No. 101420-1
Court of Appeals No. 83234-4-I
SUPREME COURT
OF THE STATE OF WASHINGTON

PENNY ARNESON fka PENNY ARNESON SWEET, on behalf of herself personally and on behalf of The 6708 Tolt Highlands Personal Residence Trust,

Petitioners,

v.

GARY NORDLUND,

Respondent,

and

MFE, LLC; COLUMBIA NORTHWEST MORTGAGE; MARK D. FLYNN; L80 COLLECTIONS, LLC; ALDENTE, LLC; and DOE DEFENDANTS 1 through 20, inclusive,

Defendants.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION AND RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The petition for review presents a single question:

Did the appellate court correctly decline to consider the Trust's challenges to the trial court's findings, where the Trust failed to provide argument and authority required by RAP 10.3(a)(6), instead attempting to incorporate arguments from their trial court pleadings?

While the Trust claims that adopting the trial court's findings creates a conflict, it never identifies one. Following controlling precedent does not create a conflict. The Trust's passing reference to RAP 13.4(b)(4) fails for the same reason – it never identifies any such interest. None exists.

This Court should deny review.

FACTS RELEVANT TO ANSWER

A. Background facts.

The Trust provides only sparse procedural facts. Pet. 2-7. The following is taken from the appellate decision to assist this Court:

> This is the third appeal in a lawsuit involving a loan that Gary Nordlund extended to the 6708 Tolt Highlands Personal Residence Trust (Trust).
>
> …
>
> The Trust was established in 2006, with Penny Arneson and her then-husband, Kenneth Sweet, as co-trustees. …
>
> Sweet, as a co-trustee of the Trust, arranged for a $375,000 loan from Nordlund. …
>
> …
>
> After the Trust failed to timely pay the balance on the Note, Nordlund initiated a nonjudicial foreclosure under the deed of trust. Arneson, both individually and on behalf of the Trust, filed this lawsuit against Nordlund …
>
> …
>
> In November 2013, the trial court dismissed all of Arneson's and the Trust's claims against Nordlund on summary judgment. The Trust appealed and, in

Arneson I, we affirmed dismissal of Arneson's individual claims against Nordlund [but] reversed the dismissal of the Trust's CPA claim …

On remand, Nordlund asserted a counterclaim against the Trust for breach of its obligations under the Note. Nordlund also moved for summary judgment on the Trust's statutory usury claim. The trial court granted the motion …

In November 2016, the Trust filed its operative, second amended complaint herein and added a common law action in assumpsit …

In September 2017, Nordlund filed a motion for summary judgment on the Trust's remaining claims against him and on the Trust's liability under the Note. …

[T]he Trust argued that it owed Nordlund "nothing" because Arneson had rescinded the Note … [The trial court] determined "that the Trust is liable to Mr. Nordlund on [the Note] as a matter of law." The trial court also dismissed the Trust's assumpsit claim.

[A] jury found by special verdict that Nordlund was not "engaged in the business of making qualified secured or unsecured loans of money in January 2010," thus vitiating the Trust's Consumer Loan Act claim and, consequently, its CPA claim. … The trial court entered judgment on the verdict and dismissed the Trust's claims against Nordlund with prejudice.

The Trust again appealed.

…

In ***Arneson II***, we … affirmed the dismissal of the Trust's Consumer Loan Act and CPA claims [but] reversed the trial court's dismissal of the Trust's assumpsit and statutory usury claims. …

On remand from ***Arneson II***, the Trust moved for summary judgment on its assumpsit claim, … Nordlund, for his part, moved for summary judgment dismissal of the Trust's statutory usury claim, renewing an earlier argument—which the trial court did not reach in initially dismissing this claim—that the claim was time barred.

In response to Nordlund's motion, the Trust filed a "Motion for Summary Judgment (Rescission) …" (Recission Motion), arguing that it had no liability whatsoever under the Note because it had rescinded the loan pursuant to TILA. Nordlund moved to strike the Rescission Motion and for CR 11 sanctions … Nordlund also argued that the Trust was judicially estopped from raising a rescission claim given its earlier representations that it never disputed the existence of a debt, that it did not plead rescission, and that no credible evidence had been adduced to dispute the existence of a loan.

The trial court declined to strike the Rescission Motion but, relying on judicial estoppel, declined to reach the merits of the Trust's rescission claim. The trial court also granted Nordlund's motion for sanctions … Meanwhile, the trial court granted Nordlund's motion for summary judgment on the Trust's statutory usury claim. The trial court also partially granted the Trust's motion for summary judgment as to its assumpsit claim. As a result of these orders, the only issues left for trial were

> whether Nordlund exacted more under the loan than was allowed by law, and if so, the amount due to the Trust in assumpsit.
>
> …
>
> [The] trial court determined that the Trust failed to establish all elements of its assumpsit claim … The trial court subsequently entered judgment in Nordlund's favor.

