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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' REPLY 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
Note	Promissory note in the amount of $648,500, plus interest
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. INTRODUCTION

This appeal concerns the interpretation and construction of a promissory note for $648,500 (the Note) and a deed of trust that secured the Note (the Deed of Trust) and future advances. Respondents Mark Porcello (Mark) and Jennifer Porcello (Jennifer) needed $312,044.32 to purchase a house in Hayden Lake, Idaho (the Hayden Lake house) and asked Mark's parents, Annie (Annie) and Anthony Porcello (Tony), if they could borrow the money. Annie and Tony agreed but did not have the money themselves. To provide the money Mark and Jennifer needed, Annie and Tony took out a short-term, high-interest loan from Legacy Group Capital (Legacy Group) for $648,500 (the Legacy Group loan).

The Legacy Group loan was $648,500 because Annie and Tony had to leverage the equity they held in two houses, a house in Woodinville, Washington (the Woodinville house) and a house in Indian Wells, California (the Via Venito house), and that required paying off the mortgage on the Woodinville house. The Via Venito house had no mortgage. Thus the Legacy Group loan included $312,044.32 (the money needed for the Hayden Lake house), $270,462.50 (the payoff for the mortgage on the Woodinville house), $48,677.62 (which according to Mark, he received), and $17,315.50 (in settlement charges). Before releasing $312,044.32 to Mark and Jennifer, Annie and Tony required them to sign the Note, which was drafted to be identical to the Legacy Group loan due to Annie and Tony's exposure, and the Deed of Trust, which pledged the Hayden Lake house as security for the Note and future advances.

Mark and Jennifer signed the Note and Deed of Trust and purchased the Hayden Lake house with $312,044.32 loaned from Annie and Tony. But they never repaid Annie and Tony

any portion of the Note, not the $312,044.32, not the $270,462.50 used to pay off the mortgage on the Woodinville house, not the $48,677.62 that Mark received, not the $17,315.50 in settlement charges, and not the interest and other fees on the Legacy Group loan Annie and Tony eventually paid or subsequent advances they made to Mark. The reason, according to Mark and Jennifer, is that Annie and Tony's attorney (Joe Mijich) informed them they would own the Hayden Lake house "free and clear" once the Woodinville house sold and the Legacy Group loan was repaid. The Note and Deed of Trust contain no such terms.

Annie and Tony eventually repaid the Legacy Group loan, the Woodinville house eventually sold, and the district court interpreted the Note and Deed of Trust to mean that Mark and Jennifer now own the Hayden Lake house free and clear. That was error. It is fundamental that an unambiguous contract must be interpreted and construed according to the plain meaning of its terms and that an ambiguity only arises if a particular term is reasonably subject to conflicting interpretation. The district court ignored those rules when it found the Note and Deed of Trust were latently ambiguous and used extrinsic evidence to add entirely new terms that vary and contradict the plain terms of the contracts.

Mark and Jennifer contend the district court was correct and justified in considering extrinsic evidence, not only because the Note and Deed of Trust were latently ambiguous but because the contracts were unintegrated and procured by Annie and Tony's fraud. Mark and Jennifer are wrong. The district court did not consider and made no findings that the Note and Deed of Trust were unintegrated or induced by fraud. Under the guise of interpreting the Note and Deed of Trust to determine the parties' intent, the district court found the contracts were

latently ambiguous and did so without identifying any language that was unclear. And on that basis, and that basis alone, the district court used extrinsic evidence, not to explain what was intended by an unclear term, but to add terms that the contracts do not contain.

The district court also erred in other ways. Substantial and competent evidence does not support the district court's conclusion that the parties meant for Mark and Jennifer to take the Hayden Lake house free and clear once the Woodinville house sold and the Legacy Group loan was repaid. Mark and Jennifer offer different explanations for why the evidence supports that conclusion, but neither account for the district court's finding that Annie and Tony were entitled to their equity in the Woodinville house after it sold, which amounted to at least $220,000. The record does not support the conclusion that Annie and Tony meant to gift their equity in the Woodinville house, thousands of dollars in loan fees, and subsequent advances to Mark and Jennifer so they could own the Hayden Lake house free and clear. Such a result is implausible.

Annie and Tony ask the Court to 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.

II. STATEMENT OF FACTS

Mark makes several factual statements that are not supported by the record. First, Mark's statement that "Jennifer and Mark questioned why the note was for $648,500 before signing" is not fully true. *See* Mark's Br. at 8. While Jennifer questioned the amount of the Note before signing, Mark did not. On September 3, 2014, Mark signed the Note and the Deed of Trust, but Jennifer did not. COE 504 (Ex. 8); COE 609 (Ex. F); COE 610-614 (Ex. G); Tr. 164:1-19

(Mark); Tr. 536:12-24 (Jennifer).[1] According to their testimony, only after Jennifer refused to sign did Mark call Joe Mijich regarding the amount of the Note. Tr. 165:25-166:19 (Mark); 481:7-19 (Jennifer). Jennifer signed the contracts the next day, on September 4. *See* COE 609 (Ex. F), 613 (Ex. F), 688 (Ex. U). Thus Mark signed the contracts before questioning the Note.

Second, Mark's statement that "the Woodinville house sold for $690,000 and the sale proceeds were distributed to Mark so that he could pay off the Legacy loan" is also not true. *See* Mark's Brief at 9. While the Woodinville house sold for $690,000, none of its proceeds paid off the Legacy Group loan. By the time the house sold, Annie and Tony had already paid down the Legacy Group loan to $193,398.12 with proceeds from a new $480,000 loan on the house (the First Evergreen loan). COE 534-537 (Ex. 14); Tr. 180:22-181:10 (Mark); COE 115:17-116:21 (Rerucha Dep.). In mid-July 2015, Annie and Tony paid the remainder of the Legacy Group loan—by that time, $198,020.17—with a portion of the proceeds from a $417,000 loan on the Via Venito house (the Second Evergreen loan). COE 712 (Ex. AA); Tr. 181:21-184:4 (Mark).

