No. 93465-7

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 73347-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Key Development Pension, Plaintiff -Appellant

v.

Clyde E. Carlson and Priscilla A. Carlson, Defendants-Respondents

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ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(Hon. David R. Needy)

APPELLANT'S
PETITION FOR REVIEW

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TREATISES

I. IDENTITY OF PETITIONER

Petitioner, Key Development Pension, was the plaintiff at trial and the Appellant before the Court of Appeals.

II. COURT OF APPEALS DECISION

A decision terminating review (the "Decision") was entered on July 11, 2016 (copy attached as APP. A).

III. STATEMENT OF ISSUES PRESENT FOR REVIEW

In this promissory notes collection action, the Petitioner asks this Court to review the following single issue.

1. Application of the Usury Statute. Whether the usury defense can be raised by one who is not by adversity and necessity of economic life driven to borrow money at any cost.

For the reasons set forth below, this issue warrants review because the Decision is in conflict with prior decisions of this Court (RAP 13.4(b)(1)), is in conflict with another decision of the Court of Appeals (RAP 13.4(b)(2)), and involves an issue of substantial public interest (RAP 13.4(b)(4)).

IV. NATURE OF THE CASE AND DECISION BELOW

This case arises out of the collection action by Petitioner Key Development Pension ("Key") to collect on two promissory notes executed by the Respondents Clyde and Priscilla Carlson ("Carlson").

Carlson disputed the claims of Key and raised the affirmative defense of usury alleging that the loans were personal loans and because they provided for an interest rate exceeding the maximum rate for consumer loans, the loans were usurious. Carlson asked the trial court to dismiss Key's claims, cancel the notes, award Carlson a judgment against Key for the amount of interest paid, and award Carlson the attorney's fees and costs incurred in the litigation.

The first loan was made in November 2000 and Carlson made interest only payments every year beginning in 2001 with the last interest payments made in the fall of 2010. The second loan was made in April 2002 again providing for interest only payments. Both loans initially had an annual interest rate of 18%. No payments were ever made towards the principal of either note. Each and every payment on both notes was made on a check drawn on either the business accounts of Northwest Seaplanes, Inc. or San Juan Air, a trade name used by Northwest. When Key sued in 2012 to collect the principal amount of the notes together with accrued interest, Carlson claimed for the first time that the loans were for personal use and the interest rate charged was in violation of Washington's usury statute, RCW 19.52.020.

Carlson did not represent to Key that he was borrowing the money for personal use. Indeed, Clyde Carlson testified that he did not recall any

conversation with either Mr. Johnson or Mr. Carlson about his intentions. CP 174, FF 8.

In 2000 and 2002, when these loans were made, Carlson owned his primary residence in Seattle, a vacation home in Chelan, Washington with two adjacent unimproved lots, a vacation home in Arizona, several airplanes, and an airplane hangar in Chelan, Washington. Carlson had owned another unimproved lot in Arizona which was sold in 2000. Mr. Carlson testified at trial that the loan proceeds from the 2000 loan were used to buy another vacation apartment in Campbell River, British Columbia, and to remodel the vacations homes in Arizona and in Chelan Washington. Mr. Carlson also testified that the proceeds from the second loan were used to pay a settlement connected with his father's estate

The tax returns of Northwest Seaplanes, Inc. showed that in 2000, the year the first loan from Key was made, Clyde Carlson, the sole-shareholder of Northwest Seaplanes, Inc., loaned over $87,000 to his company. In 2001, Carlson also made an additional loan to Northwest Seaplanes, Inc. and at the end of 2001 Northwest Seaplanes, Inc. reported nearly $250,000.00 in outstanding loans from Mr. Carlson.

At the conclusion of the bench trial, the trial judge held that Key had failed to meet its burden of proof that the loans were primarily for agricultural, commercial, investment, or business purposes and thus the

court concluded the loans violated the usury law. The trial judge entered a judgment against Key in the amount of $441,770 plus attorney fees and costs. However, the court did make the following finding:

> At the time the loans from the Plaintiff were made in 2000 and 2002, the Defendants were not needy borrowers who by adversity and necessity of economic life, were driven to borrow money at any cost from an unconscionable money lender. The Defendants were not desperate in 2000 and 2002 at the time they borrowed the money. The Defendants had the ability to move and transfer assets and possessions and property and were not one (sic) the door of destitution at that time.

CP 177, FF 21.

After the entry of the judgment, Key appealed to Division I of the Court of Appeals. That court resolved the appeal by a decision affirming the judgment in favor of the Respondents. The Petitioner now seeks review by this Court of a single issue raised by the decision of the Court of Appeals.

V. REASONS FOR GRANTING REVIEW

1. The Court of Appeal's Decision (App. A) is in conflict with this Courts holding in *Brown v. Giger*, 111 Wn.2d 76, 757 P.2d 523(1988).

In 1988, this Court decided *Brown v. Giger*, 111 Wn.2d 76, 757 P.2d 523(1988). In that case Giger had borrowed money Brown to lend to her friend so the friend could purchase a business. When the friend stopped making payments, Giger defaulted and the lender sued. Giger

raised the defense of usury claiming that because she had no interest in the friend's business and the loan to her was a personal loan subject to the usury limit. A summary judgment motion was brought by the lender and the trial court concluded that the loan was for a business purpose and, under RCW 19.52.080, exempt from the usury laws.

Division II of the Court of Appeals reversed, not because they found a disputed issue of fact, but because they concluded as a matter of law that the loan to Giger was a personal loan and subject to the usury limit set forth in RCW 19.52.020. *Brown v. Giger,* 48 Wn. App. 172, 738 P.2d 312 (1987) This Court accepted review and concluded that as a matter of law the loan was for a purpose falling within the exemption set forth in RCW 19.52.080.

Although the case had been decided by the trial judge on a summary judgment motion, and the Court of Appeals had apparently viewed the facts differently than the trial court when concluding that the loan was for personal use, this Court did not remand the case back to the trial court for a trial to resolve this apparent factual dispute. This Court concluded, despite the factual disparities, and as a matter of law, that the borrower there was not the type of individual that the usury statute was designed to protect and the exemption under RCW 19.52.080 applied. Below is the entire part II of this Court's decision in *Brown.*

Washington's usury statutes, like those of other states, are designed "to protect the needy borrower from the unconscionable moneylender" by prohibiting interest charges that exceed a statutory maximum. *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wash.2d 584, 588, 478 P.2d 232 (1970). "The protection granted is based on the fact that many borrowers are powerless to resist the avarice of the money lenders." *Baske v. Russell*, 67 Wash.2d 268, 273, 407 P.2d 434 (1965).

Interest ceilings are not always beneficial, however. Because they limit the availability of credit for high risk enterprises, usury restrictions have been criticized as "purposeless control and restraint of businesses." Note, Usury Legislation--Its Effects on the Economy and a Proposal for Reform, 33 Vand.L.Rev. 199, 219 (1980). Nor are the restrictions always necessary. Corporations, banks and other financial institutions, as well as individual investors, being accustomed to financial operations and familiar with the worth of money in the market from day to day, might well be deemed to require no statutory protection against being forced by their financial necessities to pay excessive interest for moneys borrowed. *Sparkman & McLean*, 78 Wash.2d at 589, 478 P.2d 232 (quoting *Griffith v. Connecticut*, 218 U.S. 563, 570, 31 S.Ct. 132, 54 L.Ed. 1151 (1910)).