Arneson v. Nordlund, No. 83234-4-I (Wash. Ct. App. July 25, 2022); (citing ***Arneson v. Nordlund*** (***Arneson II***), No. 78053-1-I (Wash. Ct. App. Sept. 3, 2019); ***Arneson v. Nordlund*** (***Arneson I***), No. 71148-2-I (Wash. Ct. App. March 30, 2015)).

B. Procedural history.

After the appellate court rejected the Trust's first brief, the Trust refiled on February 9, 2022. *See* Objection to Motion for Overlength Brief, attached as App. A. The Trust's opening brief included 59 assignments of error to the trial court's Findings and 15 assignments of error to its Conclusions. Pet. 5. The Trust admits it did not brief these assignments of error, but merely "incorporated by

reference its Objections filed with the trial court." *Id*. The Trust claims that it could not brief the assignments of error within the space limitations in RAP 18.17, but did not initially seek leave to file an overlength brief. *Id*.

Nordlund received an extension of time, making his response brief due Monday April 18, 2022. App. A. On Friday April 15, the Trust filed a Motion for Overlength Brief and Other Relief, asking the appellate court to either (1) approve the argument in its opening brief incorporating by reference arguments in trial court pleadings; (2) to allow it to re-brief and refile its opening brief and to pre-authorize an overlength brief of unstated length. Motion for Overlength Brief and Other Relief, attached as App. B. The Trust did not explain why it waited over two months to file this motion just days before Nordlund's response was due.

Nordlund objected on April 18, filing his response brief along with his objection. App. A. In addition to pointing out the obvious prejudice granting the Trust's motion would

have created, Nordund noted that the Trust appeared to seek legal advice from the appellate court. App. A at 3. That is, the Trust suggested "that there is no law answering whether a party may incorporate arguments from trial court pleadings," and asked the appellate court how to proceed. App. A at 3; App. B at 2-3. Nordlund also pointed out the many cases answering the Trust's question:

> Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'" ***Multicare Health Sys. v. Dep't of Soc. & Health Servs.***, 173 Wn. App. 289, 299, 294 P.3d 768 (2013) (quoting ***Kwiatkowski v. Drews***, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008) (additional citations omitted)); *see also* ***Guardianship of Lamb***, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011). Appellate courts "cannot and will not comb through the record on the possibility that some mistake may lie somewhere within." ***Multicare***, 173 Wn. App. at 299. In short, the Trust has waived any review of the findings it purports to challenge and may not provide an argument for the first time in its Reply. ***Espinoza v. City of Everett***, 87 Wn. App. 857, 870, 943 P.2d 387 (1997).

App. A at 3-4 (quoting BR 20-21). The appellate commissioner denied the Trust's motion to file an

overlength brief and "any request for approval or direction regarding potential remedies for any regrettable strategic choices in the initial brief." Pet. App. C.

REASONS THIS COURT SHOULD DENY REVIEW

A. The appellate court correctly held that the Trust waived review of the trial court's findings, where its only argument was incorporating by reference arguments made to the trial court.

The Trust "acknowledges" the authority the appellate court cited as reason to disregard arguments made only by incorporating reference to trial court pleadings:

> [The Trust] assigns error to a number of the trial court's specific findings of fact and conclusions of law. But instead of supporting these assignments of error with argument and authority as required by RAP 10.3(a)(6), the Trust attempts to incorporate the arguments from a motion for reconsideration filed in the trial court. We do not consider these arguments. *See* ***Holland v. City of Tacoma***, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("[T]rial court briefs cannot be incorporated into appellate briefs by reference."). Nor do we consider the Trust's belated attempt to argue its assignments of error in its reply. *See* ***Neighbors of Black Nugget Rd. v. King County***, 88 Wn. App. 773, 780, 946 P.2d 1188 (1997) (declining to consider argument raised for the first time in a reply brief). The Trust's specific assignments of error are waived. *See* ***Puget Sound***

> ***Bank v. Richardson***, 54 Wn. App. 295, 298, 773 P.2d 429 (1989) ("Assignments of error unsupported by argument or authority are deemed waived.").

Pet. at 7 (citing No. 83234-4-I at 9 n.10). It claims that these cases merely "discourage[]" incorporating arguments by reference, and "suggest that the remedy to the page limitations of *RAP 18.17(c)* and incorporation of trial court pleadings is a motion for over-length brief …." Pet. at 7 (emphasis original). It then claims that it did in fact seek leave to file an overlength brief, unlike the appellant in ***Holland***, *supra*. This is wrong on many levels.

