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No. 52425-2-II

COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION II

JERRY C. REEVES, et al., Appellant,

v.

GRAVITY SEGREGATION, LLC, Respondent.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Defendant-Appellant Jerry C. Reeves (“Reeves”) is a local, Portland-area builder and real estate developer who fell on hard times during the “great” recession of 2006-2008 and lost everything. Relevant to this case, Reeves conceived of a good real estate investment where he could purchase two adjacent parcels from acquaintances of his, develop the parcels together, and make both him and his acquaintances a significant profit. His friends had paid only \$40,000 for one of the parcels (and swapped properties for the other), and Reeves was hoping to pay them a million dollars (by developing the two lots into an R.V. park). To that end, Reeves purchased the interests in the two parcels of his long-time acquaintances, Charles And Mary Lou Babitzke (the “Babitzkes”), in the real property at 1601 Guild, Road, Woodland, Washington on or about July 21, 2006.

The Babitzke property consists of two distinct parcels that had been purchased (or acquired) at different times by the Babitzkes. The front parcel contained a house and outbuildings (which they acquired on a swap), and the back parcel was basically unimproved farm land (picked up for \$40,000). The front parcel

was encumbered by a loan owing to PNC Bank taken out by the Babitzkes years back. Reeves, not the Babitzkes, conceived a way to develop the parcels together in a manner that would bring big investment value. In the end, everyone but Reeves profited from his ingenuity. Reeves got nothing.

By agreement Reeves and the Babitzkes, who worked out the deal together, structured the sale as a “wrap around” purchase, whereby Defendant Reeves agreed to assume the payments to be made by Charles and Mary Lou Babitzke on their first mortgage loan with PNC Bank. The amount owing on the PNC Bank loan was just under \$200,000.00. Defendant Reeves also agreed to pay the Babitzkes an additional \$800,000 dollars (for a total price of c. \$1,000,000), more or less, in annual payments of \$100,000 dollars commencing with the down payment of \$100,000 made on July 21, 2006. This was a staggering windfall for the Babitzkes, who had paid no more than \$40,000 for one parcel and got the other in a trade of properties. Reeves agreed to such a generous purchase because he believed joint development of the parcels would yield that much profit and more in the end.

Reeves was to make annual payments of \$100,000.00 to the Babitzkes on July 21 of each year thereafter until the note obligation was paid in full. When the payments owing to PNC Bank are added to the payments owing to the Babitzkes, the entire purchase price was approximately \$1,000,000.00, as set forth in the relevant promissory note, dated November 13, 2006 (“November Note” or “Original Note”) (Tr. Ex. 3). There was an earlier note dated July 21 of 2006 (Tr. Ex. 1), which was corrected by the November Note and is thus of less relevance to this case. Both notes were accompanied by deeds of trust. Tr. Exs. 2 & 4. Importantly, the critical Deed of Trust, Trial Exhibit 4, lacks an adequate legal description of the property at issue, making the Deed a legal nullity. Moreover, neither the Babitzkes, nor their assignee, Plaintiff Gravity, ever possessed the Original Note, or an adequate legal substitute, which was essential to maintaining this action. Moreover, the trial court’s allowance of a post-trial amendment to the Complaint to allow Plaintiff Gravity to retroactively add a replevin claim was inappropriate, untimely (i.e., past the applicable statute of limitations), and severely prejudicial, particularly after the same court denied new counsel

for Defendant, who had appeared only one week before trial, even a modest continuance to learn more about the underlying case.

B. ASSIGNMENTS OF ERROR

Error No. 1. The trial court erred in ruling that Plaintiff Gravity was entitled to a judgment and decree of foreclosure when Gravity based its right to foreclose on an assigned Deed of Trust that was fatally defective because it contained *no legal description* of the real property at issue.

Error No. 2. The trial court erred in failing to dismiss Plaintiff Gravity's Complaint for Foreclosure even though neither Gravity, nor the people who assigned Gravity their rights in the subject property (the "Babitzkes"), ever had the original note and deed ("Note" and "Deed")¹, or a legal substitute for those essential documents, as required under the Washington U.C.C.

Error No. 3. The trial court erred, and showed extreme favoritism towards Plaintiff Gravity, when it allowed Gravity to amend its Complaint *after* trial to include a replevin claim, so Gravity could seize the Original Note and Deed from Defendant Reeves (which

¹ The capitalized term "Note" in this brief will refer to the Original Note of November 2006.

neither Gravity, nor its predecessors ever possessed) to save its case from dismissal, even though the statute of limitations for a replevin claim had passed more than five (5) years before.

Error No. 4. The trial court erred by allowing Gravity to calculate its damages (the amount owing to it) by adding the debt owed to PNC Bank on a mortgage covering a parcel of land that had been lost in an earlier foreclosure action by PNC Bank that the Babitzkes made no effort to stop, as well as by allowing interest to accrue on the judgment at 12% interest, even though the Note at issue provides for 0% interest.

Error No. 5. The trial court erred, and again showed favoritism towards Plaintiff Gravity, when it refused to grant a motion to amend the Answer months before trial and a simple, short continuance for new counsel to prepare for trial, although he had appeared only one week before trial (while later granting post-trial “salvation” amendment to Gravity).

C. **STATEMENT OF THE CASE**

Defendant-Appellant Jerry C. Reeves (“Reeves”) is a local, Portland-area builder and real estate investor who fell on hard times during the “great” recession of 2006-2008 and lost

everything. CP at 283, ¶ 7; Vol. 3, RP at 23, 31, 36 (“eventually fell behind on payments”), 192. Relevant to this case, Reeves conceived of a good real estate investment where he could purchase two adjacent parcels from acquaintances of his, develop the parcels together, and make both him and his acquaintances a significant profit. RP 207-09. To that end, Reeves purchased the interests in the two parcels of his long-time acquaintances, Charles And Mary Lou Babitzke, in the real property at 1601 Guild, Road, Woodland, Washington on or about July 21, 2006. RP 44-45.

The Babitzke property consists of two distinct parcels that had been purchased (or acquired) at different times by the Babitzkes. RP 43-45. The front parcel contained a house and outbuildings, and the back parcel was basically unimproved farm land. The front parcel was encumbered by a loan owing to PNC Bank taken out by the Babitzkes years back. RP at 43-45, 60-61. Reeves, not the Babitzkes, conceived a way to develop the parcels together in a manner that would bring greater value.