Washington's "business purpose" usury exemption, RCW 19.52.080, is responsive to these observations. Since its enactment in 1969, the exemption has removed the constraints of the usury restrictions from a steadily broadening class of financial transactions. Until 1975, the exemption denied the defense of usury to certain entities and persons "in the business of lending money or the development or improvement of real estate". Laws of 1969, 1st Ex. Sess., ch. 142, § 1, p. 1039; Laws of 1970, 1st Ex. Sess., ch. 97, § 2, p. 762. From 1975 to 1981, the exemption applied to an expanded group of entities and persons with respect to transactions of $50,000 or more made "exclusively for commercial or business purposes". Laws of 1975, 1st Ex. Sess., ch. 180, § 1, p. 616. And since

1981, still more entities fall within the scope of the exemption, and exempt transactions are now those of any amount made "primarily for agricultural, commercial, investment, or business purposes". RCW 19.52.080.

We discern in this steady withdrawal of the usury restraints the Legislature's intent to limit application of the usury laws to those situations in which the statutory restrictions are most urgently required. The evil at which the usury laws are aimed, as we have said, is oppression of the borrower "who by adversity and necessity of economic life [is] driven to borrow money at any cost." Baske, 67 Wash.2d at 273, 407 P.2d 434. One who incurs a debt "primarily for agricultural, commercial, investment, or business purposes", RCW 19.52.080, is not subject to such oppression, as he does not borrow out of "adversity and necessity of economic life". Thus, RCW 19.52.080 denies to this person the protections against usury.

The exemption is not a mean spirited one, however. Its purpose is positive: to free up credit for those whose ventures could not be financed at below-usury rates. Enacted and expanded during a time of rising interest rates and increasing criticisms of usury restrictions, the "business purpose" exemption functions as an "escape valve--something that would relieve the adverse pressure which the usury laws were exerting on legitimate commercial activities." Shanks, Practical Problems in the Application of Archaic Usury Statutes, 53 Va.L.Rev. 327, 347 (1967).

Brown v. Giger, 111 Wn.2d at 79 - 81. (Emphasis Added).

As noted above, the trial judge in the case at bar had found that Carlson, at the time the loans were made, "were not needy borrowers who by adversity and necessity of economic life were driven to borrow money at any cost from an unconscionable money lender." Because of this

unchallenged finding, Key argued in the Court of Appeals that the defense of usury was not available to Carlson, relying on the *Brown* case and Division I's own opinion in *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 768 P.2d 1007 (1989) discussed below. The Court of Appeals in the Decision characterized part II of this Court's opinion in *Brown* and its conclusion that Giger was not "by adversity and necessity . . . driven to borrow money at any cost" as "*dicta*". Decision at 16.

If this Court's lengthy analysis and conclusion in *Brown* is "dicta" then as Judge Dore concluded in his dissent, the matter should have been remanded to the trial court for trial because of the fact dispute. *Brown v. Giger,* 111 Wn.2d at 91 (Justice Dore, Dissenting). The determination of whether a loan is primarily for a business purpose is a mixed question of law and fact. *Marashi v. Lannen,* 55 Wn. App. 820, 823, 780 P.2d 1341 (1989). The facts are determined by the trier of fact and reviewed by the appellate courts to determine whether the facts are supported by substantial evidence. *Pardee v. Jolly,* 163 Wn.2d 558, 566, 182 P.2d 967 (2008). Summary judgment, however, is not appropriate if there are disputed issues of material facts. The facts of the Brown case as set forth in the court of appeals published decision and in this Court's published opinion differ on what Giger represented to be her interest in the business venture of her friend. If indeed those "facts" differ, then the only

explanation for this Court's decision that as a matter of law the loan to Giger was exempt from the application of the usury limits is if those disputed facts don't matter. As this Court concluded, Giger did not need to borrow the money and therefore the usury statute was not intended to protect her in that situation. That is an issue of law reviewed *de novo*. *Jansen v. Nu-West, Inc.*, 102 Wn.App. 423, 434-435, 6 P.3d 98 (2000).

Based on the undisputed fact that Giger was not by adversity or necessity of economic life compelled to borrow money at any cost, this Court concluded that the usury limits did not apply and reinstated the trial court's judgment in favor of the lender.

The Court of Appeal's Decision fails to follow this Court's well-reasoned decision in *Brown* and this court should accept review to clarify the import of its opinion.

2. The Court of Appeals Decision is in conflict with its own opinion in *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 768 P.2d 1007 (1989).

One year after this Court decided the *Brown* case, Division I of the Court of Appeals had before it the case of *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 768 P.2d 1007 (1989). In that case, Stevens had borrowed money from the mortgage company to purchase a luxury condominium. The lender charged her an interest rate of 18 ½ %. When

Stevens defaulted on the loan, the lender commenced foreclosure of the loan. Defending against the lawsuit Stevens claimed the loan violated the usury statute because the purpose of the loan was personal and the interest rate charged was, on its face, usurious. The trial court did not agree and entered judgment for the lender. On Appeal, Division I affirmed noting that "nothing suggests that Stevens was 'by adversity and necessity ... driven to borrow money at any cost'" quoting the language from *Baske v. Russell*, 67 Wash.2d 268, 273, 407 P.2d 434 (1965). *Stevens,* 53 Wn. App. at 517. That is the same language the Court of Appeals now characterizes as "dicta".

The Court of Appeals in *Stevens* went on to hold:

> In the present case, Stevens took advantage of the system to obtain financing for a luxury home that she otherwise would not have been able to obtain, and now seeks to raise the defense of usury. This is not the type of activity that the Legislature intended to protect in enacting the usury laws. Accordingly, we find that this loan falls within the exception for business loans.

Id. In other words, the Court of Appeals decided that even if the loan was for a personal use, like the borrower in *Brown,* Stevens did not need to borrow the money and the loan therefore falls within the "business purpose" exemption. This is a natural extension of this Court's holding in *Brown* that the legislature intended the usury laws to apply to those who "by adversity and necessity ... driven to borrow money at any cost"

3. This appeal involves an issue of substantial public interest that should be clarified by this Court.

This Court noted in its decision in *Brown* that usury statutes have been criticized as being unnecessary restraints on business and that the expansion of Washington's "business purpose" exemption is a positive reaction to these criticisms and designed to act as an "escape valve--something that would relieve the adverse pressure which the usury laws were exerting on legitimate commercial activities." *Brown* at 81.

Many states have usury laws that set limits on interest rates for loans. Those laws however, have been significantly weakened over the years by court decisions, and federal and state laws to the point of irrelevancy.

In *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed2d 534 (1978) the United States Supreme Court unanimously held that nationally chartered banks may charge the highest rate allowed in the bank's home state. So even Washington's usury statute with its relatively low usury limit typically has no bearing on the interest you pay on your credit card.