Holland and many like it do not merely discourage parties from incorporating arguments by reference. Pet. 7. ***Holland*** plainly states that "trial court briefs cannot be incorporated into appellate briefs by reference." 90 Wn. App. at 538. The reason for this rule is "that allowing parties to expand the issues subject to appeal by reference to trial memorandum would render the Rules of Appellate Procedure meaningless." ***U.S. W. Commc'ns., Inc. v.***

Utils. & Transp. Comm'n, 134 Wn.2d 71, 112, 949 P.2d 1337 (1997); ***Holland***, 90 Wn. App. at 538.

This is not new. "Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'" ***Multicare***, 173 Wn. App. at 299; ***Kwiatkowski***, 142 Wn. App. at 499 (same). Indeed, in ***Kwiatkowski***, the appellate court declined to consider arguments incorporated by reference to trial court briefs where, as here, the party claimed that argument by incorporation was necessary "[d]ue to the page limitation …." 142 Wn. App. at 499.

The Trust's attempt to blame the appellate commissioner is meritless. Pet. 8. When the Trust claims that it "did in fact seek leave to file an over-length *revised Initial Brief*" it omits that it filed its opening brief at length without seeking leave to file an overlength brief, waited over two months, and then – days before Nordlund's

response brief was due – sought leave to re-brief and refile an overlength brief, albeit without submitting a revised brief. The appellate commissioner was well within her broad discretion in denying the Trust's belated attempt to remedy its "regrettable strategic choices in the initial brief." Pet. App. C.

Nor can the Trust find refuge in RAP 1.2, providing that the courts will liberally interpret the RAPs "to promote justice and facilitate the decision of cases on the merits." Pet. 8-9. The Trust did not request to file an over-length brief "in a timely fashion …," but sought leave to do so 10 weeks after it filed the "initial" opening brief, and days before Nordlund's response was due and filed. Pet. 8. Nor is this matter even about filing an overlength brief. The Trust failed to provide adequate briefing and belatedly attempted to cure that deficiency by seriously prejudicing Nordlund. The appellate court did not err in denying this very late and highly prejudicial request.

State v. Olson does not help the Trust. Pet 8 (citing 126 Wn.2d 315, 893 P.2d 629 (1995)). ***Olson*** does not address the issue here – declining to consider arguments raised only by incorporation. 126 Wn.2d at 317-18. Rather, it provides only that when "challenge is clear" and there is adequate argument and citation to legal authority, the court will consider the issue despite technical flaws, such as the failure to make a proper assignment of error. *Id*. at 318-22 (quoting ***State v. Olson***, 74 Wn. App. 126, 129, 872 P.2d 64 (1994)).

The Trust's claim that Nordlund was not prejudiced fails under ***Olson*** as well. Pet. 9-10. As ***Olson*** recognizes, a party may be greatly prejudiced when the failure to adequately argue an issue in the opening brief prevents a meaningful response. 126 Wn.2d at 321. Nordlund's job as the respondent is to respond to appellate arguments, not to "comb through the record" to ascertain and answer the

Trust's trial arguments, as if they would be no different on appeal had the been properly briefed. *See* ***Multicare***, 173 Wn. App. at 299.

Nor is this prejudice alleviated by "legal authority cited in the Trust's Reply Brief," to which Nordlund had no opportunity to respond. Pet. 9. The Trust has no answer to the appellate court's correct holding declining to consider arguments raised for the first time on reply. No. 83234-4-I at 9 n.10 (citing ***Neighbors***, 88 Wn. App. at 780).

B. The findings are amply supported in any event, and the Trust does not disagree.

The Trust claims that since the appellate court declined to consider arguments raised only be reference to trial court pleadings, it "necessarily relied on the trial court's clearly erroneous Findings and Conclusion …." Pet. 10. That is false. The Trust admitted that many findings were "irrelevant," and it cannot be prejudiced by irrelevant findings. BA 21 n.6. The Trust also ignores Nordlund's

extensive briefing on the record support for the relevant findings (BA 21-24):