Two weeks later, the Woodinville house sold. *See* COE 731 (Ex. NN). None of those proceeds went to pay off the Legacy Group loan because it was already paid. Rather, the proceeds went to sales commissions and other fees (just under $49,000), paid off the First Evergreen loan ($483,957.00), and were advanced to Mark for the purchase of a property in Bellevue, Washington ($157,157.40) in connection with the Second Evergreen loan. COE 732-

[1] As in Annie and Tony's opening brief, 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."

733 (Ex. NN); 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, 1207:19-1209:6 (Kalyn). No part of the proceeds from the Woodinville house sale were given to Mark so he could pay off the Legacy Group loan.

Third, Mark's statement that "[t]he outstanding Evergreen loan for $417,000 refinanced the entire debt owed under the promissory note secured by the deed of trust on the Hayden home" is not correct. The Second Evergreen loan was unrelated to the Hayden Lake house; he needed the money to purchase the Bellevue property. Tr. 181:21-183:3, 413:9-414:10, 1486:14-23 (Mark). But the Woodinville house did not sell in time, and as a condition on Annie and Tony obtaining the Second Evergreen loan, their debts were paid first. Tr. 183:20-184:4 (Mark). That is why the Second Evergreen loan inadvertently paid off the last of the Legacy Group loan ($198,020.17), along with the mortgage on Annie and Tony's personal residence ($49,499.07), their credit card ($7,883), and a credit card held by Mark that Annie had cosigned. Tr. 183:14-184:9, 241:9-243:18 (Mark); COE 538 (Ex. 15); COE 711 (Ex. AA).

Because the Second Evergreen loan was tied to Mark's purchase of the Bellevue property, Annie and Tony advanced the remainder of the proceeds ($116,494) to Mark, plus $52,382.07 for paying off their mortgage and credit card. Tr. 188:21-189:6, 191:17-192:5, 241:9-244:18 (Mark); COE 616 (Ex. O); COE 617 (Ex. P). For that same reason, they advanced Mark the $157,157.40 from the Woodinville house sale. Tr. 204:18-206:8, 314:1-16 (Mark). Mark used all of that money for the Bellevue property. *See* COE 615 (Ex. N); COE 711 (Ex. AA). Thus, Mark's claim that the Second Evergreen loan refinanced his and Jennifer's debt on the Hayden Lake house is not correct.

III. REPLY ARGUMENT

A. The district court erred in finding the Note and Deed of Trust were latently ambiguous and in considering extrinsic evidence to interpret the contracts to include entirely new terms.

When a contract's language is unambiguous, the contract must be construed by the meaning derived from its plain wording. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454, 259 P.3d 595, 600 (2011). Whether an ambiguity exists and the interpretation of the contract if it is not are both questions of law for the Court. *Id*. at 455, 259 P.3d at 601. The district court erred in finding a latent ambiguity in the Note and Deed of Trust and in interpreting the contracts to include entirely new terms. While Mark and Jennifer argue otherwise, it is impossible to ignore that the district court failed to identify any particular term that was ambiguous. Instead the district court found a latent ambiguity because it did not understand why the parties entered into the contracts—*i.e.*, the contracts "do not make sense"—not because extrinsic evidence was needed to explain the meaning of any uncertain language. R. 471-77.

1. The district court's judgment against Annie and Tony is based on a false premise: that the Note and Deed of Trust contain a latent ambiguity.

a. Before a court can find a latent ambiguity, the contract must contain a particular term that is reasonably susceptible to conflicting interpretation or is nonsensical.

The district court found 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." R. 472. That, according to the district court, "do[es] not make sense." *Id*. From there, the district court sought to interpret the contracts and considered "extrinsic evidence to determine the parties' intent at the time the Note and Deed of

Trust were signed." *Id*. That was error because, as Annie and Tony explained in their opening brief (at pp. 27-31), no term of the contracts was in fact susceptible to a reasonable conflicting interpretation. While purporting to interpret the contracts, the district court did not identify—or attempt to explain the meaning of—any uncertain term. *See* R. 471-477.

Defending the district court's legal analysis, Mark and Jennifer seemingly recognize the district court's failure, as they each contend there was no need to find a particular term ambiguous before finding the Note and Deed of Trust contained a latent ambiguity. Mark's Br. at 12-13; Jennifer's Br. at 8-11. According to Mark, Idaho decisions have not "required a particular 'term' with multiple reasonable meanings before finding a latent ambiguity." Mark's Br. at 12. Jennifer agrees: "a latent ambiguity need not only be based on the existence of a term in the contract that is susceptible [to] more than one reasonable meaning." Jennifer's Br. at 11. Their contention is inconsistent with Idaho case law and defies basic principles of contractual interpretation and construction.

The courts' primary objective in interpreting a written agreement "is to discover the mutual intent of the parties at the time the contract is made," and the "parties' intent should be ascertained from the contract's language." *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014) (citation omitted). Thus, when interpreting a contract, the courts "'begin[] with the document's language.'" *Knipe Land*, 151 Idaho at 454, 259 P.3d at 600 (citation omitted). "For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical." *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (citations omitted). A

latent ambiguity, while not clear on the face of the contract, "becomes apparent when applying the instrument to the facts as they exist." *Id*. (citation omitted).

Thus the contract must contain some term or language that is "reasonably subject to conflicting interpretation" before a court can find it ambiguous. *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992). That is true whether the ambiguity is patent or latent, as shown by cases Annie and Tony cited in their opening brief (at pp. 27-31). In *Snoderly v. Bower*, 30 Idaho 484, 166 P. 265, 265-66 (1917), a contract term that required hay to be measured "according to government rule" was latently ambiguous because there were several such rules. In *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-49 (1952), the reference to "a ten inch pump" in a well drilling contract was latently ambiguous because there were at least three possible pumps. And in *Cool v. Mountainview Landowners Cooperative Association*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004), the term "swimming" in a written easement was latently ambiguous because interpreting it strictly would lead to an illogical result.