The passage of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) also erodes the effect of

Washington's usury law. This federal law allows all federally insured banks (including most state-chartered banks) to charge out-of-state customers the highest rate possible in the bank's home state. Indeed, in an effort to protect its own financial institutions, the Washington legislature passed a law that allows any depository financial institution authorized to do business and accept deposits in Washington State to have the same "most favored lender" power and status as national banking associations. *See.* RCW 30.04.025.

Federal law also preempts Washington's usury law in other cases. Washington's usury statute does not apply to loans, mortgages, credit sales or advances insured by any U. S. government agency or is regulated by a U. S. governmental agency. HUD, VA and FHA loans are not subject to Washington's usury statute. Loans available for purchase by Fannie Mae, Ginnie Mae or Freddie Mac are not subject to the usury statute. 12 U.S.C. 1735f-7A.

In addition to the "business purpose" exemption, the Washington legislature has also exempted other transactions from the state's usury limit: retail installment contracts, RCW 19.52.100; interest charges by broker-dealers, RCW 19.52.110; sales contracts with deferred payment of purchase price, RCW 19.52.120; interest, penalties and costs on delinquent property taxes, RCW 19.52.140; and interest on some mobile

home loans, RCW 19.52.160.

Payday lenders licensed under RCW Chapter 31.45 can make certain loans exceeding the usury limits. Lease-purchases of personal property under RCW Chapter 63.19 are exempt from the usury law. There are other transactions authorized under Washington law where the state's usury laws do not apply supporting this Court's conclusion in *Brown* that the legislature intended to "limit application of the usury laws to those situations in which the statutory restrictions are most urgently required. The evil at which the usury laws are aimed, as we have said, is oppression of the borrower 'who by adversity and necessity of economic life [is] driven to borrow money at any cost.' " *Brown v. Giger, supra* at 81 -82.

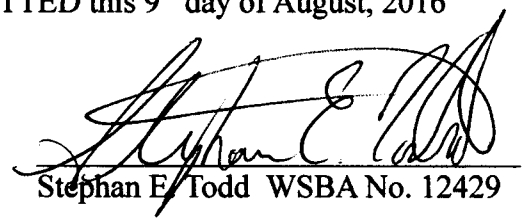
This Court should take this opportunity to clarify the reach of the usury statute and confirm the laws limited application to those situations where the most vulnerable, who by adversity and necessity of economic life, are preyed upon by unconscionable lenders.

VI. CONCLUSION

This Court should grant review to reaffirm the holding in *Brown v. Giger,* 111 Wn.2d 76, 757 P.2d 523(1988) that the legislature intended the usury law's application be limited to those who are by adversity and necessity of economic life driven to borrow money at any cost. Like the

borrower in *Brown* who did not need to borrow money at any cost, Carlson did not need to borrow money at any cost to remodel vacation homes or purchase an additional one. Carlson's use of the loan money was akin to the actions of the borrower in *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 768 P.2d 1007 (1989) who borrowed money at a high interest rate to purchase a luxury condominium she could not otherwise obtain. As the Court of Appeals noted, "[t]his is not the type of activity that the Legislature intended to protect in enacting the usury laws." *Stevens, supra* at 517.

RESPECTFULLY SUBMITTED this 9th day of August, 2016



Stephan E. Todd WSBA No. 12429

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JACK A. JOHNSON, in his capacity as the trustee of KEY DEVELOPMENT PENSION; f/k/a G & G MEATS PENSION FUND AND COLUMBIA MEAT PRODUCTS PENSION PLAN, Appellant, v. CLYDE E. CARLSON and PRISCILLA A. CARLSON, husband and wife, and the marital community composed thereof, Respondents.	No. 73347-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 11, 2016

SCHINDLER, J. — Jack A. Johnson as the trustee of Key Development Pension (Key Development) appeals the trial court's decision that the loans to Clyde E. Carlson and his spouse violated the usury statute, chapter 19.52 RCW. Key Development contends the court erred in concluding it did not meet the burden of proving the loans were exempt from the usury statute as business loans. We disagree, and affirm.

FACTS

Jack A. Johnson, Gary Dahlby, and Clyde Carlson knew each other for many years and were longtime friends. Beginning in the late 1970s until 1994, Johnson and Dahlby owned G & G Meats and formed the G & G Meats Pension Fund. Johnson and

Dahlby were the trustees of the pension fund. Carlson owned a floatplane business in Renton; Northwest Seaplanes Inc. Northwest Seaplanes Inc. is a seasonal business. Northwest Seaplanes Inc. maintained corporate records and bank accounts and filed corporate tax returns

Carlson knew Johnson and Dahlby used the pension fund to make loans. In November 2000, Johnson and Dahlby agreed to loan Carlson $150,000.

On November 10, 2000, Carlson and his spouse Priscilla Carlson executed a promissory note.[1] Carlson and Priscilla agreed to pay G & G Meats Pension Fund the principal sum of $150,000 with interest computed at the rate of 18 percent per annum. The promissory note states, in pertinent part:

> FOR VALUE RECEIVED, Clyde E. Carlson and Priscilla A. Carlson (collectively, "Borrower" herein) promises to pay to the order of G & G MEATS PENSION FUND . . . ("Lender" herein), the principal sum of One Hundred Fifty Thousand and no/100 Dollars ($150,000.00), with interest thereon from the date hereof, computed on monthly balances on the basis of a 360-day year, at the rate of eighteen percent (18%) per annum.

The promissory note states Carlson shall make interest-only payments of $6,750 in July, August, September, and October 2001 with "all accrued and unpaid interest . . . due in full on November 10, 2001." The promissory note gives Carlson the option "to extend the Maturity Date of this Note until November 10, 2002." The obligation for the promissory note is joint and several.

Johnson wrote a check to "Clyde Carlson" for $149,500 on the G & G Meats Pension Fund account. Carlson deposited the check into his personal bank account.

[1] We refer to Priscilla Carlson by her first name for purposes of clarity and mean no disrespect by doing so.

At some point after 2000, the G & G Meats Pension Fund changed to the Columbia Meat Products Pension Plan. In April 2002, Johnson and Dahlby agreed to make another loan to Carlson for $150,000.

On April 18, 2002, Carlson and Priscilla executed a promissory note for $150,000. The obligation on the promissory note is joint and several. The loan is due on April 17, 2003. Carlson and Priscilla agreed to pay Columbia Meat Products Pension Plan the principal with interest computed at the rate of 18 percent per annum. The 2002 promissory note states, in pertinent part:

> FOR VALUE RECEIVED, Clyde E. Carlson and Priscilla A. Carlson (collectively, "Borrower" herein) promises to pay to the order of Columbia Meat Products Pension P[l]an . . . ("Lender" herein), the principal sum of One Hundred Fifty Thousand and no/100 Dollars ($150,000.00), with interest thereon from the date hereof, computed on monthly balances on the basis of a 360-day year, at the rate of eighteen percent (18%) per annum.

On April 22, 2002, Johnson wrote a check to "Clyde Carlson" on a corporate account in the amount of $150,000.[2] Carlson deposited the check into his personal bank account.