> As to the $3,452.06 in pre-closing interest (CP 4193-94, FF 104-09) Nordlund testified that he was surprised to receive a check for the funds shortly after closing. RP 208, 292. The funds were not a term in the loan sheet. Ex 4. Nordlund did not ask for the funds and was not expecting to receive them. RP 208, 292. He did not know the funds were coming and did not even know what they were for. RP 292. He asked Flynn, who explained that the funds were for interest accruing between the escrow deposit and the closing. RP 208-09. This testimony supports the court's Findings and Conclusions on this fee. CP 4193-94, FF 104-09; CP 4202, CL 18.
>
> As to the $7,995 Columbia NorthWest Mortgage processing fee (CP 4194-95, FF 110-18), Koval testified that it is not unusual for a loan to include a processing fee, that the escrow instructions provided for paying this fee to Columbia (the mortgage broker on the loan), and that Columbia received the processing fee. RP 74, 97-98, 117- 18. Nordlund never had ownership interest in Columbia, and never received any funds from it. RP 291. This too supports the court's Findings and Conclusions on this fee. CP 4194-95, FF 110-18; CP 4202, CL 20.
>
> As to the $45,000 MFL LLC, mortgage broker fee (CP 4196, FF 129) Arneson signed on the Trust's behalf the HUD-1 Settlement authorizing the $45,000 fee to Flynn/MFL. Ex 8. Koval testified it is customary for borrowers to pay the broker's fee and that there is more work involved in "hard money" loans. RP

110-11, 119. Indeed, the Trust conceded that "10 points for a hardmoney loan in 2009 was probably fair because it was normally 10 points to the broker and 14 points, or 4 points, in addition, to the lender." RP 322. This amply supports the Findings and Conclusions on this fee. CP 4196, FF 129; CP 4202, CL 19.

As to the $8,742 L80 Collections processing fee (CP 4196-97, FF 130-40), Koval testified that L80 received the full fee from closing. RP 100. The charge, identified in the term sheet and in the HUD-1 Settlement, was increased twice in subsequent escrow instructions. RP 100-01, 149; Ex 5 at 76; Ex 8. Arneson investigated L80, finding no indication that Nordlund (or Flynn) owned it. RP 277. Koval had no reason to believe that Nordlund (or Flynn) received any portion of the fee. RP 118-19, 141. Nordlund had no knowledge of L80 before the lawsuit, never had any ownership interest in it, had no knowledge of its involvement in the loan, and received no portion of this disbursement. RP 292. This too amply supports the trial court's Findings and Conclusions on this disbursement. CP 4196-97, FF 130-40; CP 4203, CL 21-22.

The Trust also ignores the appellate court's lengthy analysis addressing each of these loan fees and their ample record support. No. 83234-4-I at 11-16. That is, the Trust still fails to demonstrate – or even to argue – that the

Findings are incorrect or that the appellate decision is incorrect. This Court should deny review.

1. Response re: "Judge Spearman's Order." Pet. 11- 13.

The Trust argues that in declining to consider its objections to the findings and conclusions, "the COA affirmed the trial court's erroneous summary dismissal of the Trust's recission claim …." Pet. 13. As the appellate court succinctly stated it, the "Trust's argument misstates the record. The trial court did not summarily dismiss any recission claim." No. 83234-4-I at 16-17.

On remand following the Trust's second appeal, "the trial court expressly declined to reach the merits of the Trust's rescission claim," where the Honorable Judge Mariane Spearman previously ruled in 2017 that the trust was liable on the Note, and in doing so "necessarily rejected the Trust's argument that it rescinded the Note." *Id*. at 17 n.12. The appellate court correctly rejected the

Trust's argument "that the trial court did not adjudicate [its] rescission theory in 2017," holding that "by concluding that the Trust was liable on the Note as a matter of law, the trial court necessarily rejected the Trust's argument that it rescinded the Note …." *Id*. at 17 n.12. Since the trial court did not revisit this decision during the remand hearing giving rise to the underlying appeal, "neither it—nor the Trust's rescission theory—" was properly before the appellate court. *Id*. at 17. Thus, the appellate court correctly declined to hear the argument under the law of the case doctrine. *Id*. at 17-18.

This correct decision does not conflict with ***Arneson II***. Pet. 13. There, the Trust did not challenge Judge Spearman's ruling that the Trust was liable on the Note as a matter of law. *See* CP 3982-83. Instead, the Trust claimed that it "'never disputed the existence of a debt[]'" and admitted it did not plead recission. CP 3983. The only conflict is with the Trust's claims regarding this issue.

2. Response re: Nordlund's Intent. Pet. 14-23.

The Trust claims that the appellate court likely would have reached a different result on Nordlund's intent if it had considered the challenged findings. Pet. 22. But again, the Trust completely ignores the appellate decision documenting the "substantial evidence" supporting the findings on Nordlund's intent (No. 83234-4-I at 11):

> Nordlund testified that his intent with regard to the loan was to charge 12 percent interest. Consistent with this intent, Nordlund testified that he signed a term sheet that Flynn had prepared indicating that the loan would bear interest at 12 percent. Nordlund testified that he at no point provided Flynn with any additional instructions with regard to the loan. Nordlund testified that at some point after the loan closed, he received a check in the amount of $3,452.06. He also testified that he was surprised to receive the check because he was not expecting it, so he called Flynn, who explained that the check was for interest from the time Nordlund deposited the funds into escrow until closing. Nordlund testified that prior to receiving the check, it had not occurred to him that he would be entitled to preclosing interest.

