Jennifer and Mark from their obligation to pay $648,500 based entirely on the disputed testimony of Mark and Jennifer. R. 473-474. The district court's interpretation of the alleged ambiguity materially changed the contracts and undermines the finding of an ambiguous term and is an improper use of parol evidence.

An ambiguity requires the court to interpret the uncertain term; it does not give the court authority to rewrite the parties' contract. *See* 11 Williston on Contracts § 31:5 (ambiguity does not give court authority to "make a new contract for the parties or rewrite their contract while purporting to interpret or construe it"). Parol evidence is used only "to determine what the parties intended the ambiguous terms to mean" or "what was intended by the ambiguous statement." *Snoderly*, 30 Idaho at 488, 166 P. at 265-66; *see also Matter of Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995) ("Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists.").

Thus in *Cool*, the court ascribed meaning to "swimming" based on the surrounding circumstances. 139 Idaho at 773, 86 P.3d at 487. In *Snoderly*, the court gave meaning to

"government rule." 30 Idaho at 488, 166 P. at 266. In *Williams*, to remove the latent ambiguity in "a ten inch pump," the Court looked to "extrinsic evidence to show which type of pump the description related to." 73 Idaho at 19-20, 245 P.2d at 104849. As those decisions demonstrate, parol evidence is "admitted to explain a latent ambiguity, it cannot do more; a latent ambiguity does not justify the admission of evidence designed to vary or contradict the writing." 32A C.J.S. Evidence § 1515, Westlaw (database updated June 2019). A court cannot "by a process of interpretation relieve one of the parties from the terms which he voluntarily consented to; nor can courts interpret an agreement to mean something the contract does not itself contain." *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160, 166, 349 P.2d 986, 990 (1960).

Here, the district court did just that. It used the self-interested and disputed testimony of Mark and Jennifer to add new and material terms to the Note and Deed of Trust, not to resolve any ambiguity in the contracts' terms. The parol evidence rule's legal preference towards writings arises from a distrust of parol evidence and the desire to ensure contracting parties cannot vary the terms of their writings as a result of "miscommunication, poor memory, fraud, or perjury." 11 Williston on Contracts § 33:1. The danger of parol evidence is fraud or fabrication, which can be countered by evidence of writings. *Nysingh*, 94 Idaho at 386, 488 P.2d at 357. Evidence establishing a latent ambiguity cannot come from "self-serving testimony of one party to the contract as to what the contract …'really' means." *Coffin v. Bowater Inc.*, 501 F.3d 80, 98 (1st Cir. 2007) (ellipsis in original; citation omitted).

In the end, the district court did not consider parol evidence to explain or give meaning to the amount of the Note or Mark and Jennifer's promise to pay but rewrote the Note and Deed of

Trust. Accepting Mark and Jennifer's testimony of what Joe Mijich allegedly told them, the district court found they had no obligation to repay the Note, and would own the Hayden Lake house "free and clear," if the Woodinville home sold and the Legacy Group loan was repaid. R. 477. The district court erred adding conditions that were never expressed in the Note and Deed of Trust under the guise of interpreting the contracts.

3. Idaho Code § 28-3-117 does not allow the district court to interpret and add conditions to the Note and Deed of Trust with parol evidence.

The district court also relied on Idaho Code § 28-3-117 to justify using parol evidence to interpret the Note and Deed of Trust. R. 472-473. Section 28-3-117, however, is not a basis to consider parol evidence under the circumstances here and does not allow modifying the Note and Deed of Trust with new conditions.

a. Section 28-3-117 does not allow for the admission of parol evidence to interpret the Note and Deed of Trust.

The Note is a negotiable instrument under Article 3 of the Uniform Commercial Code. *See* Idaho Code § 28-3-104(1) (defining "negotiable instrument"). Section 28-3-117 allows an obligor under a note to raise, as a defense to the obligation, evidence of a "separate agreement" that modifies or supplements the obligation:

> 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.