At some point, the Columbia Meat Products Pension Plan changed to the Key Development Pension.

Carlson made interest-only payments on the loans. The parties agreed multiple times to extend the maturity date for both promissory notes. In 2006, the parties agreed to reduce the interest rate on the notes from 18 percent to 14 percent per annum. In 2009, Johnson agreed to extend the maturity date on the promissory notes to October 2012. Carlson continued to make interest-only payments until October 2010.

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[2] The corporation is a land development company owned by Johnson.

On October 23, 2012, Johnson, as the trustee of Key Development Pension (Key Development), filed a lawsuit against Carlson and his spouse Priscilla (collectively, Carlson) for the amount due on the promissory notes. Carlson asserted as an affirmative defense that the promissory notes violated the Washington usury statute, chapter 19.52 RCW.

Key Development did not dispute the interest rate for the promissory notes exceeded the maximum interest rate allowed by the usury statute but claimed the business purpose exemption applied.

At trial, Key Development did not dispute it had the burden to prove the exemption applied. The parties also stipulated to the admission of copies of the promissory notes, the checks to Carlson for the two loans, Carlson's handwritten interest payment records, the 2000 to 2003 personal tax returns for Carlson, and the 2000 to 2004 corporate tax returns for Northwest Seaplanes Inc.

Dahlby testified that in 2000, Carlson told him he "wanted to borrow some money for — to expand — I don't know about expand, but he wanted to borrow it for the business." Dahlby said that after talking to Johnson, he and Johnson agreed to make a loan to Carlson from the pension fund.

Dahlby also testified that the following year, he loaned Carlson $200,000 to "restart Northwest Seaplanes or something on that order." Dahlby said Carlson repaid the $200,000 loan to him in full.

Johnson testified Carlson contacted him in 2002 about making another loan, and he and Dahlby agreed to loan Carlson $150,000 from the pension fund. According to

Johnson:

> A. Well, on that loan I think he contacted me directly, same scenario, was still working on buying planes or doing something with his business, asked if we had more funds that we could loan him.
> Q. And what did you tell him?
> A. We said yeah, we got a hundred and fifty more.

Key Development introduced into evidence copies of the checks for the interest payments Carlson wrote on the account for Northwest Seaplanes Inc. or its subsidiary for the 2000 and 2002 loans. The interest paid on the 2000 promissory note totaled $234,020. The interest paid on the 2002 promissory note totaled $207,750.

During the cross-examination of Johnson, the court admitted evidence about other loans Key Development or Johnson made including promissory notes, deeds of trust, and other documents.

Carlson testified that he did not recall "having a conversation with either Mr. Dahlby or Mr. Johnson about the purpose" of either the 2000 or the 2002 loan. Carlson testified he used the $150,000 from the 2000 loan to purchase an apartment in Campbell River, British Columbia, and to remodel a vacation home in Arizona and in Chelan. Carlson testified he used the $150,000 from the 2002 loan to settle a lawsuit over his father's estate. Carlson testified the timing of the interest-only payments he made using the Northwest Seaplanes Inc. account coincided with the months when his business income was the highest because those were the months he "g[o]t paid."

Certified public accountant Gary Lien testified and the court admitted the report he prepared into evidence. Lien testified he reviewed the 2000 and 2002 promissory notes, the interest payment records on the loans, Northwest Seaplanes Inc. tax returns for the years 2000 through 2008, and Carlson's personal tax returns for the years 2000

through 2003 and 2005 through 2008. Lien testified none of the Northwest Seaplanes Inc. accounting documents reflected either the 2000 or the 2002 loan "as a business liability." Lien testified the corporate tax returns did not include a deduction for the interest payments on the loans. In his opinion, Carlson's use of his business account to write checks to pay the interest on the promissory notes did not necessarily show a business purpose. In the report, Lien states:

> I am not surprised at the fact that many if not all of the monthly payments on the Promissory Notes came from the checking account of the Borrower's business rather than their personal checking account. I have seen that frequently in my years of practice.

The court concluded the interest on the two loans was usurious and Key Development did not carry its burden of establishing the business loan exemption under RCW 19.52.080 applied.

The court found the "testimony of Mr. Carlson, Mr. Johnson, and Mr. Dahlby is not determinative of or convincing regarding the purpose of the funds at the inception of the Loans." The court found the agreement to loan Carlson money was very informal—Johnson and Dahlby did not ask Carlson to provide "documentation of any kind."

The court found the terms of the 2000 and 2002 promissory notes did not indicate that the loans were for a business purpose and the checks for the loan proceeds were written "to Mr. Carlson, not his corporation." The court found that although Johnson believed the loans were for a business purpose, he "controlled the preparation of the loans and used his counsel to prepare" the promissory notes. The court found that unlike other loans made by the pension fund for a business purpose, "[n]either of the Carlson Notes specifies a business or commercial purpose." The court found the interest payments Carlson made using checks drawn on the account of

Northwest Seaplanes Inc. did not establish the loans were used for a business purpose. The court concluded the evidence showed the loans to Carlson were personal loans.

> Because the Loans are usurious on their face, Plaintiff has the burden of establishing that the Loans qualify for the exemption under RCW 19.52.080 for loans made "primarily" for "commercial, investment or business purposes" at the time of the inception.
>
> 27. "[W]hen a loan is usurious on its face, as in the present case, the burden is upon the lender to prove that its loan qualifies for the narrow transaction exemption." "The borrower's intended use for the loan proceeds must be characterized according to the manifestations of intent, if any, that the borrower made to the lender at the time the parties entered into the loan contract." As enumerated in the above findings of fact, the testimony of the parties is neither determinative nor helpful with regard to the purpose of the loans. The only contemporary documentation are the two notes themselves and the payments of the loan proceeds to borrower. Neither of the Carlson Notes specifies a business or commercial purpose. The Plaintiff paid the loan proceeds to Mr. Carlson personally. The Plaintiff lender has not carried its burden in proving that these loans qualify for the narrow transaction exemption.[3]

The court entered extensive findings of fact and conclusions of law and a judgment against Key Development for $441,770 plus attorney fees and costs.

ANALYSIS

Key Development argues the court erred in concluding it did not carry its burden of establishing the loans to Carlson were made for a commercial or business purpose under RCW 19.52.080.

The usury statute, chapter 19.52 RCW, limits the interest rate for consumer loans. As a general rule, the rate of interest charged on a loan may not exceed 12 percent. RCW 19.52.020(1). RCW 19.52.020(1) states, in pertinent part:

> Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield.

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[3] Alteration in original, footnotes omitted, citations omitted.

A transaction bearing interest above the statutory limit is prima facie usurious and unenforceable.[4] RCW 19.52.030. However, the statutory limit does not apply to commercial loans "primarily for agricultural, commercial, investment, or business purposes." RCW 19.52.080. RCW 19.52.080 states, in pertinent part:

> [P]ersons may not plead the defense of usury . . . if the transaction was primarily for agricultural, commercial, investment, or business purposes: PROVIDED, HOWEVER, That this section shall not apply to a consumer transaction of any amount.
>
> Consumer transactions, as used in this section, shall mean transactions primarily for personal, family, or household purposes.