The court did the same for each of the loan fees. *Id*. at 11-14. But again, the Trust ignores the opinion.

Simply stated, the Trust utterly fails to show any appellate error. There is nothing for this Court to review.

The Trust's remaining arguments are equally meritless. The Trust claims that Nordlund "necessarily" intended to extract unlawful fees, where he never claimed the fees were "mistaken or inadvertently erroneous." Pet. 16. This incorrectly assumes the fees were unlawful in the first place. But regarding three of the four fees at issue, the trial court ruled, and the appellate court affirmed, that the Trust failed to meet its burden that the amount at issue was interest or was not a reasonable loan fee. No. 83234-4-I 12-14. These fees were not unlawful.

The trial court ruled that the remaining fee, $3,452.06 disbursed to Nordlund, was interest exceeding the amount allowed by law, but that Norlund lacked the requisite intent. No. 83234-4-I at 10. As addressed immediately above, the appellate court affirmed, discussing the ample evidence supporting this conclusion. *Id*. at 11.

The Trust next claims that the appellate court erroneously placed the burden of proof on the Trust, not Nordlund. Pet. 17, 19-20. As the appellate court succinctly and correctly held, the "Trust is incorrect: '[T]he burden of proof is upon him who asserts that the transaction is usurious.'" No. 83234-4-I at 15 (quoting ***McCall v. Smith***, 184 Wash. 615, 622, 52 P.2d 338 (1935)). Only if a loan is usurious on its face will the lender have the burden of proving an exemption from usury law. No. 83234-4-I at 15. The Trust appears to admit this. Pet. 17.

The Trust claims too that there "is little dispute that the subject loan was usurious on its face." Pet. 18. The Trust made the same claim for the first time in its reply brief, reason alone to ignore it. No. 83234-4-I at 15 n.11. The appellate court nonetheless noted that "the Trust does not support this assertion with any analysis whatsoever, much less explain why the loan was usurious on its face given that the interest rate shown on the Note is 12 percent per

annum, with a default rate of 18 percent per annum "'OR the maximum rate allowed by law, whichever is less.'" *Id*.

This also does not conflict with ***Arneson II***. Pet. 14. There, the appellate court reversed the trial court's summary dismissal of the Trust's assumpsit claim, holding that fact questions precluded summary judgment. ***Arneson II*** at 13-14. Here, the trial and appellate courts addressed each assumpsit element, finding that all fell in Nordlund's favor. No. 83234-4-I at 11-15.

3. Response re: CR 11 sanctions. Pet. 23-29.

The Trust next blames the appellate court's decision affirming the CR 11 sanctions on its refusal to consider the challenged findings. Pet. 23-29. There is no apparent connection and the Trust does not identify any. *Id*.

In any event, the appellate court correctly affirmed the CR 11 sanctions. No. 83234-4-I at 21-25.[1] The CR 11 sanction results from the Trust belatedly asserting that it had rescinded the loan, despite previously and repeatedly admitting that it did not dispute the loan existed and did not plead recission. *Id*. In ***Arenson II***, the Trust represented to the appellate court "that it never disputed the existence of a debt and that the issue of rescission was not pleaded." *Id*. at 22. On remand from ***Arneson II***, the Trust state that there was "'no credible evidence adduced to date'" to dispute the loan. *Id*. When repeatedly admitting the loan existed, the Trust "gave no indication it was reserving with

[1] The Trust omits that the trial court "ordered the Trust's counsel, individually, to pay $10,000 to the King County Bar Foundation" and imposed fees and costs jointly and severally against counsel and the Trust. No. 83234-4-I at 6-7 & 7 n.9. "The Trust's counsel did not appeal and therefore only the sanctions payable jointly and severally by the Trust" were before the appellate court. *Id*. at 7 n.9.

regard to its rescission theory, strongly impl[ying] that the Trust did not intend to pursue rescission." *Id*. at 22-23.

Yet in the most recent remand, when Nordlund moved to summarily dismiss the Trust's statutory usury claim as time barred, "the Trust's only response was that it had no liability under the Note because it had rescinded it—contrary to its earlier representations that it was not disputing the existence of a debt" and had not plead recission. *Id*. at 23. Thus, the appellate court correctly affirmed the trial court's discretionary decision awarding sanctions on the basis that the Trust's "Rescission Motion was not well grounded in fact and was brought 'for the improper purpose of promoting gamesmanship and needless litigation.'" *Id*.