In each of those decisions, actual language in the contract was unclear when applied to the facts of the case. To be sure, the entire point of resolving the ambiguity in "government rule," "a ten inch pump," and "swimming" was to explain the meaning of uncertain language and the parties' intent. That was not the case here as the district court failed to identify or explain any uncertain term of the Note or Deed of Trust. *See* R. 471-477.

b. In *Porter* and *Canyon Highway District No. 4*, the Court found an ambiguity tied to a particular term.

It follows that "conflicting interpretations as to 'why the principal amount of the Note and Deed of Trust were more than double the amount needed to purchase the Hayden home,'" Mark's Brief at 12-13 (citing R. 473), do not justify finding the contracts are latently ambiguous. The ambiguity must be tied to a particular term that is reasonably susceptible to another meaning and requires explanation when applied to the facts as they exist. No Idaho case cited by Mark and Jennifer, or otherwise found, allows a court to find a latent ambiguity untethered to the contract's actual language and its application to the existing facts. That includes *Porter v. Bassett*, 146 Idaho 399, 195 P.3d 1212 (2008), cited by Mark, and *Canyon Highway District No. 4 v. Canyon County*, 107 Idaho 995, 695 P.2d 380 (1985), cited by Jennifer.

According to Mark, citing *Porter*, unidentified "inconsistencies in the Note and Deed of Trust throw[] a 'shadow of ambiguity' over the instruments," requiring the introduction of parol evidence to determine the parties' intent. Mark's Br. at 13. But the shadow in *Porter* was cast by actual language in a deed that could have been interpreted multiple ways. *See* 146 Idaho at 404-05, 195 P.3d at 1217-18. In particular, the Court found the deed was ambiguous because "the phrase 'meanderings of the hollow' could be interpreted to mean a line either at the center of the hollow or following the sinuosities of the hollow from the SE to the NW corners." *Id*. at 405, 195 P.3d at 1218. That is in contrast to the district court here, which identified no such ambiguity.

Canyon Highway District No. 4 also included specific language that was ambiguous, albeit in a statute. Yet according to Jennifer, the decision recognizes that a latent ambiguity can

arise simply because a contractual relationship itself is "nonsensical" or does not make sense, thereby freeing the district court from identifying and explaining a term that is unclear. *See* Jennifer's Brief at 9-11. The principle that a contract term is ambiguous if its language is "nonsensical" derives from *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184 (2003). *See Swanson*, 145 Idaho at 62, 175 P.3d at 751 (citing *Purdy*). In *Purdy*, the Court sought to interpret an insurance policy and observed in a footnote that a "policy provision could be ambiguous if there were no reasonable interpretations." 138 Idaho at 447 n.1, 65 P.3d at 188 n.1.

An example of such language is found in *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 297 P.3d 222 (2012). In *Steel Farms*, a landlord and tenant entered into a written agreement granting the tenant a lease and option to purchase a farm. But while the agreement expressly granted the tenant the option to purchase the farm, strict application of its plain language left the tenant with no opportunity to actually exercise the option. *Id*. at 266, 297 P.3d at 229. The Court found the plain language of the conflicting provisions was "nonsensical" and that parol evidence was necessary to determine the parties' intent. *Id*.

Canyon Highway District No. 4 does not involve nonsensical language but sought to explain what the legislature meant by a "taxing district" that received money in 1979. There voters approved a change in how a county's secondary roads were administered, resulting in a highway district replacing a county department. 107 Idaho at 996, 695 P.2d at 381. The change was complicated by a statute that directed how sales tax proceeds returned to the county should be distributed to taxing districts: each taxing district's share was based on the amount distributed "for the fourth calendar quarter of 1979." *Id*. at 997, 695 P.2d at 382. The statute also required

that the "resulting sums shall be paid to the county treasurer of each county for distribution to each taxing district … which received sales tax moneys in 1979." *Id.*

The county claimed the highway district was not eligible to receive the department's apportionment of sales tax monies, since the highway district was created in 1981 and was not a taxing district in 1979. *Id*. The highway district sued, and the district court found it was a taxing district entitled to the apportionment of sales tax monies even though the language of the statute appeared unambiguous on its face. *Id*. There was, according to the district court, a latent ambiguity in the statute regarding exactly what the legislature intended when the plain language was applied to the facts. *Id*. The district court found the highway district was entitled to a share of the sales tax money as a taxing district in 1979, just as the department would have been, because extrinsic evidence showed the reorganization "merely resulted in a change of administration of an ongoing governmental function." *Id*.

The Idaho Supreme Court agreed that the highway district was a taxing district eligible for the distribution of the tax sales money: "[t]he more reasonable interpretation is that the sales tax money should follow the responsibility." *Id*. Thus, just as *Snoderly*, *Williams*, and *Cool* did, *Canyon Highway District No. 4* gave meaning to specific language that was unclear and that required explanation when applied to the facts of the case. *Canyon Highway District No. 4* does not support Jennifer's contention that a latent ambiguity can arise without language that is reasonably susceptible to another meaning or simply because the contractual arrangment itself does not make sense. *See* Jennifer's Brief at 11.

c. The circumstances here are akin to *Knipe Land*, where there was no latent ambiguity, not *Cool*, where there was a latent ambiguity.

In their opening brief (at pp. 30-31), Annie and Tony contrasted the holdings in decisions such as *Cool*, which found a latent ambiguity, with the holding in *Knipe Land*, which did not. In *Knipe Land*, a property broker and a landowner entered into an employment contract to sell the land. 151 Idaho at 452-53, 259 P.3d at 598-99. The contract included a provision that, in effect, allowed the broker to earn twice as much under a failed sale of the land than in a successful sale. *See id*. at 456, 259 P.3d at 602. The Court rejected the district court's implicit finding that such a seemingly absurd and unfair result created a latent ambiguity. *Id*. The circumstances here are analogous to *Knipe Land*, not *Cool*.