A borrower asserting a loan violates the usury statute bears the initial burden to show the loan was usurious. Stevens v. Sec. Pac. Mortgage Corp., 53 Wn. App. 507, 514, 768 P.2d 1007 (1989).

Key Development does not dispute the interest rate on the 2000 and 2002 loans is usurious and it had the burden to establish the loans were made for a business purpose. Jansen v. Nu-W., Inc., 102 Wn. App. 432, 439, 6 P.3d 98 (2000) ("When a loan is usurious on its face, the burden is on the lender to show the business exception of RCW 19.52.080 applies."); see also Marashi v. Lannen, 55 Wn. App. 820, 823, 780 P.2d 1341 (1989) ("[T]he burden is on the lender to show the business exception applies.").

The determination of whether a loan was primarily for a business purpose within the meaning of RCW 19.52.080 is a mixed question of law and fact. Marashi, 55 Wn. App. at 826. We review the trial court's findings of fact for substantial evidence. Pardee

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[4] In any action based on a usurious contract, if the borrower has paid interest under the contract, "the creditor shall only be entitled to the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest." RCW 19.52.030(1). Further, the "debtor shall be entitled to costs and reasonable attorneys' fees plus the amount by which the amount the debtor has paid under the contract exceeds the amount to which the creditor is entitled." RCW 19.52.030(1).

v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). We view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and persuasiveness of the evidence. Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 556, 132 P.3d 789 (2006); Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). We review a trial court's conclusions of law de novo. Pardee, 163 Wn.2d at 566.

The stated purpose of the borrower for obtaining the loan is a question of fact, but whether that purpose constitutes a business purpose is a question of law decided by the court. Jansen, 102 Wn. App. at 439-41. In other words, while the fact finder "decides the factual question of what the parties understood the funds were going to be spent on," it is for the court to "decide as a matter of law whether the[ ] proposed expenditures constitute business purposes." Jansen, 102 Wn. App. at 441.

The court must examine "objective indications of purpose in determining the applicability of the 'business purpose' exemption." Brown v. Giger, 111 Wn.2d 76, 82 757 P.2d 523 (1988). The purpose of a loan "is principally established by the representations the borrower makes to the lender at the time the loan is procured." Brown, 111 Wn.2d at 82; Jansen, 102 Wn. App. at 439. "The lender's purpose for the loan, which almost always is a business purpose, is irrelevant." Aetna Fin. Co. v. Darwin, 38 Wn. App. 921, 928, 691 P.2d 581 (1984).

When the representations of the borrower are inconclusive, the documentary evidence is "more conclusive" of the purpose of the loan. Brown, 111 Wn.2d at 83; see also Jansen, 102 Wn. App. at 440 ("The documentary evidence carries more weight

than unsubstantiated claims of contrary oral representations."). A direct conflict in the evidence on the question of the purpose of the loan creates an issue for the trier of fact. Marashi, 55 Wn. App. at 824.

Key Development argues the "uncontroverted" testimony of Dahlby and Johnson established the loans to Carlson were for a business purpose. We defer to the trial court on credibility. Boeing Co., 147 Wn.2d at 87 ("It is the sole province of the trier of fact to pass on the weight and credibility of evidence."). The court must weigh not only the credibility of witnesses but also "the persuasiveness of the evidence." In re T.W.J., 193 Wn. App. 1, 8, 367 P.3d 607 (2016); Acord v. Pettit, 174 Wn. App. 95, 109, 302 P.3d 1265 (2013) (weight and persuasiveness of testimony are "matters for the judge trying the case").

The court found the testimony regarding Carlson's purpose for the loans was not determinative or convincing. Finding of fact 8 states:

> Testimony Regarding Business Purpose. Clyde does not recall that there ever was a conversation with Dahlby or Johnson in which he was asked or in which he stated his personal need or the purpose for the money. Johnson and Dahlby both testified that they understood there was a business purpose for the loan[s]. When the testimony of Mr. Johnson and Mr. Dahlby is considered, it is not a matter of not believing them or finding them not credible, but when their memories on other issues is listened to and considered it is very apparent that their memories are lacking. The events relating to the Loans occurred in 2000 and 2002, clearly Mr. Johnson and Mr. Dahlby have lots of difficulty remembering events that long ago. The oral testimony of Mr. Carlson, Mr. Johnson and Mr. Dahlby is not determinative of or convincing regarding the purpose of the funds at the inception of the Loans.

Carlson testified he did not recall discussing the purpose of the 2000 loan or the 2002 loan with Dahlby or Johnson. Carlson testified:

> Q. And do you recall having a conversation with either Mr. Dahlby or Mr. Johnson about the purpose of either of these loans?

A. No, I don't recall.
Q. . . . You don't recall the substance of the conversation, or you don't recall having a conversation?
A. Well, I just – I don't recall having a conversation about it, no.

The record supports the court's finding that although Dahlby and Johnson testified Carlson said the loans were for his business, "when their memories on other issues is . . . considered it is very apparent that their memories are lacking. . . . [C]learly Mr. Johnson and Mr. Dahlby have lots of difficulty remembering events" in 2000 and 2002.

During cross-examination, Dahlby admitted that "at seventy years old," his memory was "not very good" and he needed to talk to Johnson to "refresh [his] memory of the events of the year 2000 and 2002." Dahlby could not remember the details of the 2002 loan he made to Carlson and had "no specific memory" of Carlson executing either promissory note.

Johnson could not remember any details about the business purpose for the 2002 loan and could not remember why he wrote the check for the 2002 loan on a corporate account rather than the Columbia Meat Products Pension Plan account.

Johnson also could not remember the details of the other pension fund loans. For example, the evidence showed Key Development made loans secured by a deed of trust to Terry and Sara French (collectively, French) in 2007 and in 2009. But Johnson could not remember when Key Development made the loan to French in 2007 and provided inconsistent explanations about the purpose of the loan. And Johnson could not remember any details regarding the 2009 loan to French. Johnson also testified he personally loaned money to French to purchase a boat but could not remember the amount of the loan or when French paid off the loan.

We defer to the credibility determination of the trial court and conclude the record supports finding the testimony of Johnson and Dahlby was "not determinative of or convincing" regarding the purpose of the loans.

The court also concluded the tax returns for Northwest Seaplanes Inc. were "not convincing or helpful in determining the purpose of the Loans." The court found the "fact that the loan repayment schedule coincided with the Corporation's best months" was "not persuasive as to the purpose of the Loans at their inception" because "those same months were also Mr. Carlson's best personal income months." The court found the fact that Carlson made loan payments using checks drawn on the account of his business did not establish the loans were business loans because "the Corporation was merely writing one check rather than writing a check to Mr. Carlson who in turn would write a check to Plaintiff."

Turning to the documentary evidence, the court found the objective terms of the promissory notes showed the 2000 and 2002 loans "appear to be personal loans." Finding of fact 13 states:

> The Objective Terms of the Promissory Notes. These Loans, based on the documentation, appear to be personal loans. Both the names of the parties, the lack of business security provided with them, the lack of any specific intent stated in the documents themselves and the fact the loan proceeds were payable personally to Mr. Carlson, indicate that they are personal loans.