The Trust seems to suggest that its statement that it never disputed the existence of the debt related only to its assumpsit claims, not its recission claim. Pet. 25. The debt existed or it didn't – it cannot exist for one claim but nor for

another. *Id*. And in any event, the Trust overlooks that it admitted it never plead recission.

Without any argument or explanation, the Trust claims that ***Arneson II*** n.8 supports its asserted recission claim in the most recent remand. Pet. 25-26. This appears to refer to ***Arneson II***'s recognition that the Trust had pled a recission claim in its second amended complaint. ***Arneson II*** at 13 n.8. The appellate court correctly rejected the same argument, holding that it "misunderstand[s] the basis of the trial court's sanctions award, i.e., the Trust's *conflicting representations about* what it pleaded and whether it intended to pursue its rescission claim." No. 83234-4-I at 23-24 (emphasis original). That is, whether "the Trust actually pleaded rescission or the trial court adjudicated the claim is irrelevant." *Id*. at 24.

The Trust next claims that it can both admit the debt existed, but also have rescinded it. Pet. 26. This ignores that the Trust maintained over years of litigation that the

debt existed, while never mentioning that it had supposedly already rescinded the debt. No. 83234-4-I at 22-23.

The Trust next blames the trial court for failing to do more to inquire of or warn counsel, or to document his "'conflicting representations.'" Pet. 26-29. This is meritless.

The conflicting statements are telling the court that the debt exists and recission has not been pled, and then asserting that the note was rescinded, canceling the debt. *See* No. 83234-4-I at 22-23. The Trust fails to identify how inquiring of counsel would have justified his conflicting representations, and the trial court is not required to ask counsel to explain his own contradictory statements. *Id*. at 24. The trial court heard the sanctions motion at the same hearing it heard the Trust's recission motion that gave rise to the sanctions request, after full briefing on both. *Id*. No other warning was required. *Id*.

In sum, the appellate court correctly affirmed the trial court's discretionary decision awarding sanctions. This Court should deny review.

C. There is no conflict.

The Trust claims this matter conflicts with "other decisions of this Court and the COA …." Pet. 9. While promising this is "discussed below," the Trust merely repeats the same unsupported assertion. Pet 10, 14, 23, 29. This Court should reject this baseless assertion. ***Am. Fed'n of Teachers, Local 1950 v. Pub. Emp't Relations Comm'n***, 18 Wn. App. 2d 914, 921 n.3, 493 P.3d 1212 (2021), *rev. denied*, 198 Wn.2d 1038 (2022).

D. This Court should deny review, deny the Trust's request for fees, and award Nordlund fees for having to respond.

The Trust seeks attorney fees based on the parties' Note and Deed of Trust. Pet. 29. This is entirely disingenuous. The Note allows fees incurred enforcing the Note, and the trial court awarded Nordlund only those fees.

CP 4734-37. Nordlund did not seek fees related to the Trust's usury and assumpsit claims, and the court did not award any, agreeing that they occur "outside of the contract." CP 4382-84, 4735-36. The Trust did not challenge the fee award on appeal. The Trust's request is baseless.

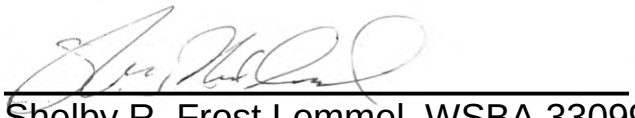
This Court should award Nordlund fees for having to respond to this frivolous Petition. *See* RAP 18.9(a); ***Stiles v. Kearney***, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). The only issue actually presented to this Court is whether the appellate court may decline to consider arguments raised only by incorporation. Pet. 1-2. That is well settled and the Trust provides no basis for departure here. *Supra*, Argument § A. Moreover, as the appellate court noted, "it would defeat the purpose of [the CR 11 sanction] award to force Nordlund to pay additional litigation expenses to defend the award on appeal." No. 83234-4-I at 25-26.

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 3rd day of January 2023.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing **ANSWER TO PETITION FOR REVIEW** was produced using word processing software and the number of words contained in the document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images (*e.g.,* photographs, maps, diagrams, and exhibits) is 4,804.

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Attorney for Respondent

APPENDIX
Table of Contents

APPENDIX A

Objection to Motion for Overlength Brief
April 18, 2022

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

PENNY ARNESON fka PENNY ARNESON SWETT, on behalf of herself personally and on behalf of The 6708 Tolt Highlands Personal Residence Trust, Appellants, v. GARY NORDLUND, Respondent, and MFE, LLC; COLUMBIA NORTHWEST MORTGAGE; MARK D. FLYNN; L80 COLLECTIONS, LLC; ALDENTE LLC; and DOE DEFENDANTS 1 through 20, inclusive, Defendants.	No. 83234-4 OBJECTION TO MOTION FOR OVER-LENGTH BRIEF AND OTHER RELIEF

IDENTITY OF OBJECTING PARTY & RELIEF REQUESTED

Respondent Gary Nordlund objects to Appellant The 6708 Tolt Highlands Personal Residence Trust's ("Trust") motion for over-length brief and other relief, and requests that this Court deny the motion.