By agreement of and convenience to all, the sale was structured as a “wrap around” purchase, whereby Defendant Reeves agreed to assume the payments to be made by Charles and Mary Lou Babitzke on their first

mortgage loan with PNC Bank. The amount owing on the PNC Bank loan was just under \$200,000.00. RP 139, 147, line 2. Defendant Reeves also agreed to pay the Babitzkes an additional \$800,000 dollars, for a total of approximately one million (including the \$200,000 outstanding balance on the PNC mortgage), in annual payments of \$100,000 dollars commencing with the down payment of \$100,000 made on July 21, 2006. RP at 23, 45-46, 57-58, 97. This was a staggering windfall for the Babitzkes, who had paid \$40,000 on the back parcel at issue and had acquired the other parcel in a trade (which PNC foreclosed on). RP at 141, lines 1-6. Reeves agreed to such a generous purchase because he believed joint development of the parcels would yield that much profit and more in the end. *See* RP at 139-140.

Reeves was to make annual payments of \$100,000.00 to the Babitzkes on July 21 of each year thereafter until the note obligation was paid in full. When the payments owing to PNC Bank are added to the payments owing to the Babitzkes, the entire purchase price was approximately \$1,000,000.00. *See* Tr. Exs. 1-4.

The original transaction was evidenced by a Promissory Note dated July 21, 2006, signed by the promisor, Jerry C. Reeves,

along with another document titled, "Deed of Trust." Tr. Exs. 1, 2. This later document was actually a deed, signed by the Babitzkes, and Jerry C. Reeves, conveying the property to Jerry C. Reeves and was thus improperly named. The document bore the notarized signatures of Charles and Mary Lou Babitzke on July 21, 2006. The document was recorded as Cowlitz County recorder's document No. 3305063 on July 21, 2006. The Promissory Note dated July 21, 2006 was not recorded. Exs. 1 and 2.

In November of 2006, a second set of documents was prepared and signed by the parties. This time, three separate documents were prepared. The first was a Deed of Trust, signed by Jerry C. Reeves, and Charles and Mary Lou Babitzke. All three signatures were notarized by William F. Woodard, Notary Public for the State of Washington on November 13, 2006. The Deed of Trust document was recorded on November 13, 2006, as Cowlitz County Recorder's document No. 3317246. The Deed of Trust document did not contain the referenced legal descriptions for the Babitzkes property that were to be attached as exhibits "A" and "B". Tr. Ex. 4. Exhibit "A" was to contain the legal description for the front parcel and exhibit "B" was to contain the legal description to the back parcel. Again, there were no actual legal

descriptions of the property at the time the Deed of Trust was signed.

The second November document was a revised Promissory Note dated November 13, 2006, signed by Jerry C. Reeves on November 13, 2006. Tr. Ex. 3. The November Note was recorded as Cowlitz County Recorder's document No. 3317245 on November 13, 2006. Ex. 3. This note arguably increased the amount that Reeves was to pay for the Babitzkes' property by \$200,000. There was no consideration stated or given for the November Promissory Note.

The third was a document titled "Corrected Statutory Warranty Deed Replacing 'Deed of Trust' Dated July 21, 2006 Auditors Number 3305063." The corrected Statutory Warranty Deed was signed by Charles and Mary Lou Babitzke and Jerry C. Reeves and all three signatures were notarized on November 13, 2006. This document was recorded as Cowlitz County Recorder's document No. 3317244 on November 13, 2006. Ex. 5. The parties agreed that this second set of three documents dated November 13, 2006 was intended to replace the original two documents signed in July of 2006.

Mr. Reeves ultimately defaulted on the payments owed to Mr. and Mrs. Babitzke in 2008, and then to PNC Bank in April of 2012. RP 69, lines 18-21. PNC Bank then foreclosed on the first or front parcel via a judicial foreclosure proceeding commenced on March 18, 2015. RP 62, line 6. The foreclosure Complaint filed by PNC Bank named Defendant Reeves as the owner of the property (the front parcel) at the time of the commencement of the foreclosure. That proceeding ended in a Money Judgment and Decree of Foreclosure in favor of PNC Bank on March 30, 2016 naming Charles and Mary Lou Babitzke as the judgment debtors on the property. RP at 60-62. The Babitzkes did nothing to try to stop the foreclosure of the front parcel of the property, although they retained counsel for that purpose. RP at 60. Despite that inactivity, Gravity claimed the amount owing on the bank loan as part of its damages, and the Court allowed that \$200,000 to be added to Gravity's claim at the last minute, although the Complaint did not plead the unpaid PNC loan amount as a measure of damages. *Compare* Findings of Fact and RP at 60, 153-55, 220-21 with Complaint, and Amended Answer, CP 283-84.

The front parcel was ultimately sold, via Cowlitz County Sheriff's Sale, to PNC Bank and a redemption period of one year

was set which ended on July 29, 2017. No successful redemption of the front parcel was ever completed. RP at 60.

Approximately one year after the PNC foreclosure began on the front parcel, Charles and Mary Lou Babitzke sold their interest in Defendant Reeves' Note and Deed of Trust issued to them by Defendant Reeves to Gravity Segregation, LLC. Tr. Ex. 9; RP 134-36. Gravity had originally been approached by Reeves (through his broker, Ingrid) to try to secure financing to allow him to pay off the Babitzkes and save his investment. RP at 134-35, 208. But Gravity decided to try to steal his deal instead of helping him. *See id.* As part of Gravity's sale transaction with the Babitzkes, the Babitzkes signed and presented Gravity Segregation with a document titled "Lost Instrument Affidavit," in which they wrongly claimed that the Promissory Note dated November 13, 2006, "has been lost, and was lost at the time it was in my [their] care and control." Ex. 6. Defendant Reeves testified that this original Promissory Note dated November 13, 2006, was not lost but was returned to him by the Babitzkes in a meeting at their home in 2014. RP at 194-196.

The Babitzkes were initially paid \$50,000 by Plaintiff Gravity Segregation in their sale transaction with a promise of more money if additional funds were recovered by Gravity. Ex. 9; RP 165, lines 21-23. Gravity quickly commenced its own Judicial Foreclosure proceeding against Mr. Reeves on or about March 30, 2016 in Cowlitz County Superior Court. CP 1-2. Prior to trial, the court refused to grant even a modest continuance to allow a new attorney who had been on the case only one week time to prepare for trial. RP at 4-10. The same judge would later allow Gravity to amend its complaint at the very end of trial to add a replevin claim to try to save its case from the fact that neither Gravity, nor the Babitzkes had ever possessed the original notes and deeds on which they purported to sue. Vol. 5. (March 9) RP at 109-11

After a bench trial in which the court at times appeared to advocate on the record for Plaintiff Gravity, the case ended in a Judgment and Decree of Foreclosure being entered in favor of Plaintiff Gravity Segregation on the back parcel, said Judgment being signed and entered on June 26, 2018. The Judgment and Decree of Foreclosure entered by the trial court were supported by Findings of Fact and Conclusions of Law again dated June 26, 2018 and entered by the trial court on that date. CP 87 and 88.