The record supports the court's finding. Both promissory notes identify "Clyde E. Carlson and Priscilla A. Carlson" as the borrower and the obligation is "joint and several." The promissory note securing the $150,000 loan in 2000 states Carlson promises to pay G & G Meats Pension Fund. The promissory note in 2002 to secure the $150,000 loan promises to pay Columbia Meat Products Pension Plan. Neither

promissory note indicates the loan is for a business purpose. The checks Johnson wrote to Carlson for the two loans are payable only to "Clyde Carlson."

The unchallenged findings establish that because Key Development destroyed or returned loan documents after a loan was repaid, "the Court did not have the benefit of seeing how the Plaintiff documented other loans contemporaneously with the Carlson Loans." However, the findings state, "It is clear to this Court that the Plaintiff had the ability to document business loans." For example, the court notes that a loan to Lakeside Heating and Air Conditioning LLC "prepared by Plaintiff-Lender and its counsel . . . expressly provided in its documents that the 'loan evidenced by the note is for business purposes and the loan funds will be used solely for business purposes'."

The court also notes that in the promissory notes executed by Lakeside Heating and Air Conditioning LLC and Tonkka Trucking and Excavating LLC, "the Plaintiff-Lender identified the business entity as the borrower and the individuals as co-borrowers or guarantors."

The record shows Johnson made a loan to Lakeside Heating and Air Conditioning LLC in January 2004. The "AGREEMENT TO MAKE SECURED LOAN" lists the business's owners as guarantors of the loan[5] and requires both the business and the owners to represent the loan "evidenced by the note is for business purposes and the loan funds will be used solely for business purposes." The promissory note securing the January 2004 loan to Lakeside Heating and Air Conditioning LLC lists the

[5] The security agreement states in pertinent part:

Agreement made January 23, 2004, between Brandon S. Agostinelli and Linnea Agostinelli, husband and wife, . . . in this agreement referred to as guarantor, Lakeside Heating & Air Conditioning, LLC, . . . in this agreement referred to as debtor, and Jack A. Johnson . . . , in this agreement referred to as secured party.

business rather than its owners as the borrower.[6] The promissory note for a January 2008 loan Johnson made to Tonkka Trucking and Excavating LLC lists the business as well as its owner as the borrower.[7] The record supports the court finding that the documentary evidence related to the loans is "more indicative of a business loan than having only the individuals as the borrower, when the individuals also are the owners of a business."

Key Development contends the court erred in admitting evidence of the other loans and relying on that evidence to conclude it did not carry its burden of proving the business purpose exemption applied.

We review the admission of evidence for abuse of discretion. Univ. of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). A trial court abuses its discretion if it bases its decision on "untenable grounds or untenable reasons." Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

The court admitted promissory notes, deeds of trust, and other documents for loans Key Development made to individuals or businesses after making the loans to Carlson, exhibits 58, 59, 60, 61, 63, 64, 66, 67, and 68.[8] Key Development objected to

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[6] The promissory note states in pertinent part:

FOR VALUE RECEIVED, LAKESIDE HEATING & AIR CONDITIONING, LLC, a Washington limited liability company ("Borrower" herein) promises to pay to the order of JACK A. JOHNSON . . . ('Lender" herein), the principal sum of TWO HUNDRED AND ONE THOUSAND and no/100 Dollars ($201,000.00) with interest thereon at the initial annual rate of ten percent (10%).

[7] The promissory note states in pertinent part:

FOR VALUE RECEIVED, Tonkka Trucking and Excavating, LLC, a Washington limited liability company and Benjamin Tanielian (collectively "Borrower" herein) promises to pay to the order of JACK A. JOHNSON . . ., ('lender' herein), the principal sum of SIXTY THREE THOUSAND and no/100 Dollars ($63,000.00) with interest thereon at the annual rate of fourteen percent (14%).

[8] Key Development also argues the court erred in admitting exhibit 65 but the court did not admit exhibit 65 into evidence.

the admission of the exhibits as not relevant. Carlson argued the exhibits were relevant to show Key Development had the ability to document business loans made on behalf of the pension fund and to impeach Johnson. The court admitted the exhibits "[f]or that limited purpose." The court ruled that "[w]hat weight will be allowed will be determined later."

For the first time on appeal, Key Development argues the exhibits were only admissible to show habit or routine practice under ER 406. We do not consider arguments raised for the first time on appeal. RAP 2.5(a); Heg v. Alldredge, 157 Wn.2d 154, 162, 137 P.3d 9 (2006); see Mears v. Bethel Sch. Dist. No. 403, 182 Wn. App. 919, 934, 332 P.3d 1077 (2014) (" 'A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.' ") (quoting State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). The court did not abuse its discretion in admitting and considering the exhibits.[9]

We conclude the court did not err in concluding Key Development did not carry its burden of establishing the business purpose exemption under RCW 19.52.080 applied to the two loans to Carlson.

In the alternative, Key Development relies on dicta in Brown and Stevens to argue that because Carlson was not " 'by adversity and necessity of economic life driven to borrow money at any cost,' " the usury statute does not apply. Brown, 111 Wn.2d at 80-81 (quoting Baske v. Russell, 67 Wn.2d 268, 273, 407 P.2d 434 (1965)). Brown and Stevens do not support Key Development's argument.

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[9] "[T]he threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." Kappelman, 167 Wn.2d at 9. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

In Brown, the court addressed whether a loan was "properly characterized as personal in nature." Brown, 111 Wn.2d at 81. Because the borrower executed loan documents clearly stating the loan was for a business purpose, the Supreme Court held the trial court properly characterized the loan as having a business purpose. Brown, 111 Wn.2d at 82-83. The court noted in dicta that "nothing suggests that [the borrower] was 'by adversity and necessity . . . driven to borrow money at any cost.' " Brown, 111 Wn.2d at 83 (quoting Baske, 67 Wn.2d at 273).[10]

In Stevens, the court addressed whether the defendant lenders carried their burden of proving the loan was for a business purpose. Stevens, 53 Wn. App. at 515. The borrower in Stevens stated in the loan application that the loan was "for investment purposes" and signed an affidavit stating the loan proceeds "would be used for business rather than personal purposes." Stevens, 53 Wn. App. at 510-11. The court held the "objective manifestations were that the loan was for business purposes, and therefore the 'business purpose' exception applies." Stevens, 53 Wn. App. at 516. In dicta, the Stevens court states, "[N]othing suggests that Stevens was 'by adversity and necessity . . . driven to borrow money at any cost.' " Stevens, 53 Wn. App. at 517 (quoting Baske, 67 Wn.2d at 273).

The dicta in Brown and Stevens cannot contravene the plain language of the usury statute. Gerberding v. Munro, 134 Wn.2d 188, 224, 949 P.2d 1366 (1998) (Dicta is language not necessary to the decision and "need not be followed."). The plain and unambiguous language of chapter 19.52 RCW does not indicate in any way that the intent of the usury law is related to borrowers who are " 'by adversity and necessity . . .