Mark and Jennifer fail to address or distinguish the merits of *Knipe Land*. They simply argue the decision has no application because the district court here did not find the Note and Deed of Trust were latently ambiguous based on "perceived unfairness." Mark's Brief at 13; Jennifer's Br. at 11-12. But that was the substance of the district court's rationale. It found the Note and Deed of Trust were latently ambiguous because the principal amount of the Note was more than double the amount Mark and Jennifer need to purchase the Hayden Lake house. R. 472. The district court also believed that the contracts do not reflect the parties' entire agreement "because the Note and Deed of Trust, on their face, do not make sense." R. 472.

That is no different than the argument the landowner made in *Knipe Land*, whether the result is described as "absurd" or "unfair," or one that "do[es] not make sense." To be sure, in *Knipe Land* the alleged latent ambiguity was not tied to any particular language that was

rendered uncertain by the facts of the case or that needed further explanation. 151 Idaho at 456, 259 P.3d at 602. The Court found the resulting "absurdity" was not akin to the absurdity found in *Cool* (if "swimming" had been strictly interpreted). *Id*. That is the situation here too.

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

Here too the perceived absurdity does not suggest that the parties intended the Note and Deed of Trust to mean anything other than what the contracts plainly say. The Note and Deed of Trust were essential to the transaction. Mark and Jennifer had no way to acquire the money they needed to purchase the Hayden Lake house without signing them. *See* COE 608 (Ex. E). The Note is evidence of that debt and contains Mark and Jennifer's absolute promise to pay a specified amount, at a specified time:

> For value received, the undersigned ("Maker"), 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 …. The entire balance of $648,500 shall also be payable on November 29, 2014.

COE 609 (Ex. F). The Deed of Trust expressly secures that obligation, plus "all such further sums as may hereafter be loaned or advanced by the Beneficiary" to either Mark or Jennifer while they owed the Hayden Lake house. COE 610 (Ex. G).

There is only one reasonable interpretation of a promise to pay the principal of $648,500 with interest: a promise to pay the principal sum of $648,500 with interest. The natural and only implication of Mark and Jennifer's agreement is an absolute promise to pay. In the Note and Deed of Trust, Mark and Jennifer bound themselves to pay $648,500, plus interest, secured by

the Deed of Trust. They also agreed that the Deed of Trust would secure future advances while they owed the Hayden Lake house. 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.

2. In violation of the parol evidence rule, the district court considered extrinsic evidence to explain a perceived ambiguity in the Note and Deed of Trust without tying the evidence to any particular term.

In their opening brief (at pp. 32-34), Annie and Tony also explained that there is another way to demonstrate the district court's error in finding the Note and Deed of Trust were latently ambiguous: the extrinsic evidence the district court considered did not interpret or explain the meaning of any uncertain term but, instead, materially altered the contracts to include entirely new terms. In interpreting the Note and Deed of Trust, that violated the parol evidence rule. The parol evidence rule holds that once the parties have reached a final written agreement, their prior or contemporaneous understandings, negotiations, and agreements are ineffective, immaterial, and incompetent to vary, contradict, or enlarge the written contract. *Valley Bank v. Christensen*, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991).

a. Annie and Tony raised the use of parol evidence to interpret the contracts as a substantive issue, and the district court considered it and interpreted the contracts to include new conditions.

Jennifer contends that Annie and Tony waived their argument that extrinsic evidence cannot be used to add new terms to the Note and Deed of Trust by failing to object to the *admission* of extrinsic evidence at trial. Jennifer's Br. at 5-6, 12-13. Jennifer is wrong. Annie and Tony do not assign error to the admissibility of extrinsic evidence but to the district court's failure to correctly apply substantive law to the facts before it. *See* Annie and Tony's Opening

Br. at 25-34. There is no waiver of an issue when the party makes its position known, and it is considered by the district court.

The Court has observed that the parol evidence rule is a rule of substantive law, not a rule of evidence: "parol evidence is excluded because the law requires the terms of the agreement to be found in the writing itself and not because of any reasons which ordinarily require the exclusion of evidence, such as some policy against its admission, or its untrustworthiness or lack of probative value."[2] *Reynolds Irrigation Dist. v. Sprout*, 69 Idaho 315, 327, 206 P.2d 774, 781 (1948) (quoting 32 C.J.S. *Evidence* § 851, at 787). Thus the admission of extrinsic evidence does not make the evidence legally effective and competent. Even if the extrinsic evidence is received without objection, it still must be ignored. *See, e.g., Marek v. Lawrence*, 153 Idaho 50, 57, 278 P.3d 920, 927 (2012) (finding district court impermissibly considered evidence outside the language of a deed).

Because the parol evidence rule is a substantive rule, the failure to object to the admission of parol evidence is not a waiver. *See In re Estate of Smith*, 427 P.2d 443, 444 (Kan. 1967) (finding that parol evidence rule "must be adhered to, irrespective of whether or not proper

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[2] The view that the parol evidence is a substantive rule and not a rule of evidence is widely recognized. *See* 11 *Williston on Contracts* § 33:4, Westlaw (4th ed., database updated July 2019) ("The view that the parol evidence rule is substantive rather than procedural has received such widespread recognition that it may be said to be universally accepted."); 2 E. Allen Farnsworth, *Contracts* § 7.2, at 222 (3d ed. 2004) ("That the rule is not one of 'evidence' is affirmed by courts and scholars, specialists in the field of evidence, who assure us that the rule is one 'substantive law.'"); 9 John H. Wigmore, *Evidence in Trials at Common Law* § 2400, at 4 (3d ed. 1981) ("[T]he rule is in no sense a rule of evidence, but a rule of substantive law." (emphasis omitted)).

objection is interposed at trial"); *Bulis v. Wells*, 565 P.2d 487, 490 (Wyo. 1977) ("We acknowledge, of course, that the parol-evidence rule is one of substantive law and must be applied even where testimony is admitted without objection." (citation omitted)); *Gajewski v. Bratcher*, 221 N.W.2d 614, 629 (N.D. 1974) ("[S]ince parol evidence is not a rule of evidence but of substantive law, the failure to make proper and timely objection to the admissibility of oral or intrinsic evidence does not render such evidence competent or admissible or entitle it to any probative force or value, and imposes a duty upon the appellate courts to disregard and to exclude such evidence from its consideration in the rendition of its decision ….").