Defendant Jerry C. Reeves, thereafter timely filed his Notice of Appeal herein on July 24, 2018. CP 91.

D. NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT.

Defendant-Appellant, Jerry C. Reeves appeals from the rulings of the trial court on June 26, 2018, ruling that Plaintiff Gravity, LLC, had met its legal burden and was entitled to a Judgment and Decree of Foreclosure on the back parcel of the Babitzke property and was additionally entitled to an Order of the Court granting its claim for Replevin of the original promissory Note dated November 13, 2006 which Order required Defendant Reeves to surrender his possession of the Original Note to the trial court clerk. Reeves seeks either reversal of the outcome of the case, since Plaintiff Gravity could not establish its entitlement to relief as a matter of settled law or, in the alternative, a new trial.

E. ARGUMENT

1. The Trial Court Erred in Ruling that Gravity was entitled to a Judgment, Although Gravity Based Its Rights on an Assigned Deed of Trust that Contains No Legal Description of the Real Property at Issue.

During trial, witness Terry Woodruff, who was familiar with the various documents recorded with the county about the property at issue, testified as follows: “there was not a legal description on the original deed of trust.” RP at 177. In fact, the only relevant deed of trust in this matter has no legal description of the property at issue. Tr. Ex. 4; *see also* Reeves Decl. on Lack of Property Description. Again, this “Deed of Trust,” which is Trial Exhibit 4, offered by Plaintiff and admitted by the Court, has NO LEGAL DESCRIPTION. *See* Tr. Ex. 4, CP 1-28, Ex. D. This is the Deed of Trust relied on and sued on by Plaintiff in this case, and that Deed of Trust has no legal description. *See also* CP 1-28, Exhibit D; RP (5/1/18) at 20-25. The Court can confirm this by examining Trial Exhibit 4 or the same exhibit attached to the original Foreclosure Complaint as Exhibit D. Although the Deed of Trust itself indicates the importance of a legal description in its reference, (“See legal descriptions attached as exhibit A&B”), no legal description is attached. The Plaintiff has thus sued me based on a Trust Deed that is invalid on its face. The document is legally incomplete and inoperative under Washington law: a legal description is an essential component of any statutory deed of trust for real property under Washington law. *See, e.g., Pardee v. Jolly,*

163 Wash. 2d 558, 566-67 (2008) (documents conveying interests in real estate are void if they do not contain an adequate description of the real estate). Accordingly, there is no valid deed of trust under which Gravity could legally pursue this foreclosure action. This rule is strictly construed in Washington and has no exceptions that apply here.

RCW 64.04.010 requires that: “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real upon real estate, shall be by deed.” Beginning with *Martin v. Seigel*, 35 Wash. 2d 223, 212 P.2d 107 (1949), Washington has adopted the strict requirement that the statute of frauds requires a **complete legal description of the property**. In *Martin*, the Earnest Money Agreement recited “the following real property: at 309 E. Mercer and furniture as per inventory in the City of Seattle, County of King, state of Washington.”

After acknowledging a more liberal rule allowing parol testimony to describe the property, the court adopted a strict approach. “It will thus be seen that this court is at variance with the more liberal rule which permits parol testimony to explain what particular property the parties had in mind when they contracted to

transfer real property described merely by a street number. We do not care to recede from the rule adopted by us, which had been stated in a long line of decisions over a number of years and known and followed by the members of the bar . . . to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties.” *Id.* at 35 Wash. 2d at 228. Moreover, the court held the description by street number, city, county and state was insufficient.

The *Marin* rule was challenged in *Key Design, Inc., v. Moser*, 138 Wash. 2d 875 (1999), where the contract referenced “Vince’s Fitness Center 1711 Hewitt Street in the City of Everett, Snohomish County, Washington” but no legal description was provided. The trial court found the agreement violated the statute of frauds. On appeal, the Plaintiff asked the court to overrule *Martin*, adopt a judicial admission exception, and reform the agreement to include the legal description. The court declined.

The *Martin* rule was recently affirmed in *Home Realty Lynnwood, Inc., v. Walsh*, 146 Wash. App. 231, 189 P.3d 253 (2008), where the purchase agreement was not part of the

agreement but was contained in the folder at the real estate office.

Home Realty, supra at 146 Wash. App. 239.

In this case, the Deed of Trust reads as follows:

“WITNESSETH: Grantors(s) hereby bargains(s), sell(s), and convey(s) to Trustee in trust, with power of sale, the following described real property in Cowlitz County, Washington: 1601 Guild Rd. Woodland Washington, +/- 23.01 acres known as T1C (11.48 acres) and T1B (11.53 acres) together with easement for ingress and egress. **See legal description attached as exhibit A & B.**” (Emphasis applied). “Abbreviated Legal: 1601 Guild Rd, Woodland, WA. Tax Parcel Number(s): 6016602 and 6016601”

A review of the recorded document shows quite clearly that exhibits “A” & “B” were **not attached** at the time of recording. This is the Deed of Trust that the Babitzkes had, and this is the Deed of Trust they purported to assign to Gravity. Ex. 4. Yet, it has no legal description. The legal description was not attached at the time the Deed of Trust was signed or recorded. Without the legal descriptions attached, the Deed of Trust was void and unenforceable under the *Martin* rule. Accordingly, the Deed of Trust assigned by the Babitzkes to Plaintiff Gravity was void and unenforceable. The trial court thus erred in allowing Plaintiff to maintain its Claim for judicial foreclosure on the back parcel of Defendant Reeves’ property. Plaintiff’s case should therefore have

been dismissed. The trial court erred in failing to do so after the issue was plainly raised by Defendant's counsel.

2. The Trial Court Erred in Failing to Dismiss Gravity's Case, Even Though Neither Gravity, Nor the Babitzkes Ever Had the Original Note or Deed, or a Legal Substitute for Those Essential Documents, as Required Under the Washington U.C.C.