I.C. § 28-3-117. Reasoning that the provision "provides that other agreements may be considered

when interpreting a negotiable instrument," the district court found it could "consider extrinsic evidence to interpret the Note and Deed of Trust based on the significant difference between the purchase price and the amount needed to close the purchase on the one hand and the Note and Deed of Trust on the other hand." R. 472-473.

There are several reasons why section 28-3-117 did not give the district court a basis to rely on parol evidence to add conditions to the Note and Deed of Trust. First, section 28-3-117 is "[s]ubject to applicable law regarding exclusion of proof of contemporaneous or previous agreements" and thus the parol evidence rule. *See also* I.C. § 28-3-117 cmt. 2. As already addressed, the district court erred finding the Note and Deed of Trust were latently ambiguous and relying on parol evidence to interpret the contracts. Thus the district court cannot rely on section 28-3-117 to consider extrinsic evidence that is otherwise improper.

Second, the district court did not actually apply section 28-3-117. The district court made no factual findings or legal conclusions that the parties entered into a "separate agreement" for Mark and Jennifer to take the Hayden Lake house free and clear when the Woodinville house sold and the Legacy Group loan was paid. Nor did the district court find a separate agreement that served as a "defense" to their obligation to pay the Note. Rather, the district court relied on Mark and Jennifer's "understanding" to *interpret* the Note and Deed of Trust to include the conditions. R. 473. Section 28-3-117 does not give the district court such authority.

Third, interpreting new conditions into the Note, as the district court did, would render the Note no longer a negotiable instrument under Article 3 and no longer subject to section 28-3-117. To constitute a negotiable instrument, a writing must be "an unconditional promise or order

to pay a fixed amount of money." I.C. §§ 28-3-104(1), 28-3-106. The district court's interpretation that the Note and Deed of Trust would be satisfied once the Woodinville house sold and the Legacy Group loan was paid adds conditions to the payment of the Note, taking it outside of Article 3 and section 28-3-117. *See* R. 477.

b. The statute of frauds precludes an oral, separate agreement under section 28-3-117.

Even if the district court had found that Mark and Jennifer reached a "separate agreement" with Annie and Tony on the payment of the Note, such an agreement would violate the statute of frauds and is invalid. Adding conditions to the Note and Deed of Trust to allow Mark and Jennifer to take the Hayden Lake house when the Woodinville home sold and the Legacy Group loan was repaid are essential unwritten terms relating to an interest in real property. Idaho's statute of frauds in Idaho Code § 9-503 forbids that. The provision provides:

> No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

I.C. § 9-503. "Because a deed of trust is an interest in real property, it falls under the terms of I.C. § 9-503." *Ogden v. Griffith*, 149 Idaho 489, 493, 236 P.3d 1249, 1253 (2010). And because the Note and Deed of Trust are intertwined, the Note also falls with the statute.

Ogden illustrates why. There, two parties reached an oral settlement agreement that required one party to pay a sum of money that was to be secured by a deed of trust. *Id*. at 491, 236 P.3d at 1251. The settlement agreement was never reduced to writing. *Id*. Because "the

settlement agreement itself called for a deed of trust," the Court held that the settlement agreement was within Idaho Code § 9-503, and the settlement agreement "must be in writing." *Id*. at 493, 236 P.3d at 1253. Without a writing, the settlement agreement was not enforceable absent some other exception. *Id*. at 494, 236 P.3d at 1254.

It is also true that a contract required by the statute of frauds to be in writing cannot be materially modified by a subsequent oral agreement. 10 Williston on Contracts § 29:46, Westlaw (4th ed., database updated July 2019); *see also Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1991) (holding oral modification of non-material terms to written real estate purchase agreement need not be in writing to be enforceable under statute of frauds). That would be the situation here if the district court found the new conditions formed a separate agreement under section 28-3-117. Because the Note and Deed of Trust fall under the statute of frauds, a separate agreement modifying Mark and Jennifer's unconditional promise to pay must have been in writing to be enforceable, and there was none.