[10] Some alteration in original.

driven to borrow money at any cost.' "[11] To the contrary, the stated purpose of the usury statute is "to protect the residents of this state from debts bearing burdensome interest rates" on consumer loans. RCW 19.52.005. A consumer loan is "primarily for personal, family, or household purposes." RCW 19.52.080.

We affirm the court's findings of fact and conclusions of law and entry of the judgment against Key Development.

Carlson requests attorney fees on appeal under RCW 4.84.330 and RAP 18.1. The 2000 and 2002 promissory notes each contain a unilateral attorney fee provision.[12] RCW 4.84.330 provides that where a contract contains a unilateral attorney fee provision, the prevailing party is entitled to fees. Wash. Fed. v. Gentry, 179 Wn. App. 470, 496, 319 P.3d 823 (2014). Upon compliance with RAP 18.1, Carlson is entitled to fees on appeal.

Schindler, J.

WE CONCUR:

Spearman, J.

Becker, J.

[11] Brown, 111 Wn.2d at 83 (alteration in original) (quoting Baske, 67 Wn.2d at 273).

[12] Both promissory notes state, in pertinent part, "If this Note is placed in the hands of an attorney for collection after any default, Borrower promises to pay all costs of collection and a reasonable sum as attorneys' fees, whether suit is brought or not."

APPENDIX B

J4

Hon. Judge David Needy

SUPERIOR COURT OF WASHINGTON
IN AND FOR SKAGIT COUNTY

JACK A. JOHNSON, in his capacity as the trustee of KEY DEVELOPMENT PENSION, f/k/a G & G Meats Pension Fund and Columbia Meat Products Pension Plan, Plaintiff, v. CLYDE E. CARLSON and PRISCILLA A. CARLSON, husband and wife, and the marital community composed thereof, Defendants .	NO. 12-2-02034-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for trial before the undersigned Judge of the above-entitled court on October 13, 2014 and October 20, 2014 and the court having reviewed the exhibits admitted at trial and having heard the testimony of the witnesses on behalf of the plaintiff Jack A. Johnson in his capacity as the trustee of Key Development Pension f/k/a G&G Meats Pension Fund and Columbia Meat Products Pension Plan, ("Key Development" or "plaintiff") and the defendants Clyde E. Carlson and Priscilla A. Carlson, husband and wife, ("defendants") and having heard argument of counsel, the court makes the following:

I. FINDINGS OF FACT

1. Jack Johnson ("Johnson"), Gary Dahlby ("Dahlby") are the trustees the Key Development Pension and have known defendant Clyde Carlson (Clyde") for many years.

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2. Since about 1988, Clyde owned a float plane business, Northwest Seaplanes, Inc. (the "Corporation") based out of Renton, Washington. The business was incorporated, maintained its own set of accounting records, bank accounts and filed its own corporate tax returns. The seaplane business is seasonal in the Pacific Northwest and Defendant's personal income was derived from this business.

3. Because of their friendship, Clyde was aware that Johnson and Dahlby made loans from their pension funds. In November 2000, Clyde approached Plaintiff and inquired as to whether Plaintiff would make him a loan.

4. The first note in the amount of $150,000 was executed in November 2000 in favor of G & G Meats Pension Fund ("G&G Meats Note"). The interest rate was 18% for the first six years, and then in 2006 the interest rate was reduced to 14%. The loan process was very informal; there was no loan application or documentation of any kind required. There was no underwriting; there was no credit review. This Note was originally due in November 2001, but the parties extended the due date multiple times until October 2012 when Plaintiff demanded final payment. Defendants did not make the payment as requested.

5. G&G Meats issued a check in the amount of $149,500 made payable to "Clyde Carlson", and he deposited it into his personal bank account, and used the proceeds to pay a variety of personal expenses.

6. The second Note, this time made to Columbia Meat Pension Plan, was executed in April 2002 ("Columbia Meat Note") – also at 18% interest for the first four years, and then in 2006 the interest rate was reduced to 14%. The $150,000 check was written to Clyde Carlson personally, on the Key Development Corporation account – rather than from the "pension" account. He again deposited it into his personal bank account and used the proceeds to pay

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personal expenses. This Note was originally due in November 2003, but the parties extended the due date multiple times by oral agreement until October 2012 when Plaintiff demanded final payment. Defendants did not make the payment as requested.

7. A summary of the terms and payments of each of the two Notes is as follows:

Note 1	borrower	lender	amount borrowed	interest	amount paid
11/10/2000	Clyde and Priscilla Carlson	G&G Meats	$150,000	18%	$234,020

Note 2	borrower	lender	amount borrowed	interest	amount paid
4/18/2002	Clyde and Priscilla Carlson	Columbia Meats	$150,000	18%	$207,750
			$300,000		$441,770

8. Testimony Regarding Business Purpose. Clyde does not recall that there ever was a conversation with Dahlby or Johnson in which he was asked or in which he stated his personal need or the purpose for the money. Johnson and Dahlby both testified that they understood there was a business purpose for the loan. When the testimony of Mr. Johnson and Mr. Dahlby is considered, it is not a matter of not believing them or finding them not credible, but when their memories on other issues is listened to and considered it is very apparent that their memories are lacking. The events relating to the Loans occurred in 2000 and 2002, clearly Mr. Johnson and Mr. Dahlby have lots of difficulty remembering events that long ago. The oral testimony of Mr. Carlson, Mr. Johnson and Mr. Dahlby is not determinative of or convincing regarding the purpose of the funds at the inception of the Loans.

9. Tax Returns. The tax returns and information there in is too far afield and not helpful in determining the purpose of the Loans. It does not appear that the Corporation claimed

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interest deductions for these loans. There may have been some loaning of funds back and forth between the Corporation and the shareholder, Mr. Carlson. The tax return evidence is not convincing or helpful in determining the purpose of the Loans.

10. Evidence of Unrelated Loan from Mr. Dahlby to Mr. Carlson. That loan was paid in full and is not before the Court.

11. The Loan Payment Schedule. The fact that the loan repayment schedule coincided with the Corporation's best months is not persuasive as to the purpose of the Loans at their inception, because those same months were also Mr. Carlson's best personal income months. This fact is not persuasive one way or the other.

12. Use of Funds. The actual use of the funds is not convincing one way or the other. With the Columbia Meats Loan, the evidence is more clear that in the immediate time frame of receiving the $150,000 in April of 2002, Mr. Carlson used a material portion of the $150,000 to pay a settlement of a personal legal matter involving his sister. Mr. Carlson testified that he used the proceeds of the November 2000 G & G Meats Loan for a variety of personal expenses.

13. The Objective Terms of the Promissory Notes. These Loans, based on the documentation, appear to be personal loans. Both the names of the parties, the lack of business security provided with them, the lack of any specific intent stated in the documents themselves and the fact the loan proceeds were payable personally to Mr. Carlson, indicate that they are personal loans.

14. The Lender had the Ability to Document Business Loans. It is clear to this Court that the Plaintiff had the ability to document business loans when he chose, specifically, the Lakeside Heating and Air Conditioning Loan, prepared by Plaintiff-Lender and its counsel, expressly provided in its documents that the "**loan evidenced by the note is for business**

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purposes and the loan funds will be used solely for business purposes." That same representation does not appear in either of the Loans at issue herein.