The trial court erred in failing to dismiss Plaintiff Gravity's Complaint for Foreclosure even though neither Gravity, nor the people who assigned Gravity their rights in the subject property (the Babitzkes), ever had the Original Note or Deed, or a legal substitute for those essential documents, as required under the Washington U.C.C. Up to the time of trial, both parties agreed that this case was governed by Section 62A.3-309(a) of the WA U.C.C. (*See* Plaintiff Gravity's Pre-Trial Br. at 5-6); CP 64 at 5-6. In its Pre-Trial Brief, Gravity explicitly argued that "the rule governing the foreclosure of lost, stolen, or destroyed instruments secured by deeds of trust is RCW 62A.3-309(a)." Cp 64 at 5. During oral argument and without prior notice, counsel for Gravity (who otherwise routinely argued unfair surprise when the shoe was on the other foot) roved far beyond this provision, citing non-binding cases from other jurisdictions (discussed below) that ignore the provision that Gravity insisted in its Pre-Trial Brief was

controlling: In that brief, and throughout the pendency of this entire case until the second day of trial, with new counsel for Defendant just arriving on the scene, Gravity conceded that RCW 62A.3-309(a) governs this case. (*Id.*).

There is no dispute that the Babitzkes testified that they *never* had possession of the original Notes. Both Charles and Mary Lou Babitzke claimed the same thing at trial: they testified that Defendant Reeves signed the Notes, in each case, and then left with the originals to record or copy (some variation) them. RP 55, 97. Although her testimony has varied considerably on the issue, Mary Lou Babitzke offered similar testimony under oath at one point in her deposition:

Q. So, you had one promissory note [the July 2006 Note] and one deed.

A. Yes.

Q. And what happened to those documents?

A. Jerry wanted to make copies. And then he was going to bring them back.

Q. Okay. Did he ever bring back to you the originals or did he give you copies?

A. Copies.

(Dep. of Mary Lou Babitzke, taken on 4/19/17, at P. 74, attached to Beattie Decl. as Ex. A). CP 75, Ex. A. Ms. Babitzke testified to the same effect, again after multiple versions of events, on the second Note:

Q. Regarding the second promissory note [the November 2006 Note] and second deed, were there more than one original of the deed?

A. Just one.

Q. And what happened to those original documents . . . ?

* * * * *

A. They went with Jerry [Reeves].

(*Id.* at 74). According to their own sworn testimony under oath, the Babitzkes thus claim that they NEVER had possession of the original Notes. According to them, Reeves had the Notes from the very moment of the original agreement to purchase back in July of 2006. Neither is it the case as Gravity misleadingly suggested at trial that the Babitzkes “had possession” when they signed them. RP at 149-150. (“after you signed it, did you give possession back to Reeves”). The Notes are not signed by the Babitzkes; they are

only signed by Reeves. (See Ex.'s 1, 3). So, this was simply misdirecting the witness into inaccurate testimony.

Gravity's leading examination and gamesmanship notwithstanding, the Babitzkes had no reason ever to have possession of the Notes, and they have testified that they never did have possession of the signed originals. Indeed, Ms. Babitzke testified to *exactly that fact*:

Q. "What reason do you have to conceal the fact that you gave me [Reeves] back the original note?"

A. "I didn't, or my husband and I didn't give you back the original note, *cause we never had an original note.*" (Emphasis added).

(Dep. Of Mary Lou Babitzke at 36, Beattie Ex. A) CP 75, Ex. A. They "never had an original note." *Accord* RP, Vol. 3, at 55, 66-67, 97. Gravity also admitted, through its President, that it never had the Original Note. RP at 149. It is important to recall that the evidence supports *only two* versions of events. Either the Babitzkes *never* received the original notes, as they testified at trial (and in some parts of their depositions) or they gave Reeves back the file during a meeting in 2014, as Reeves has consistently

testified, signifying that they were not pursuing further collection efforts on the Notes. See RP at 194-196. There is no third version of events.

At trial, what Gravity and the overtly-sympathetic court attempted to do is to patch together some hypothetical third version of events unsupported by the testimony to throw the case Gravity's way. The law is not supposed to be results oriented. It is not a novelty "nose of wax" to be pushed and pulled to fit the comelier face. The court made it clear it did not like Mr. Reeves, but that is not a reason to ignore the law. We do not pick the parties we *like better* and then bend the law and the facts to make them prevail. Justice is supposed to be blind, not results oriented. There was a *soupcou* of exactly that during oral argument: where there seemed to be a thoroughgoing search to find any way, however farfetched, to avoid the clear application of a straightforward statutory provision that enumerates the very *limited* exceptions under which a party can foreclose on a note and deed *without possessing the originals*. See generally RP on 3/9/18, Vol. 5, at 3-86 (where court repeatedly argues all aspects of ways to help Gravity before allowing a *post-trial* amendment of the

Complaint to allow Gravity to seize the Original Note under a replevin theory).

It was Gravity's burden to show it is entitled to enforce the Original Note and foreclose on the property, contrary to what Gravity argued. RCW 62A.3-309(b); *JP Morgan Chase Bank v. Morton*, Civ. Case No. 49846-4-II (Wash. Ct. App. Div. 2, March 27, 2018) (rejecting assignee bank's claim and reversing summary judgment because of failure to advance sufficient evidence satisfying RCW 62A.3-309(a)).

Washington Chapter 62A.3, which incorporates article 3 of the Uniform Commercial Code (UCC), provides for the enforcement of negotiable instruments like promissory notes. The Parties here agree that the Notes are negotiable instruments under Washington law. (*See* Pl.'s Pre-Trial Br. at 5); CP 64 at 5. Under RCW 62A.3-301, the parties entitled to enforce a note include (1) the "holder" of the note or (2) a person not in possession who is entitled to enforce the note under RCW 62A.3-309. The parties agree that neither the Babitzkes, nor Gravity was in possession of the Original Note at any relevant time.

Under RCW 62A.3-309(a), in turn, which specifically addresses the precise situation where a person has lost a note, or had it destroyed:

“A person who has lost possession of an instrument is entitled to enforce the instrument if: (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. RCW 62A.3-309(a).”

This is a conjunctive test (and disjunctive in other places), so all the requirements of the provision connected with an “and” must be met. Contrary to what counsel for Gravity argued, it is the person seeking to enforce an instrument who must prove the terms of the instrument and the right to enforce it. RCW 62A.3-309(b); *Morton, supra* at 5.