Further, to properly preserve an issue for appellate review, "both the issue and the party's position on the issue must be raised before the trial court." *State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019). Annie and Tony did so here. On summary judgment, they argued "that the Note and Deed of Trust are complete agreements and that parol evidence cannot be considered to alter the terms of unambiguous agreements." R. 208. Likewise at trial, they argued that the Note and Deed of Trust were unambiguous, were not susceptible to another reasonable interpretation, and must be interpreted and construed according to their plain terms. R. 380-81, 387, 436. Both Jennifer and the district court specifically addressed those issues.

In her closing reply argument, Jennifer addressed "Defendants' arguments for *application of the Parol Evidence Rule* to the Note and Deed of Trust," citing the district court's order denying summary judgment, and incorporated the district court's "reasoned analysis" by reference and asked the district court to "reject those arguments *once again*." R. 408 (emphases added). Of course the district court did. After reciting substantive rules on contractual

interpretation, R. 471, the district court found a latent ambiguity in the Note and Deed of Trust and, therefore, that it was appropriate to consider extrinsic evidence "to determine the parties' intent at the time the Note and Deed of Trust were signed" and "to interpret the Note and Deed of Trust based on" the perceived latent ambiguity, R. 472-73.

The district court then concluded the parties intended that Mark and Jennifer's obligation under the Note and Deed of Trust would be satisfied when the Woodinville house was sold and the Legacy Group loan was repaid. R. 473, 477. Because the parol evidence rule was addressed to and decided by the district court, *Kraly v. Kraly*, 147 Idaho 299, 208 P.3d 281 (2009) does not apply. *See* Jennifer's Br. at 6. In *Kraly*, the Court refused to consider whether parol evidence was properly admitted because there was no objection raised at trial. 147 Idaho 299, 302–03, 208 P.3d 281, 284–85 ("We will not consider issues pertaining to the admission of evidence where no objection was raised to admission at trial."). Unlike in *Kraly*, the district court had the opportunity to address the same issue that is raised here.

Moreover, below, Jennifer did not raise her position that the failure to object to the admission of extrinsic evidence constitutes a waiver of the parol evidence rule. Rather, as just shown, the parties and the district court debated the use of extrinsic evidence to interpret and modify the Note and Deed of Trust, despite the receipt of the evidence. Jennifer argued, just as Annie, Tony, and Mark did, the legal sufficiency of the extrinsic evidence and its meaning and effect on the terms of the Note and Deed of Trust. Thus, the parties, by their actions, addressed extrinsic evidence as an issue of substantive law, not evidence. Jennifer cannot now complain that Annie and Tony should have objected to the admission of parol evidence. *See City of*

Middleton v. Coleman Homes, LLC, 163 Idaho 716, 727, 418 P.3d 1225, 1236 (2018) (holding party cannot assert error when party's own conduct induces the commission of the error).

b. The district court made no findings or conclusions on whether the Note and Deed of Trust were induced by fraud or completely or partially integrated.

Jennifer and Mark also argue the parol evidence rule has no application here because of other exceptions to the rule, such as where fraud is alleged or where the writing is not integrated. *See* Jennifer's Brief at 6-8, 12-19; Mark's Brief at 11. The fundamental problem with those arguments is that the district court did not justify its use of extrinsic evidence based on those reasons. *See* R. 471-473. The district court was clear that it sought to interpret the Note and Deed of Trust to resolve a perceived latent ambiguity and determine the parties' intent. *See* R. 471-477. It did not find the contracts void or voidable or that the parties entered into a collateral agreement. *See id*.

Thus, the record does not support Jennifer's contentions that the district court was justified in considering parol evidence based on fraud in the inducement. *See* Jennifer's Br. at 6, 15-19. While "the parol evidence rule has nothing to do with a case where the defense is fraud in procuring the agreement," *Utils. Eng'g Inst. v. Criddle*, 65 Idaho 201, 141 P.2d 981, 985 (1943), the district court made no factual finding or legal conclusion on alleged fraudulent efforts to induce Jennifer to sign the Note and Deed of Trust. R. 453-78. It would be improper for the Court to do so now. *See Gillespie v. Mountain Park Estates, L.L.C.*, 138 Idaho 27, 31, 56 P.3d 1277, 1281 (2002). (refusing to address a fraud allegation on appeal and whether the elements of fraud had been proven because the district court had not addressed the issue).

The district court also did not justify its use of extrinsic evidence because the Note and Deed of Trust were unintegrated. *See* R. 471-473. The parol evidence rule does not apply where the writing is not integrated. *Valley Bank*, 119 Idaho at 498, 808 P.2d at 417. Jennifer places great emphasis on the district court's finding that "[i]t is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense." R. 472; Jennifer's Br. at 7-8, 12. But that was all the district court said. The district court made no determination on whether the Note and Deed of Trust were completely or partially integrated. *See* R. 471-477.

An integrated agreement is a writing constituting a final statement on a subject. *See Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971). A writing can be partially integrated if it is exhaustive on a limited subject. *Id*. Whether a particular subject of negotiations is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances. *Id.* In *Nysingh*, for example, the Court determined a note was not integrated because it did not refer to two crucial portions of the parties' agreement. *Id*. The district court engaged in no such analysis here. *See* R. 471-477. It made no finding of the parties' intent related to integration. It only found the Note and Deed of Trust did not make sense, when in fact their plain language did.