FACTS RELEVANT TO MOTION

The Trust filed its opening brief on February 7, 2022. This Court rejected that filing on February 8 because the brief and the appendix must be in one PDF. The Trust re-filed its opening brief on February 9, making Nordlund's response brief due on March 11. Nordlund received an extension of time until April 18 to file his brief.

On Friday April 15, the last court day before Nordlund's brief is due, the Trust asked this Court to "approve" an argument in its opening brief incorporating by reference its objections to the trial court's Findings of Fact and Conclusions of Law, or to allow the Trust to re-brief

and refile its opening brief – filed over two months ago – and to pre-approve the overlength filing. Mot. at 1-2.

ARGUMENT

The Trust's motion appears to seek legal advice from this Court, suggesting that there is no law answering whether a party may incorporate arguments from trial court pleadings, and asking how to proceed. Mot. at 2-3. A quick search reveals numerous cases answering this question. As explained in Nordlund's Brief of Respondent, filed concurrently with this response (BR 20-21):

> Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'" ***Multicare Health Sys. v. Dep't of Soc. & Health Servs.***, 173 Wn. App. 289, 299, 294 P.3d 768 (2013) (quoting ***Kwiatkowski v. Drews***, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008) (additional citations omitted)); *see also* ***Guardianship of Lamb***, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011). Appellate courts "cannot and will not comb through the record on the possibility that some mistake may lie somewhere within." ***Multicare***, 173 Wn. App. at 299. In short, the Trust has waived any review of the findings it purports to challenge and may not provide an argument for the

first time in its Reply. ***Espinoza v. City of Everett***, 87 Wn. App. 857, 870, 943 P.2d 387 (1997).

The Trust's motion is plainly brought for purpose of delay. The Trust offers no explanation for the timing of its motion. The Trust should have resolved the adequacy of its briefing tactics *before* filing its opening brief. Since filing, it has had nearly 10 weeks (68 days) to determine whether an argument that merely incorporates arguments by reference is adequate. Again, a cursory search reveals it is not. Yet the Trust waited until just before Nordlund's response was due to bring this motion. This "gamesmanship" is not new. *See* RP 33; CP 3985.

The Trust incredibly states that granting this request would not prejudice Nordlund. That is absurd.

Nordlund's brief is complete and filed herewith, on the day it is due. At this state, it would plainly prejudice Nordlund for this Court to pre-approve one of the Trust's

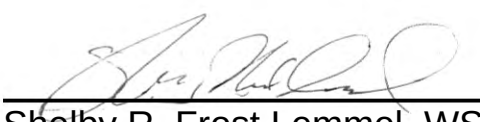
arguments, or allow it to re-brief an issue Nordlund will then have to answer – again.

CONCLUSION

This Court should deny the Trust's extraordinary, baseless, and highly prejudicial request.

RESPECTFULLY SUBMITTED this 18th day of April 2022.

MASTERS LAW GROUP, P.L.L.C.



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Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing **OBJECTION TO MOTION FOR OVER-LENGTH BRIEF AND OTHER RELIEF** was produced using word processing software and the number of words contained in the document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images (*e.g.,* photographs, maps, diagrams, and exhibits) is 534.

Shelby R. Frost Lemmel, WSBA 33099
Attorney for Respondent

MASTERS LAW GROUP PLLC

April 18, 2022 - 4:47 PM

Transmittal Information

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Appellate Court Case Number:	83234-4
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APPENDIX B

Motion for Overlength Brief and Other Relief
April 15, 2022

NO. 83234-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PENNY ARNESON f/k/a PENNY ARNESON SWEET, on behalf of herself personally and on behalf of the 6708 Tolt Highlands Personal Residence Trust

Appellant

v.