4. The district court erred in finding Mark and Jennifer were not in default.

Because there is no other reasonable interpretation of Mark and Jennifer's promise to pay $648,500, the district court erred in concluding that the Note and Deed of Trust were latently ambiguous and in considering parol evidence to resolve the perceived ambiguity. When a contract's terms are unambiguous, the court cannot revise the contract to make a better agreement for one of the parties. *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992). The district court should have enforced the Note and the Deed of Trust as written. And based on the undisputed evidence, the court should have found Mark and Jennifer were in default

under the Note. Finally, the court should have determined what Mark and/or Jennifer owed. In doing none of those things, the district court erred.

B. The district court's interpretation of the parties' intent under the Note and Deed of Trust is not supported by substantial and competent evidence.

Even if Mark and Jennifer's promise to pay $648,500 is ambiguous, the district court still erred because its determination of the parties' intent and resolution of the ambiguity is not supported by substantial and competent evidence. The district court found that it made sense for Mark and Jennifer to walk off with a house they did not pay for once the Woodinville house was sold and the Legacy Group loan repaid, despite having repaid none of the loan themselves. For that to be true, Annie and Tony must have meant to gift Mark and Jennifer at least $312,044.32, plus all of their equity in the Woodinville house. Mark and Jennifer's windfall is an implausible result and inconsistent with the district court's findings regarding the Woodinville house, the execution of the Note and Deed of Trust, and the Evergreen loans.

1. The parties could not have intended for the Woodinville house, once sold, to satisfy the debt owed on the Legacy Group loan.

Where the facts reveal a latent ambiguity, the courts seek to determine the parties' intent at the time they entered into the contract. *Knipe Land,* 151 Idaho at 455, 259 P.3d at 601. The interpretation of an ambiguous contact is a question of fact. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). The parties' intent is to be determined by the objective and purpose of the particular provision and the facts and circumstances surrounding the formation of the contract. *Id.* The district court determination that the parties intended Mark and Jennifer's unconditional promise to pay $648,500 to mean a promise to pay $648,500 that would terminate

when the Woodinville house was sold and the Legacy Group loan was repaid, no matter who repaid it, is implausible and inconsistent with the record. *See* R. 477.

The district court reached that finding, in part, because the principal amount of the Note was more than the amount needed to purchase the Hayden Lake home, the amount of the Note matched the Legacy Group loan, the Legacy Group loan paid off the original mortgage on the Woodinville house, and Mark and Jennifer understood the Hayden Lake house would be "free and clear" when the Woodinville house sold and the Legacy Group loan was repaid. R. 473-477. But that evidence only goes so far. And critically, it does not support the crux of the district court's finding: "Annie and Tony were not out-of-pocket on the Hayden transaction but borrowed money to allow Jennifer and Mark to purchase the Hayden home" and "the loan Annie and Tony obtained was paid." R. 477.

Consider Mark and Jennifer's understanding that the Woodinville house, once sold, would pay off the Legacy Group loan. *See* R. 473-474. Based on the district court's other findings, that was not possible. From the beginning, it was known and understood that the equity in the Woodinville house was not enough to cover the Legacy Group loan. *See* R. 461. The Legacy Group loan was closed just before Mark and Jennifer signed the Note and Deed of Trust. At that time, as the district court recognized, "[t]here was insufficient equity in the Woodinville home by itself to secure" the Legacy Group loan. *Id*. Thus, the Legacy Group loan was secured by the Woodinville house *and* the Via Venito house. *Id*.

The parties assumed the Woodinville house would sell quickly. R. 465. It makes no sense then that the parties could expect the equity in the house to pay off the Legacy Group loan when

it was insufficient to secure the loan in the first place. And of course, that was proven true. The Woodinville house sold for $690,000. R. 466. As Mark acknowledged, even if the house had sold for that amount, the proceeds from the sale would have been short of paying off the Legacy Group loan. *See* Tr. 186:14-187:3, 205:18-23 (Mark).