A recent Ninth Circuit case interpreted the Washington statute as follows: "The plain meaning of RCW 62A.3-309(a) is that a person no longer in possession of an instrument is nonetheless entitled to enforce it if that person was in possession and entitled to enforce it when the loss of possession occurred. Subsection (b) requires a proponent under subsection (a) to prove

the terms of the instrument, *e.g.*, *via* a Lost Note Affidavit. . .” *In re Arnold John Allen*, 472 B.R. 559, 566 (9th Cir. BAP 2012). Here, the factual die is cast. The Babitzkes both testified that they NEVER were in possession of the original Notes. RP at 49, 96-97. Indeed, Charles Babitzke testified that Reeves never even gave him a copy of the Notes. But he then inconsistently testified that he showed copies of the Notes to his attorney for review, and they “looked fine.” RP (Vol. 3) at 69. He also apparently provided copies to his counsel (Benjamin Wolff), who did in fact represent the Babitzkes during much of the relevant time, despite their convenient denial that Mr. Wolff had told them they were untimely in pursuing their claims against Reeves, which – according to Reeves – resulted in their giving him the files back, including the Original Note, in 2014.

In any case, the Babitzkes testified under oath that they NEVER had the Notes. And that is fatal to Gravity’s case. As noted, section 62A.3-309(a) of the WA U.C.C. provides the very limited exceptions to the general rule that a plaintiff must hold the original note to sue on it. The first requirement of section 62A.3-309(a) requires that “the person **was in possession** of the instrument and entitled to enforce it when loss of possession

occurred.” Based on their testimony, however, neither the Babitzkes, nor Gravity can meet this requirement.

The Babitzkes explicitly testified that they NEVER had the originals of the November 2006 Note, or the July 2006 Note for that matter. RP 3/8/18, at 66-67, 97, 121. Moreover, they testified that in all the years from 2006 until trial, they had never demanded the Notes from Reeves, orally or in writing, and never asked their lawyers to do so. RP at 97. Through Mr. David Knudson, Gravity also admitted that it did not have the original Notes. RP at 149. This was also confirmed by the fact that Reeves produced the original November Note in Court, as well as by Gravity’s pleadings and the Lost Instrument Affidavit (Ex. 6), in which the Babitzkes falsely claimed that the Note “has been lost and was lost at the time it was in my custody, care and control.” Plainly, if the Babitzkes recalled that Reeves left the 2006 meetings with the original Notes, then those documents were not lost, especially since the Babitzkes never asked for them. Moreover, according to their litigation-inspired, latest version of events, they NEVER had possession of those documents, because Reeves signed the Notes and left with the originals.

It is thus clear from the trial testimony that neither Charles Babitzke, nor Mary Lou Babitzke ever possessed the critical November Original Note. It is also clear that they never transferred or gave that Note to Gravity and that Gravity, therefore, never possessed the November Note. Instead, what was driven home again and again in their testimony is that the Babitzkes met with Reeves, and then Reeves left to record the Note (and Deed of Trust) *and NEVER returned the Note thereafter*. Both Charles and Mary Lou Babitzke testified to that fact and did so repeatedly. RP 49, 96-97, 131. For this reason, Gravity's case fails: neither Gravity, nor the Babitzkes ever "possessed the instrument" – to use the language of the U.C.C. (62A.3-309(a)) – before it was supposedly lost.

Neither is there any real dispute about the meaning of “possession.” It is physical possession, not some theoretical right to sue. This is clear from the context of RCW 62A.3-309(a) itself. That provision speaks of a note or other instrument being “possessed, lost, destroyed” and its “whereabouts” being undetermined. RCW 62A.3-309(a). These descriptive words make no sense if the statute intends to mean “the possession of a claim” or the “theoretical right to possession of a note.” The Washington

cases, too, speak of “possession” as physical possession, and deal with issues such as whether the original note was located in the bank’s file cabinets, and so on. *See, e.g., Morton* at 3 (“Laird searched the bank credit files and was unable to locate the original note”). None of this makes any sense if we are going to suddenly waive a wand and turn physical possession, loss, destruction, transfer, etc. into a theoretical right to assert a claim. Indeed, even the typical lost instrument affidavit, like the one at issue here (Ex. 6), makes no sense if “possession” merely means “the right to bring a claim,” as Gravity contends.

The Lost Instrument Affidavit in this case states that the “Note has been lost” – not that some theoretical right to sue has been lost. That is what both Parties understood before Gravity’s case became dubious. In this sense, Gravity’s citation of the unpublished decision in *Wells Fargo Bank, NA v. Short*, Case No. 30726-3-III (Wash. Court App., March 27, 2014), which was the subject of considerable discussion at trial, goes too far. If “possession” merely means “the right to pursue a claim,” then the entire scaffolding of RCW 62A.3-309(a) collapses. A legion of Washington State (and national) cases makes no sense if all a plaintiff need show is a right to sue and a theoretical chain of

custody. One wonders why thousands of litigants and courts have chased down original documents if all one need show is some theoretical right to sue. *See also Federal Financial Co. v. Gerard*, 90 Wash. App. 169, 949 P.2d 412 (Wash. App. Div. 1 1998) (“transfer of rights by physical transfer of original paper”).

Finally, in *Denis Joslin Company v. Robinson Broadcasting Company, LLC*, 977 F. Supp. 491 (D.D.C.) (1997), the district court ruled as follows:

“Section 28.3-309 provides that: (a) A person not in possession of an instrument is entitled to enforce the instrument if (1) the person was in possession of the instrument and entitled to enforce it when the loss of possession occurred. . . . Plaintiff is not now in possession of the Note. Nor was plaintiff “in possession of the instrument and entitled to enforce it when the loss of possession occurred.” Indeed, plaintiff in this case never had actual possession of the note, and plaintiff concedes that the note was lost while the FDIC - not plaintiff - was in possession. The language . . . clearly states that the person suing on a lost note is entitled to enforce the note only if that person “was in possession of the instrument when the loss of possession occurred.” UCC § 3-309. The plain language of the provision mandates that the plaintiff suing on the note must meet two tests, not just one: it must have been both in possession of the note when it was lost and entitled to enforce the note when it was lost.”

The Joslin decision triggered an amended version of § 3-309 by the drafters of the Uniform Commercial Code that seeks to extend enforcement rights to assignees of negotiable instruments

who have never had physical possession of the original at any time, but it appears that a majority of states has declined to adopt that amendment, including Washington's legislature. Therefore, Washington's version of RCW 62A.3-309 today is the same as the § 3-309 version relied upon by the Joslin court in 1997. Gravity would thus invite the Court to nullify the State legislature's will by embracing an interpretation of the provision at war with its plain meaning.