GARY NORDLUND, *et al.*,

Respondent,

MOTION FOR OVER-LENGTH BRIEF AND OTHER RELIEF

KOVAC & JONES, PLLC
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I IDENTITY OF MOVING PARTIES

Appellant, PENNY ARNESON, f/k/a PENNY ARNESON SWEET on behalf of the "6708 TOLT HIGHLANDS PERSONAL RESIDENCE TRUST (hereinafter "the Trust"), respectfully requests the Court grant the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

The Trust respectfully moves the Court for approval of the Trust's incorporation of the trial court's Findings of Fact and Conclusions of Law of August 23, 2021 for specific assignment of error (CP 4177-4205) and the objections thereto as set forth in the Trust's Motion for Reconsideration of August 27, 2021 for briefing the Trust's as to each assignment of error (CP 4206-4263) or, in the alternative, the authorize the parties to file over-length initial briefs to fully address each of the identified assignments of error, pursuant to *RAP 18.17(c)*. This would necessarily require the Court to authorize the Trust to file a revised initial brief. This motion is submitted for consideration without oral argument.

III. FACTS RELEVANT TO MOTION

On February 9, 2022, the Trust filed its Initial Brief. The Trust cited a number of assignments of error related to the

Findings of Fact and Conclusions of Law entered by the trial court on August 23, 2021:

> The trial court erred in issuing and filing Findings of Fact (6, 10, 11, 16, 29, 33, 41, 55, 56, 62, 64, 66, 67, 68 70, 85, 86, 91, 98-103, 104-109, 110-118, 119-129, 130-141, 152,) and Conclusions of Law (2, 5, 6, 8, 9, 12, 16, 18-22, 23-25) that included facts and conclusions that were not supported by the trial record and/or constituted errors of law and erred in failing to address the Trust's objections thereto. CP 4177-4205; CP 4206-4263.

In addressing these assignments of error, given the briefing limitations imposed by *RAP 18.17(c)(2)*, the Trust offered the Court its arguments as to its assignments of error by incorporation of the trial record, specifically, the trial court's Findings of Fact and Conclusions of Law (CP 4177-4205) and Appellant's Motion for Reconsideration (CP 4206-4263) (a document of over 34,000 words): "The Trust renews its objections to the trial court's erroneous findings and conclusions, which is offered here on appeal by incorporation of the Trust's Motion for Reconsideration of August 30, 2021. CP 4206-4263".

The Trust now seeks the guidance of the Court as to whether its incorporation of the trial court record is sufficient to

meet its requirements under *RAP 10.3,* and, if not, how the Trust can remediate the situation.

IV. STATEMENT OF GROUNDS FOR RELIEF

> A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

However, the rule is silent as to whether it can be fulfilled by incorporation to the record on review. Indeed, the Trust has been unable to find any statute, court rule or relevant reported case that has addressed the issue squarely.

It is conceded that this Court will not consider assignments of error that are not properly briefed. See generally *In re Disciplinary Proceedings Against Whitney*. 155 Wn.2d 451, 466, (2005). However, that is not the case here. By incorporation of the trial court's Findings of Fact and Conclusions of Law (CP 4177-4205) and Appellant's Motion for Reconsideration (CP 4206-4263), the assignments of error have been identified and thoroughly briefed.

The Trust respectfully requests the Court apply its discretion under *RAP 1.2* to accept the Trust's briefing of its assignments of error to the trial court's Findings and Conclusions by incorporation to the record on appeal. See *State v. Olson,* 126 Wn.2d 315 (1995).

In the alternative, the Trust request the Court authorize the parties to file over-length initial briefs to fully brief each of the identified assignments of error, pursuant to *RAP 18.17(c).* As noted above, the Trust's Motion for Reconsideration was over 34,000 words. Moreover, it should be noted that Respondent, GARY NORDLUND (hereinafter "Mr. Nordlund"), did not respond to the Trust's Motion for Reconsideration in the trial court in any way. While it is conceded that the Trust's Motion for Reconsideration contained a number of redundancies that can be paired down, Mr. Nordlund will need additional space in his initial responsive brief to address the Trust's objections to the trial court's Findings and Conclusions for the first time. Accordingly, the parties should be permitted to file initial or revised over-length briefs, pursuant to *RAP 18.17(c).*

No party to this action would be prejudiced by the Court

granting the relief requested, which is sought to encourage the interests of justice and a fair presentation of the issues on appeal in accordance with *RAP 1.2.*

The undersigned hereby certifies that the number of words contained in this document contains approximately 871 words, in compliance with *RAP 18.17.*

REPECTFULLY SUBMITTED this 15th day of April 2022.

KOVAC & JONES, PLLC.

/s/ Richard Llewelyn Jones

Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellants

KOVAC AND JONES PLLC

April 15, 2022 - 12:32 PM

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 3rd day of January 2023 as follows:

Co-counsel for Respondent

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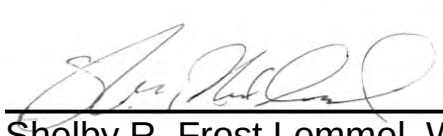

Shelby R. Frost Lemmel, WSBA 33099
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MASTERS LAW GROUP PLLC

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