There is also another finding that undermines the belief that the Woodinville house would pay off the Legacy Group loan: the district court's finding that the parties agreed to reconcile their respective contributions to the Woodinville house once it sold. R. 464-465. Because that was the deal, the proceeds surely could not have paid off the Legacy Group loan. Annie and Tony would have recouped their equity in the Woodinville house after repaying Mark and Jennifer for theirs, which the district court found was $150,000. R. 465. Prior to obtaining the Legacy Group loan, that would have left Annie and Tony a great deal of equity after paying off the $270,000 existing mortgage on the house. The math and the evidence simply do not support a finding that the Woodinville house would pay off the Legacy Group loan.

2. The district court failed to understand Annie and Tony's financial outlay to provide Mark and Jennifer the money for the Hayden Lake house.

The district court's error in resolving the perceived ambiguity in the Note and Deed of Trust, however, goes much deeper. Finding that the parties intended the Hayden Lake house to be "free and clear" once the Legacy Group loan was paid represents a critical misunderstanding of how Annie and Tony were able to provide Mark and Jennifer with at least $312,044.32 in the first place and how the Legacy Group loan was actually paid.

The district court believed that Annie and Tony did not come "out-of-pocket on the

Hayden transaction" and borrowed money to provide Mark and Jennifer with $312,044.32, which was ultimately paid back. R. 477. As before, that understanding cannot be reconciled with the district court's recognition that Annie and Tony were entitled to their equity in the Woodinville house once it sold, R. 464-465, that Annie and Tony unlocked their equity in the Woodinville and Via Venito houses to secure the Legacy Group loan, R. 461, and that the loan was ultimately paid off by Annie and Tony with additional loans on both houses, R. 465-466.

This is perhaps best illustrated by considering the circumstances as they existed, according to the district court, *before* Annie and Tony obtained the Legacy Group loan. At that time, the existing mortgage on the Woodinville house was just over $270,000. R. 461-462. If the house sold for $690,000 (as it ultimately did), Annie and Tony's proceeds would be around $370,000 after paying off the existing mortgage and nearly $49,000 in selling fees. *See, e.g.*, COE 714 (Ex. CC). Mark and Jennifer were entitled to $150,000 of those proceeds, R. 465, which would leave Annie and Tony approximately $220,000 from the sale.

Then consider the Woodinville house when Mark and Jennifer signed the Note and Deed of Trust, *after* the Legacy Group loan but *before* the First and Second Evergreen loans. To obtain the Legacy Group loan, Annie and Tony replaced their old conventional mortgage with a new, higher loan amount and interest rate and cashed out the equity in both the Woodinville and Via Venito houses to do so. *See* R. 461-462. The Legacy Group loan included the old mortgage on the Woodinville house, $17,315.50 in loan charges, $312,044.32 distributed to Mark and Jennifer for the purchase of the Hayden Lake house, and $48,677.62, which Mark testified he also received. *See* COE 692-698 (Ex. V); Tr. 157:11-22 (Mark).

If the Woodinville house had sold quickly, and sold for $690,000, Annie and Tony would have received $640,000 after nearly $49,000 in selling fees. *See, e.g.*, COE 714 (Ex. CC). Accepting Mark and Jennifer's testimony, as the district court did, the parties intended those proceeds to pay off the Legacy Group loan and once paid in full, Mark and Jennifer's obligations under the Note would be satisfied. *See* R. 463, 476-477. In other words, the parties meant for Mark and Jennifer to take all the equity in the Woodinville house (plus equity in the Via Venito house), and for Annie and Tony to take nothing and encumber themselves in new debt.