Gravity's case also fails under prong iii of 62A.3-309(a). That prong requires that "the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." Remarkably, the Babitzkes both testified that, in all the time from 2006 until the present, they had never written or asked Reeves (until counsel did in Court) if he had the Note or would return it. Plainly, if the Babitzkes recall that Reeves left the title company with the Original Note and *never* returned it, then it cannot be true that the Note was "destroyed or its whereabouts cannot be determined."

This begs the question of how the Babitzkes could both swear out under oath the Lost Instrument Affidavit introduced into evidence as Exhibit 6, at the urging of Gravity (swearing that the Note had "been lost"), if they recalled that Reeves had the originals all along.

If Gravity and the Babitzkes thought Reeves had the Note, they also cannot maintain that the Note's "whereabouts cannot be determined." Neither can they contend that "it is in the wrongful possession of an unknown person or a person that cannot be found." It is not clear that Reeves' possession of the Note at all relevant times was wrongful. But, more importantly, he is plainly not an "unknown person" or "a person that cannot be found." RCW 62A.3-309(a). They apparently believed all along that Reeves had the Note, yet never asked for it. Finally, they cannot argue that Reeves is "not amenable to service of process." He has been successfully served twice (in this case and in the related case involving PNC's foreclosure of the front parcel of the property). For this reason, as well, Gravity's case fails.

The requirements of U.C.C. section 62A.3-309(a) are fatal to Plaintiff's case. For generations, the law has not allowed people to enforce and collect on notes *they do not have*, except in very

narrow circumstances, any more than people can cash checks they do not have or deposit cash they do not have. That remains substantially true today. *See Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash.2d 83 (Wash. 2012) (definition of “holder” normally requires physical possession of commercial paper).

Finally, Reeves notes that Gravity has a more nuanced problem even beyond the fact that it stands in the shoes of the Babitzkes and cannot meet the requirements of RCW 62A.3-309(a). At the time that the Babitzkes purported to assign the right to sue under the Notes to Gravity, they themselves did not have the right to sue, since they did not themselves have the Notes or a legal substitute for the Notes. It is axiomatic that an assignor cannot assign more than he himself has. Since the Babitzkes did not have the right to sue at the time of assignment of their “rights” in 2016, and did not possess the Note, they could not have assigned the Note, or the right to sue, to Gravity. *See Dennis Joslin Co.*, 977 F. Supp. at 495 (cannot transfer original notes lost or not in possession before assignment). Relatedly, if neither the Babitzkes, nor Gravity ever possessed the original Notes, then Gravity cannot be a “holder” or “holder in due course” under the law and lacks standing to pursue this case at all. Thus, the trial

court legally erred in ruling that Plaintiff could proceed with its judicial foreclosure when its assignors, the Babitzkes, never possessed the original November Note date, and did not lose that Note, as stated in their Lost Instrument Affidavit, while the note was in their care, custody or control. Confronted with this defeat of Plaintiff's claim under settled Washington law, the trial court came to the rescue and allowed an untimely, post-trial amendment of the Complaint, beyond the applicable statute of limitations, allowing Gravity to bring a replevin claim to retroactively seize the Original Note, thus trying to support the fiction that Gravity had sued with the Original Note in its possession – which was simply not the case.

3. The Trial Court Erred, and Showed Extreme Favoritism to Plaintiff Gravity, When It Allowed Gravity to Amend its Complaint After Trial to Include a Replevin Claim, So Gravity Could Claim to “Possess” the Original Note to Save its Case from Dismissal, Even Though the Statute of Limitations for Replevin Claims Had Run More Than Five (5) Years Earlier.

Following its case in chief, after Reeves brought a motion for a directed verdict, Gravity moved to amend its Complaint to add a Replevin claim. *See generally* RP of 3/8/18, Vol. 5, at 3-38. Ironically, this stemmed from an argument by Defendant's counsel that Plaintiff Gravity could not foreclose on an Original Note that

it never possessed. This was the sympathetic trial court judge's attempt to violate the law but "do substantive justice" by pretending that Gravity actually possessed the Original Note it needed to "possess" under the law in order to sue. Gravity did not get around to filing its Amended Complaint, adding the last-second replevin claim, until *after* trial. CP at 236-245. Defendant Reeves thus never had the opportunity to defend against the equitable claim, to cross-examine the witnesses on that claim, to bring motions on that claim, to conduct discovery on that claim, or to ready for trial on that claim.

Moreover, the trial court's life-saving munificence towards Plaintiff Gravity occurred after the Court earlier denied Reeves' motion for a two-week continuance, so counsel, who had been on the case only one week, could learn the case and after an earlier ruling by the same court disallowing Defendant Reeves' Motion to Amend his Answer to add a Third-Party Claim against the Babitzkes for Fraud. *See* Dkt. for 6/9/17.

The prejudice to Reeves of this ruling is extreme and self-evident: Gravity won an immediate correction to its Complaint, not on the eve of trial, but essentially *after* trial, and Reeves was never able to take discovery on the new claim, to question witnesses at

depositions, to prepare for trial on the claim, to question witnesses at trial on the claim, or to develop the many defenses, legal and equitable, to Gravity's new claim for Replevin.

Importantly, this new claim was fully knowable, foreseeable, and available on day one of the case; it did not have to wait for trial. As noted in *Green v. Hooper*, 149 Wash. App. 627, 637 (2009), such an amendment cannot be allowed "if there is no adequate opportunity to cure the surprise that might result . . . or if the issues have not in fact been litigated with the consent of the parties." Both things are true here.

There is no factual record here suggesting that the Parties behaved as if Gravity's Complaint included a Replevin theory. That is what it means to conform the pleadings to the evidence. It does not mean that one of the parties suddenly realizes it has made a fatal oversight; it means that the parties understood all along that the claim was part of the case. There are no such facts here. Indeed, the entire concept appeared to arise in trial as an acknowledgement of the possible failure of Gravity's case because of its lack of the Original Notes (or a legal substitute).