To the extent Jennifer argues fraud and lack of the integration are grounds for the Court to apply the "right result, wrong theory" rule and find no error in the district court's interpretation of the Note and Deed of Trust, that is not correct. The rule does not authorize the Court to uphold a particular result by engaging in appellate fact-finding upon conflicting

evidence. *See Schraufnagel v. Quinowski*, 113 Idaho 753, 756, 747 P.2d 775, 778 (Ct. App. 1987) (refusing to apply alternative theory where Court was asked to address host of factual and legal issues for first time on appeal), *disapproved on other grounds by Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990). As explained, the Court would be required to do so here.

c. Purporting to interpret the Note and Deed of Trust, the district court cannot consider extrinsic evidence to add entirely new conditions that the parties themselves omitted.

Even if the district court's consideration of extrinsic evidence was proper, it erred in using that evidence as a basis for adding absent terms rather than as a tool for interpreting and explaining the Note and Deed of Trust's existing language. Contrary to Mark and Jennifer's position, the extrinsic evidence the district court relied on did not reveal the contracts are reasonable susceptible to terms that allowed them to take the Hayden Lake house "free and clear" once the Woodinville house sold and the Legacy Group loan was repaid. Mark's Br. at 13-15; Jennifer's Br. at 6-7, 12. More directly, Mark and Jennifer's disputed conversation with Joe Mijich did not demonstrate an ambiguity in the contracts.

As shown in *Snoderly*, *Williams*, and *Cool*, the offered extrinsic evidence must be relevant to prove a meaning to which the language of the contract is reasonably susceptible. In other words, the extrinsic evidence must be tethered to a particular term or language. But the extrinsic evidence Mark and Jennifer introduced was not offered to explain or clarify any particular term or language of the Note and Deed of Trust but to add terms that do not exist in the writings. There is no dispute that the express terms of the contracts do not release Mark and Jennifer from their obligations once the Woodinville house sold and the Legacy Group loan was

repaid. As such, the district court should have ignored the extrinsic evidence. *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.").

In sum, while purporting to interpret the Note and Deed of Trust, the district court improperly subjected the parties to a contract that was not expressed in their writing. The district court's authority when construing a contract is limited. It cannot modify the contract to create a new agreement and cannot "revise an agreement where its interpretation is involved." *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160, 166, 349 P.2d 986, 990 (1960). It cannot make better agreements for the parties than they made themselves. *Id*. "[N]or can courts interpret an agreement to mean something the contract does not itself contain." *Id*. But here the district court interpreted the Note and Deed of Trust to include terms that do not exist.

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.

According to Mark, Idaho Code § 28-3-117 allows the courts to "utilize other agreements when interpreting such an instruction." Mark's Br. at 11. While the district court held the same view, *see* R. 472 ("the UCC provides that other agreements may be considered when interpreting a negotiable instrument."), they both are mistaken. As Annie and Tony explained in their opening brief (at pp. 34-36), Section 28-3-117 is subject to the parol evidence rule and does not concern the use of extrinsic evidence to *interpret* an ambiguous negotiable instrument per se. Rather the statute recognizes that an instrument "may be modified, supplemented or nullified by

a separate agreement of the obligor and a person entitled to enforce the instrument." Idaho Code § 28-3-117. The district court made no findings that the parties entered into a separate agreement and undertook no such analysis. *See* R. 472-473. To be sure, it never addressed whether a subsequent agreement complied with the requirements of a valid contract. *See id*.

Despite or in light of that, Jennifer contends that Section 28-3-117 is the codification of a common law contract principle, namely that "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." Jennifer's Br. at 15-16 (citing *Thomas v. Campbell*, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984)). Based on that contention, Jennifer argues that the Note was modified based on Joe Mijich's fraudulent representations to Mark and Jennifer. *Id*. at 16-19. Jennifer's argument suffers from the same problem as noted before. The district court did not consider fraud or make any findings on fraud. R. 453-78. Because the district court did not address Jennifer's argument, there is nothing for the Court to review. *See Gillespie*, 138 Idaho at 31, 56 P.3d at 1281.

In any event, for that same reason, the Court is unable to apply the "right result, wrong theory" rule with respect to the district court's application of Section 28-3-117. *See Schraufnagel*, 113 Idaho at 756, 747 P.2d at 778. Too many factual and legal issues remain to apply the statute differently. Moreover, "if a decision, taken as a whole, appears to reflect a misapprehension of law, proper appellate response is to vacate the decision and to remand the case for reconsideration in light of the proper legal framework." *Thrall v. St. Luke's Reg'l Med. Ctr.*, 157 Idaho 944, 947, 342 P.3d 656, 659 (2015). The district court's decision misapplied the law to interpret new terms into the Note and Deed of Trust and requires remand for the court to

weigh the disputed facts and direct its findings according to the correct legal principles.

Lastly, even if the Court could find Joe Mijich's statements to Mark and Jennifer were sufficient to constitute a separate agreement, the statute of frauds precludes such a finding. *See Ogden v. Griffith*, 149 Idaho 489, 493, 236 P.3d 1249, 1253 (2010) ("Because a deed of trust is an interest in real property, it falls under the terms of I.C. § 9-503."). Annie and Tony addressed the statute of frauds at pages 36-37 of their opening brief. In response, Jennifer maintains that they waived this issue because it was never raised to the district court. While Annie and Tony did not raise this issue below, it is also true that the Joe Mijich's statements were not considered by the district court to form a separate agreement. Annie and Tony raised the issue only to the extent Mark or Jennifer argues on appeal that the parties reached a collateral agreement modifying the Note and Deed of Trust.

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.