Such a windfall to Mark and Jennifer and injustice to Annie and Tony makes no sense if, as the district court also found, Mark and Jennifer were only entitled to $150,000 out of Annie and Tony's equity in the Woodinville house once it sold. *See* R. 465. It is impossible to reconcile the district court's finding that Annie and Tony were entitled to their equity in the Woodinville house and the finding that the parties intended Mark and Jennifer to own the Hayden Lake house free and clear once the Legacy Group loan was repaid. Both cannot be true. Annie and Tony's equity in the Woodinville house was converted to the Legacy Group loan; it did not disappear.

Moving forward to the First Evergreen loan, the situation was no different. Annie and Tony refinanced the Woodinville house and obtained a new $480,000 mortgage. R. 465. If the house had sold for $690,000 then, Annie and Tony would have received around $160,000 after selling fees and paying off the First Evergreen loan. But as before, under the district court's reading of the Note and Deed of Trust, Annie and Tony would have paid that money to the Legacy Group loan and once paid in full, Mark and Jennifer would own the Hayden Lake house free and clear—again leaving Annie and Tony with nothing but more debt. (In reality, Annie and

Tony paid down the Legacy Group loan to $193,398.12 and gave $116,494 to Mark. *See id.*)

Finally, consider the Second Evergreen loan and the sale of the Woodinville house, and what actually happened. Mark convinced Annie and Tony to obtain the Second Evergreen loan, a $417,000 mortgage on the Via Venito house. R. 465-466. Mark planned to take all the proceeds from this loan. R. 466. But when the loan closed, $198,020.17 went to pay off the Legacy Group loan in full and the rest went to Mark. R. 466; COE 712 (Ex. AA); Tr. 183:14-16, 188:21-25 (Mark). Then the Woodinville house sold for $690,000. R. 466. After paying fees and the First Evergreen loan, $157,157.40 remained, which again went to Mark because he had been shorted proceeds from the Second Evergreen loan. R. 466.

At this point, Mark's shell game had moved Annie and Tony's equity in the Woodinville and Via Venito houses from loan to loan to loan, and the Legacy Group loan was paid in full. Annie and Tony had acquired three different loans, incurring significant fees, all to loan Mark and Jennifer at least $312,044.32 to close the Hayden Lake house. But according to the district court, the parties intended for Mark and Jennifer to own the Hayden Lake house free and clear, and for their obligations under the Note and the Deed of Trust to be satisfied, once the Legacy Group loan was paid in full, no matter who paid it.

That interpretation is not reasonable, leads to an illogical result, and fails to grasp what Annie and Tony gave to provide Mark and Jennifer with at least $312,044.32. If the district court's interpretation were true, Annie and Tony intended to gift Mark and Jennifer the Hayden Lake house, all of the equity in the Woodinville and Via Venito houses—not just $150,000 of the equity in the Woodinville house—and the loan fees on the Legacy Group loan and the Evergreen

loans incurred on their behalf. Mark and Jennifer presented no such evidence of Annie and Tony's intent. *See Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 126, 206 P.3d 481, 490 (2009) (essential element of gift is manifested intent to make gift).

A reasonable trier of fact would not accept and rely on the findings made by the district court in resolving the perceived ambiguity. At the very least, after reviewing this record, the Court should be left with a definite and firm conviction that a mistake has been made. Thus, if the Court finds the Note and Deed of Trust were latently ambiguous, the district court's determination of the parties' intent should be reversed.

C. The district court erred in finding the Deed of Trust does not cover future advances.

At trial, Annie and Tony argued that the Deed of Trust secured more than just Mark and Jennifer's indebtedness under the Note; it also secured future advances made to Mark and Jennifer while they owned the Hayden Lake house. *See* R. 474-476. The district court disagreed and found "there is no credible evidence" that the parties agreed that the Hayden Lake house would secure advances such as the interest and late fees Annie and Tony paid on the Legacy Group loan, the fees they paid to refinance the loan, and the money they gave Mark from the Second Evergreen loan on the sale of the Woodinville house. R. 475-476.