This case was filed back in March of 2016. CP 1-9. Gravity took discovery in this case, sent out written interrogatories and

requests for production, and took Mr. Reeves' deposition on April 27, 2017; it thus had two years to amend the Complaint to add the obvious claim for Replevin. Asking for unique or special property back, whether a deed, a title, a note, or a Rembrandt painting, is the entire point of Replevin and is common practice. *Hensrude v. Sloss*, 150 Wash. App. 853, 864 (Div. I, 2009) (recovering Ferrari). Moreover, Reeves' Answer explicitly raises the defenses of laches, statute of limitations, and lack of standing, premised, at least in part, on the notion that the Babitzkes and Gravity did not have the Original Note, because the Babitzkes stopped pursuing the case back in 2014 and gave him the file, as Reeves testified. CP 30-31 (denying that Plaintiff has or owns any Note or Deed of Trust). Gravity was thus on notice, since at least the time Reeves answered in April of 2016 that Reeves contested Gravity's standing to bring the lawsuit based on lack of possession of the Original Note. There is simply no good cause for the two-year delay in moving to amend the Complaint. Thus, the trial court legally erred in allowing the 12th-hour amendment of Plaintiff's Complaint to add a claim for Replevin, based on Defendant's counsel's suggestion that this is what *they should have done years before*, when Reeves missed his first \$100,000 payment.

Whether equitable relief is appropriate is a question of law to be reviewed de novo. *Niemann v. Vaughn Comm'ty Church*, 154 Wash. 2d 365, 374, 113 P.3d 463 (2005). In this case, the trial court was asked to grant Plaintiff the right to amend its complaint *following the close of its case* at trial to add a claim for Replevin. This was an intervention by the Court to try to snatch Plaintiff's case from the jaws of defeat, since the evidence was clear that Gravity had never possessed the Original Note upon which it had to sue. Replevin is an equitable action or remedy. Whether this relief was appropriate under the circumstances of the case must be reviewed de novo.

Moreover, Plaintiff's late amendment of its Complaint to include an action for Replevin was *untimely*, both under the statute of limitations and under equitable doctrines and defenses such as laches, waiver, acquiescence, and related doctrines. The statute of limitations for Replevin claims is three (3) years. *Jackson v. Jackson*, Case No. 26082-4-II, 2001 Wash. App. LEXIS 2094 at *13 (Wash. Ct. App. Sep. 14, 2001). A statute of limitations ordinarily begins to run when the plaintiff's legal rights are impacted or affected – in this case when Reeves defaulted on the loan in July of 2008. *Id.* But this lawsuit was not filed until March

30, 2016 – almost eight (8) years later. CP 1-9 (Complaint). Under no conceivable scenario is the court-facilitated, twelfth-hour amendment of the Complaint to add a replevin claim timely: even if that amendment is deemed to relate back to the filing of the lawsuit in March of 2016 under CR 15, it still comes more than five (5) years after the three-year statute of limitations had run.

The Parties agree that Reeves failed to make the third promised \$100,000 payment against the Note in July of 2008; he made \$100,000 payments in July of 2006 and 2007 and then never made another \$100,000 payment. RP of 3/6/18, Vol. 3, at 21, lines 4-15, RP 57-58, 97. At that point, the Note was in default. The Babitzkes were then on notice that their legal rights were being injured, and they should have begun to explore their legal rights and remedies.

The Babitzkes knew that Reeves' fortunes had changed with the market downturn during the recession; they knew he "had no money" and was also going through a hotly-contested property division with his ex-wife. RP at 58, lines 18-21, 104-05. The Babitzkes even consulted with lawyers about their legal rights and "collecting more money from Reeves." RP at 58, 61, 113-14. Yet, they elected *not* to pursue Reeves, or even inquire about the status

or location of the Original Note, at any time from July 2008, when Reeves first defaulted on loan, until Reeves' deposition and trial in 2018 – a period of *nearly eight (8) years!* RP at 60-61, 69-70, 106, 113-14,

If their trial testimony is to be credited, as the trial court claimed, the Babitzkes knew all along that Reeves had the original Promissory Notes. RP 97, 103. Yet, they never asked for the documents back until trial. RP 69-70, Accordingly, the Babitzkes' right to advance a claim of Replevin ended in approximately July of 2011 – three years after Reeves defaulted on the loan. Under no plausible theory does the replevin claim linger on, in a state of suspended animation, for an additional five or more years.

In short, even the trial court's unfair and unreasonable allowance of a last-second amendment to the Complaint does not save Gravity's case. At best, that amendment could only relate back to the date of filing in March 2016, eight years after Reeves defaulted on the loan. For the Babitzkes, and for Gravity who stands in their shoes because of their assignment of rights to Gravity (Tr. Ex. 9), a claim of Replevin would be five years late. Indeed, the claim was untimely at the time that the Babitzkes assigned their rights to Gravity on March 17, 2016. Tr. Ex. 9)

Accordingly, Gravity cannot have received a right to seek Replevin of the Notes from the Babitzkes. The claim was dead before it ever reached Gravity. The trial court thus erred in ruling that the statute of limitations had not already run on Plaintiff's claim for Replevin.

4. The Trial Court Erred by Allowing Gravity to Claim as Damages the Debt Owed to PNC Bank on a Mortgage Covering the Front Parcel of Land Lost in an Earlier Foreclosure Action that Plaintiff Did Not Defend.

The parties' calculations of damages differ significantly because Plaintiff Gravity is adding the nearly \$200,000 PNC Bank mortgage balance that was owing on the front parcel of the Babitzke land that was foreclosed on by PNC Bank in 2016 and was not part of this case. RP (3/8/18) at 6-8, 21-24, 39-40, 147. Gravity thus views Reeves' obligation on the loan to be essentially "one million dollars plus the PNC loan." RP at 147, 154-55. Reeves believes it was a total of one million dollars. *Id.*²

Several things support Reeves' position. First, the November Note has the following interesting language: "The mortgage can be paid off any time. If the undersigned [Reeves] elects to pay off all or any portion of the Note above the monthly

² Reeves also questions why a judgment on a loan at zero percent interest (Tr. Ex. 3) gets to earn 12%.

payments assumed herein, that payment amount shall . . . reduce the amount of the outstanding Note (Tr. Ex. 3). That sounds circular – “payments on the Note shall reduce the Note.” But the intention is likely that extra payments on the mortgage shall reduce the obligation on the Note. In other words, the Babitzkes do not get one million dollars plus payment of the PNC Bank mortgage.