In their opening brief, Annie and Tony explained why substantial and competent evidence does not support the district court's interpretation of the Note and Deed of Trust. *See* Annie and Tony's Br. at 38-44. The district court's conclusion that the parties intended Mark and Jennifer to take the Hayden Lake house "free and clear" once the Woodville house sold and the Legacy Group loan was repaid is implausible based on the record. In particular, the record simply does not support the district court's belief that "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.

Those findings cannot be reconciled with another key finding made by the district court: that Mark and Jennifer should receive $150,000 from the equity in the Woodinville house. *See* R. 465. That being the case, Annie and Tony were entitled to the rest. *See id*. But when all was said and done, Annie and Tony received none of the equity in the Woodinville house and financed three loans that allowed Mark and Jennifer to walk off with a house they did not pay for. Mark and Jennifer presented no evidence that Annie and Tony meant to gift all their equity in the Woodinville house, the $312,044 needed to purchase the Hayden Lake house, and all the loan fees incurred to obtain and eventually pay off the Legacy Group loan. *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 a manifested intent to make gift).

Mark and Jennifer come up with different explanations to support the district court's interpretation of the Note and Deed of Trust and conclusion that the parties intended to forgive the Note once the Legacy Group loan was repaid. According to Mark, that is shown because he and Annie would have suffered a $40,000 net loss if the Woodinville house has sold as planned (*i.e.*, before the Second Evergreen loan). Mark's Br. at 15. From there, Mark contends the Second Evergreen loan covered that loss, plus the $312,044 loaned to Mark and Jennifer for the Hayden Lake house, and that Annie and Tony were made whole because Mark pays the Second Evergreen loan. *Id*. Jennifer simply argues that Tony and Annie received $150,000 when the Woodinville house sold. Jennifer's Br. at 20.

Mark and Jennifer's explanation is contradicted by the trial court's acknowledgment that the Second Evergreen loan was all Mark's and had no relation to the Legacy Group loan. R. 465-466. As discussed earlier at p. 5, Mark testified that the Second Evergreen loan was unrelated to the Hayden Lake house and the Legacy Group loan; it was needed to purchase the Bellevue property, which is why he eventually received the Second Evergreen loan's proceeds and advances from Annie and Tony to replace the proceeds that were otherwise dispersed. *See* Tr. 181:21-183:3, 188:21-189:6, 191:17-192:5, 204:18-206:8, 241:9-244:18, 314:1-16, 413:9-414:10, 1486:14-23 (Mark); COE 615 (Ex. N); COE 711 (Ex. AA). That included $116,494 in proceeds from the loan, plus advancements of $52,382.07 and $157,157.40.

To the extent that Mark equates the sale of the Woodinville house to a loss of $40,000 and Jennifer claims that Annie and Tony made a $150,000 profit once the house was sold, they completely ignore the fact that Annie and Tony were entitled to their share of the equity in the Woodinville house, leveraged that equity (plus equity from the Via Vento house) to loan Mark and Jennifer $312,044 to purchase the Hayden Lake house, and incurred substantial fees to close the Legacy Group loan and eventually pay off that loan. Yet Annie and Tony did not receive a penny of their equity or reimbursement for those fees. Annie and Tony's opening brief explained this, following the equity in the Woodinville house as it moved to the Legacy Group loan and the Hayden Lake house. *See* Annie and Tony's Br. at 40-44.

The simplest way to understand what Annie and Tony contributed to the purchase of the Hayden Lake house is to consider the parties' respective financial stake in the Woodinville house if it sold for $690,000 before Annie and Tony obtained the Legacy Group loan. After selling fees

(nearly $49,000) and paying off the first mortgage (just over $270,000), the equity in the house would have been around $370,000. *See id*. According to the district court, Mark and Jennifer were entitled to $150,000 of that, leaving $220,000 for Annie and Tony. *See* R. 465. Of course that did not happen. The equity in the Woodinville house, together with the equity in the Via Venito house, was used to obtain the $648,500 Legacy Group loan. R. 461. And because the Legacy Group loan was eventually paid off through subsequent refinancing of both houses, the district court found Annie and Tony were not out-of-pocket and were paid in full. R. 477

Using Annie and Tony's $220,000 in equity as the focal point, where did that money go? The district court was satisfied that the Legacy Group loan and the Note were identical, that the parties anticipated the Woodinville house would be sold to pay off the Legacy Group loan, and that the Legacy Group loan was eventually repaid. *See* R. 473-477. But those facts did not account for Annie and Tony's equity in the Woodinville house, for which they were not compensated. *See* Annie and Tony's Br. at 40-44. Nor can the facts be stretched to mean that Annie and Tony intended to gift Mark and Jennifer all of that equity so they would own the Hayden Lake house "free and clear" once the Legacy Group loan was paid. *See id*.

That is an implausible interpretation of the Note and Deed of Trust and an implausible result. The Court should be left with a definite and firm conviction that a mistake has been made. A reasonable trier of fact would not accept and rely on the findings made by the district court in resolving the perceived ambiguity. 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.

As noted, the parties included an express future advance clause in the Deed of Trust. COE 610 (Ex. G). Annie and Tony addressed the clause in their opening brief (at pp. 44-46) and explained that the district court erred when it found the parties did not intend to secure subsequent advances made to Mark and Jennifer while they owned the Hayden Lake house. *See* R. 474-476. Future advance clauses are enforceable in Idaho, and the district court cannot simply refuse to enforce it. *See, e.g., Biersdorff v. Brumfield*, 93 Idaho 569, 572, 468 P.2d 301, 304 (1970) ("[I]f 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.").

1. The district court ignored the parties' express agreement to protect future advances made for any purpose.

In response, Jennifer contends the evidence at trial supports the district court's findings that there was no creditable evidence of intent to cover future advances. Jennifer's Br. at 20-22; *see also* R. 475-476. Jennifer makes the same mistakes the district court did. She too relies on *Biersdorff* for the proposition that there must be sufficient extrinsic evidence before a court will enforce a future advance clause. *See* Jennifer's Br. at 20-22. But *Biersdorff* concerned a mortgage that made no reference to securing subsequent indebtedness. 93 Idaho at 571, 468 P.2d at 303. Nonetheless, the district court found the parties intended to secure future advances by oral agreement, and the Court affirmed and found that agreement enforceable. *Id*. at 572-73, 468 P.2d at 304-05.