The district court's conclusion ignores the plain language of the Deed of Trust and the validity of future advance clauses under Idaho law. "A future advance clause in a mortgage is a provision stating that funds advanced by the mortgagee after the creation of the mortgage will be secured by the mortgage." 59 C.J.S. Mortgages § 213, Westlaw (database updated June 2019). Such clauses "are valid to extend the security to other existing indebtedness or to future

indebtedness between the same parties." *Id.* As the Court explained in *Biersdorff v. Brumfield,* 93 Idaho 569, 572, 468 P.2d 301, 304 (1970), "if the parties intended that there should be future advances secured by the mortgage, that agreement protected the seniority of the lien for the subsequent advances."

The district court misread *Biersdorff* and failed to consider the plain language used in the Deed of Trust. *See* R. 475-476. The Deed of Trust expressly provides security for Mark and Jennifer's indebtedness under the Note, as well as for any future loans or advancements made by Annie and Tony for any purpose while Mark and Jennifer own the Hayden Lake house:

> and *to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them,* while record owner of present interest, *for any purpose,* and of any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided … *it is the express intention of the parties to this Deed of Trust that is shall stand as continuing security until paid for all such advances together with interest thereon*.

COE 610 (Ex. G) (emphases added). Despite the parties' "express intention" that the Deed of Trust "stand as continuing security" for "all such further sums as may hereafter be loaned or advanced … for any purpose," the district court ignored that language and even turned to parol evidence without justifying its use. *See* R. 475-476.

Just like any other contract, the best evidence of the parties' intent is the language of the Deed of Trust. *See Opportunity,* 136 Idaho at 607, 38 P.3d at 1263 ("If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent."). The district court erred by ignoring the express language of the Deed of Trust. In

determining whether Annie and Tony could foreclose under the Deed of Trust, the court should have considered the future advances and loans that Annie and Tony made to Mark and Jennifer while record owners of the Hayden Lake house.

D. If they prevail on appeal, Annie and Tony are entitled to costs and attorney fees.

Annie and Tony seek costs on appeal under I.A.R. 40. They also seek their attorney fees on appeal under the Note and Deed of Trust. When a valid contract contains a provision for an award of attorney fees, the terms of the contract establish a right to attorney fees. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 186, 75 P.3d 743, 747 (2003). The Note provides: "In case this Note is collected by an attorney, either with or without suit, the undersigned hereby agree to pay a reasonable attorney's fee." COE 609 (Ex. F). In addition, Annie and Tony are entitled to reasonable attorney fees under Idaho Code § 12-120(3) as the prevailing party in a civil action to recover on a note or negotiable instrument.

V. CONCLUSION

For the reasons explained, the Court should reverse the judgment of the district court and remand for the court to apply the Note and Deed of Trust as written, find Mark and Jennifer were in default under the Note, and determine the amount owed by Mark and Jennifer.

DATED: August 23, 2019.

STOEL RIVES LLP

/s/ W. Christopher Pooser___
W. Christopher Pooser
Appellate Attorneys for the Estates of Anthony J. Porcello and Annie C. Porcello and Kalyn M. Porcello, as personal representative

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 23, 2019, I caused a true and correct copy of the foregoing APPELLANTS' BRIEF to be served by the method indicated below, and addressed to the following:

Terrance R. Harris
RAMSDEN, MARFICE, EALY & HARRIS

[ ] Via U.S. Mail
[ ] Via Facsimile
[ ] Via Overnight Mail
[ ] Via Hand Delivery
[ ] Via Email
[X] Via iCourt Service

Peter J. Smith
Jillian H. Caires
Smith & Malek

[ ] Via U.S. Mail
[ ] Via Facsimile
[ ] Via Overnight Mail
[ ] Via Hand Delivery
[ ] Via Email
[X] Via iCourt Service

/s/ W. Christopher Pooser
W. Christopher Pooser