This might seem like a stretch until one looks carefully at the original, July Note. Tr. Ex. 1. That note makes it crystal clear that “[t]he total purchase price is \$1,000,000.” Ex. 1. It also adds the outstanding amount of the PNC mortgage, about \$194,000, to the additional debt assumed through the July Note, \$806,000, to make it crystal clear mathematically that the deal is one million dollars for the property. Ex. 1. This was not meant to change in the November Note. The deal was still \$1,000,000 for the Babitzke property, except the initial \$100,000 had already been paid.

This is exactly how Gravity understood and pled its case in its Complaint. CP 5 (claiming \$900,000 owing after the initial payment and NOT claiming the value of the unpaid balance on the PNC mortgage). They did not change their theory of the case to add the \$196,000 in unpaid mortgage debt until trial, over Reeves’ objection. *See* Pl.’s Tr. Brief; RP from 3/8/18. Moreover, when

PNC foreclosed on its mortgage on the front parcel of the two-parcel property, the Babitzkes did *nothing* to resist that foreclosure or to redeem the property. RP at 43-45, 60-61. Gravity should thus be estopped from claiming *both* the unpaid Note amount and the unpaid PNC Bank mortgage amount. Giving gravity money that was supposed to be paid to PNC Bank gives Gravity a windfall. This case is about the back piece of property – the part that had no mortgage on it. RP at 43-45. Reeves should not both have to lose the front parcel of property to PNC Bank *and* pay Gravity monies that should have gone to the bank. Under no realistic commercial scenario would Gravity or Babitzke end up with money that was to go to PNC; they are not making any payments with that money. But, in any case, that was not the deal contemplated.

5. The Trial Court Erred and Again Showed Favoritism to Gravity by Not Allowing Even a Short Continuance for New Counsel to Learn the Case, Given That He Has Appeared One Week Before.

Undersigned counsel appeared in this matter one week before trial commenced. RP of 3/8/18 at 4-5. Reeves' new counsel immediately moved for a short continuance, even offering various accommodations to the Plaintiff, including allowing Plaintiff Gravity to put on its witness who had traveled. In light of the

stakes involved in the case, Reeves would have also paid for travel costs to allow the witness or witnesses (there were only 1-2 who traveled any distance) to return after a continuance of a few weeks. The court, the same court who would allow Gravity to file a case-altering Amended Answer *after* trial ended (CP 236-245), rejected Reeves' motion for a short continuance out of hand. RP at 9-10. The same court had also rejected Reeves' effort to amend his answer months before trial. (Dkt. on 6/9/17). Yet, it was perfectly acceptable to allow Gravity to amend its Complaint *after* the close of its case-in-chief to add a claim that was existing and foreseeable when the case was filed more than two years before.

Whether to continue a trial depends on the sound discretion of the trial court and should be readily granted upon a showing of good cause. CR 40; *Bramall v. Wales*, 29 Wash. App. 390, 393 (1981). In assessing a motion to continue, the trial court may consider a number of factors including, (a) the needs of the moving party; (b) possible prejudice to the adverse party, (c) prior history of the litigation, including prior continuances granted to the moving party; (d) any conditions posed in the continuances previously granted; and (e) any other matters that may bear upon the court's exercise of discretion. *Balandizich v. Demeroto*, 10

Wash. App. 718 (1974). Here, the trial court did not balance these factors with any sympathy for or openness to Mr. Reeves' needs, who was looking at hundreds of thousands of dollars in liability, but only managed to locate counsel to try this matter a week before trial. Neither is there any evidence the case had been unreasonably delayed; it was filed in March of 2016 and tried a little more than two years later. A two-month continuance would not have meaningfully prejudiced Gravity, who (after all) is involved simply to exploit a business opportunity at Reeves' expense. They came to Washington hoping to wrest an investment from the failing business of Mr. Reeves. They could have at least had the comity to allow his new counsel two weeks to prepare for trial. And the Court should have set aside her sometimes palpable dislike for Mr. Reeves to allow him a modicum of fairness. Although this case is not big, it ended up with several complex, even cutting-edge issues. Undersigned counsel could have done a better job for Mr. Reeves and our court system, if he had been afforded a few weeks to prepare for trial. Under all the circumstances, it was unjust to deny Mr. Reeves that short continuance.

F. CONCLUSION

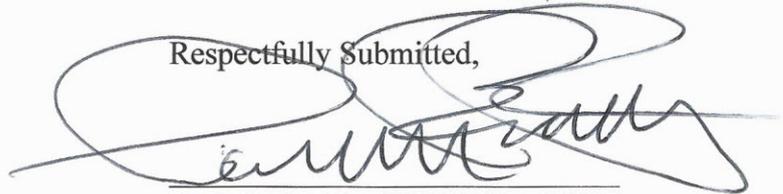
Plaintiff Gravity was not entitled to foreclose on the Note of November 2006. It never possessed the Original Note on which it purported to sue or a legally acceptable substitute for that Note. Moreover, its predecessors in interest, the Babitzkes, never possessed the Original Note and thus could not have assigned it. Additionally, the Deed of Trust assigned by the Babitzkes to Plaintiff Gravity was void and unenforceable, because it completely lacked a legal description of the property at issue.

After actually joining Plaintiff's counsel in arguing for some strained exception to the need for an original note under Washington law, the trial court, abandoning any pretense of objectivity, exclaimed, "what do you want me to do, let *him* get away with it?" So, exclaiming, she then allowed a last-minute amendment of Gravity's Complaint, after previously denying a much earlier motion to amend the Answer and a motion to continue so new trial counsel could have a few days to learn the case before trial. Even this fairly high-handed attempt to favor one side fails, however, because the claim for replevin was untimely, since the original owners were on notice of harm to their legal interests way back in 2008, when Reeves missed the first major

legal payment. Under no realistic view of the facts were the Babitzkes, and their assignee Gravity, entitled to wait *eight (8) years* to try to locate the Original Note and bring a replevin claim. For all these reasons, the judgment of the trial court should be reversed. At a minimum, a new trial should be ordered, so Mr. Reeves can be represented by counsel who has had more than a few days to prepare for trial.

DATED: This 8th day of May 2019

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul H. Beattie", written over a horizontal line. The signature is stylized and somewhat cursive.

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DECLARATION OF SERVICE

I hereby certify and declare that on May 8, 2019, a copy of the foregoing Appellant's Opening Brief was electronically filed with the Washington Court of Appeals, Division II, which has the following address:

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I hereby further declare that on May 8, 2019, I emailed (by agreement) a true and correct copy of the foregoing Appellant's Opening Brief to the following attorney of record for Plaintiff-Respondent:

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