15. Additionally, in the Lakeside Loan and the Tonkka Loan, the Plaintiff-Lender identified the business entity as the borrower and the individuals as co-borrowers or guarantors. This is more indicative of a business loan than having only the individuals as the borrower, when the individuals also are the owners of a business. The Plaintiff made other loans within two years of the Columbia Meats Loan where the documentation specifically stated that the loan was for a business purpose. If Plaintiff truly understood the Carlson loans to be business or commercial loans, Plaintiff had the ability through its counsel, to document that the loan was a business or commercial loan.

16. Lack of Lender Documentation. Over the years Plaintiff and its predecessors have made over 40 loans. However, Plaintiff only had loan files and documents in its possession relating to loans that had not yet been paid off. These loans were the Carlson Loans, the Lakeside Loan, the French Loans and the Tonkka Loan. All other loan files and documents had been destroyed or returned to the borrower once the loan was repaid. The destruction of the loan documents is noted only to point out that the Court did not have the benefit of seeing how the Plaintiff documented other loans contemporaneously with the Carlson Loans.

17. The Loan Proceeds were Paid Directly to Mr. Carlson. In exchange for the Notes, the Plaintiff issued the payment directly to Mr. Carlson, not to his corporation. The facts are undisputed that these checks were deposited into Mr. Carlson's personal account.

18. Plaintiff used Counsel to prepare Loan Documents. Mr. Johnson indicated that he believed the loans were for a business purpose, yet he controlled the preparation of the loans and used his counsel to prepare the Loans.

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19. Evidence that Corporation Paid the Loan Payments Rather than Mr. Carlson Personally. Although the interest payments were made by the Corporation, rather than the Carlsons, it does not appear that the Corporation claimed an interest deduction for those payments, and thus, the Corporation was merely writing one check rather than writing a check to Mr. Carlson who in turn would write a check to Plaintiff.

20. Interest Rate. Both the G&G Note and the Columbia Meats Note provide for an eighteen percent interest rate.

21. At the time the loans from the Plaintiff were made in 2000 and 2002, the Defendants were not needy borrowers who by adversity and necessity of economic life, were driven to borrow money at any cost from an unconscionable money lender. The Defendants were not desperate in 2000 and 2002 at the time they borrowed the money. The Defendants had the ability to move and transfer assets and possessions and property and were not one the door of destitution at that time.

II. PARTIES' CONTENTIONS

22. Plaintiff asserts that both Loans are in default and Defendant owes interest and principal. Plaintiff claims that the Notes are exempt from the usury statute because they were for business purposes.

23. Defendants claim that the Notes were personal loans and therefore are usurious. Defendant seeks restitution for amounts paid to Plaintiff under the Usury Statute, RCW 19.52. et seq.

III. CONCLUSIONS OF LAW

24. This Court has jurisdiction over the parties and subject matter of this action.

25. Defendants have met their initial burden of establishing that the Loans are usurious

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on their face as they are personal loans. The Loans only identify an individual as the borrower, there is no business security and there is no recitation of a business purpose anywhere in the loan documentation.

26. Because the Loans are usurious on their face, Plaintiff has the burden of establishing that the Loans qualify for the exemption under RCW 19.52.080 for loans made "primarily" for "commercial, investment or business purposes" at the time of the inception.

27. "[W]hen a loan is usurious on its face, as in the present case, the burden is upon the lender to prove that its loan qualifies for the narrow transaction exemption."[1] "The borrower's intended use for the loan proceeds must be characterized according to the manifestations of intent, if any, that the borrower made to the lender *at the time the parties entered into the loan contract.*"[2] As enumerated in the above findings of fact, the testimony of the parties is neither determinative nor helpful with regard to the purpose of the loans. The only contemporary documentation are the two notes themselves and the payments of the loan proceeds to borrower. Neither of the Carlson Notes specifies a business or commercial purpose.[3] The Plaintiff paid the loan proceeds to Mr. Carlson personally. The Plaintiff lender has not carried its burden in proving that these loans qualify for the narrow transaction exemption.

28. The lawful rate of a personal loan is twelve percent (12%), in this case, the Loans were usurious because they each bear a stated interest rate of eighteen percent (18%).

29. Because the Loans are usurious, the Defendants are entitled to recover their court costs and reasonable attorneys' fees in connection with this lawsuit and the interest in the amount

[1] *Aetna Finance Co. v. Darwin*, 38 Wn. App. 921, 924-25 (1984), *review denied*, 103 Wn 2d. 1019 (1985).
[1] RCW 19.52.025. *See also, Trust of Strand v. Wel-Co Group*, 120 Wn. App. 828, 835 (Wa. App. 2004).
[2] *Aetna Finance Co.*, 38 Wn. App. at 927-28 ("The lender's purpose for the loan, which is almost always is a business purpose, is irrelevant"); *Brown v. Giger*, 111 Wn. 2d 76, 82 (1988) (quoting *Aetna Finance Co.*, 38 Wn. App. at 927).
[3] *Brown v. Giger*, 11 Wn. 2d at 82 (loan documents include borrower's representations that loan was for a business or commercial purpose); *Trust of Strand v. Wel-Co Group*, 120 Wn. App. at 832 (loan agreement included representation from borrower that the loan was to be used exclusively for business purposes);

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31. Accordingly, the Carlsons are entitled to an award of $441,770.00 plus their costs and reasonable attorneys' fees pursuant to RCW 19.52.030 in the amount to be determined by this court following the filing of the fee application by Defendants as a result of the Loans being usurious.

CONSUMER PROTECTION ACT CLAIM

32. Defendants claim that the Loans violated the Consumer Protection Act. RCW 19.86. Because the Court has determined that the Loans violated the Usury Statute, the Court has not made findings regarding the Consumer Protection Act.

DONE IN OPEN COURT THIS 29 Day of January, 2015.

Judge David Needy

PRESENTED BY:

PETERSON RUSSELL KELLY, PLLC

By: _____
Marcia P. Ellsworth, WSBA #14334
Eric C. Carlson, WSBA #22360
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No._____

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 73347-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Key Development Pension, Plaintiff -Appellant

v.

Clyde E. Carlson and Priscilla A. Carlson, Defendants-Respondents

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ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(Hon. David R. Needy)

DECLARATION OF MAILING

Stephan E. Todd, WSBA # 12429
14319 15th Drive SE
Mill Creek, WA 98012
(425) 585-0274
Attorney for Key Development
Pension, Appellant

The undersigned declares that he is a citizen of the United States and a resident of the State of Washington, living and residing in Snohomish County in said state, over the age of eighteen (18) years, not a party hereto, and competent to be a witness in this action; that on the 9th day of August, 2016, I caused to be served to:

Marcia P. Ellsworth
Peterson Russell Kelly PLLC
10900 NE 4th St, Ste 1850
Bellevue, WA 98004-8341

( ) via Hand delivery
(X) via U.S. Mail

a copy of the Appellant's Petition for Review.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9th day of August, 2016 at Mill Creek, Washington.

Stephan E. Todd