Here, in contrast, there was an express contract to protect future advances, and it must be enforced according to its terms, as in *Farmers National Bank v. Shirey*, 126 Idaho 63, 878 P.2d

762 (1994). In *Farmers National Bank*, the Court held that a security agreement secured future advances where it granted a security interest "to secure payment and performance of the liabilities and obligations of Debtor to Secured Party of every kind and description ... due or to become due, now existing or hereafter arising." 126 Idaho at 73, 878 P.2d at 772. The future advance clause in the Deed of Trust is even more explicit. Not only did the parties agree to secure payment of the Note, they agreed

> *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). Thus the Deed of Trust expressly provides security for all future loans or advancements made by Annie and Tony, for any purpose, while Mark and Jennifer own the Hayden Lake house.

In the face of that express agreement, the district court cannot ignore it. The district court should have considered the money Annie and Tony advanced to Mark and Jennifer while they owned the Hayden Lake house and while they were married to determine their debt. *See*, *e.g.*, R. 465-466 (finding Annie and Tony advanced further sums to Mark and obtained the Evergreen loans to pay the Legacy Group loan). It does not matter that the district court viewed future advances to refinance the Legacy Group loan or other properties as unrelated to the Note. *See* R. 475-476. As with its interpretation of the Note, the district court improperly relied on extrinsic

evidence without identifying any ambiguous language and justified its analysis because the agreement does not make sense. *See id*.

Because the Deed of Trust secured the subsequent advances made to Mark and Jennifer, the district court erred in refusing to consider those amounts in determining whether Annie and Tony could foreclose on the Hayden Lake house.

2. Whether the Deed of Trust secured future advances was raised and decided.

In addition, Jennifer cites the district court's statement that Annie and Tony failed to develop the future advance argument other than to argue that Mark and Jennifer failed to satisfy the terms of the Note and Deed of Trust. *See* Jennifer's Br. at 18, 22 (citing R. 476). The district court did not support the statement or reach a conclusion as to its impact. *See* R. 476. But to the extent the district court questioned whether the future advance clause was properly before it, the record shows Annie and Tony's position was raised and rejected.

During the trial, Annie and Tony's counsel addressed the future advance clause directly to the district court and questioned witnesses on the clause and the sums advanced to Mark after the Deed of Trust was executed and while he and Jennifer held the Hayden Lake house together. *See*, *e.g.*, Tr. 37:3-38:12, 289:13-290:13, 293:2-23 (counsel); Tr. 314:1-315:1, 355:23-356:1, 417:8-10, 422:16-425:22 (Mark); Tr. 967:13-968:17 (Parker); Tr. 1193:7-1194:1, 1201:24-1203:19, 1212:1-1213:8 (Kalyn). Jennifer's counsel also raised questions about the clause. *See* Tr. 996:2-998:18, 1008:17-1009:3 (Parker).

Annie and Tony also addressed the future advance clause and the advances Mark and Jennifer owed in their closing argument. R. 394-399, 430-431. So did Jennifer. R. 371-372, 413-

414. Thus the Deed of Trust's future advance clause was raised and argued, and the district court addressed it and ruled it had no effect on the foreclosure of the Deed of Trust. R. 474-476. As with the parol evidence rule, the issue is properly before the Court on appeal. *See Gonzalez*, 165 Idaho at 99, 439 P.3d at 1271.

D. Annie and Tony have not appealed the district court's finding that Mark and Jennifer are entitled to $150,000 in equity from the Woodinville house.

Jennifer raises an additional issue on appeal: whether she is entitled to a credit of $150,000 if the Court finds sums are owed under the Note and Deed of Trust. *See* Jennifer's Br. 4, 22. Annie and Tony explained in their opening brief (at pp. 10-12, 40) that the district court found Mark and Jennifer are entitled to $150,000 in equity from the Woodinville house. *See also* R. 464-465. Annie and Tony have not challenged that finding on appeal because Mark and Kalyn each testified that Annie and Tony and Mark and Jennifer would share in the proceeds once the house sold, based on their respective contributions. *See* Tr. 150:18-151:8, 1483:8-1484:2, 1485:1-6 (Mark); Tr. 1282:7-19, 1308:5-1309:4 (Kalyn).

Further there is substantial and competent evidence to support the district court's findings that the parties' contributions were "roughly equal" and that Mark and Jennifer were entitled to $150,000 from the equity in the Woodinville house once it sold. *See* R. 464-65. It follows then, as noted, that Annie and Tony were equally entitled to their equity in the house. Mark and Jennifer's credit of $150,000 completely undermines the district court's later conclusion that the parties intended the Note to be forgiven and the Deed of Trust released simply because the Woodinville house was sold and the Legacy Group loan was repaid.

E. Whoever prevails on appeal is entitled to costs and attorney fees.

Neither Mark nor Jennifer questions Annie and Tony's right to attorney fees on appeal under the Note. *See* Mark's Br. at 16; Jennifer's Br. at 23. The Note expressly states that Mark and Jennifer must "pay a reasonable attorney's fee" if the Note is collected by an attorney. COE 609 (Ex. F). In addition, Idaho Code § 12-120(3) allows the prevailing party reasonable attorney fees in a civil action to recover on a note or negotiable instrument. Should Annie and Tony prevail, they are also entitled to an award of attorney fee under the statute, just as Mark and Jennifer would be.

IV. 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: November 22, 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 November 22, 2019, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF to be served by the method indicated below, and addressed to the following:

Terrance R. Harris Michael E. Ramsden 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