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No. 71148-2-1

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

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

Appellants,

v.

GARY NORDLUND AND ALDENTE, LLC

Respondents
And
Defendants,

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

2011 MAY 29 AM 11:45
COURT OF APPEALS DIV I
STATE OF WASHINGTON

RESPONSE BRIEF OF ALDENTE, LLC

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TABLE OF CONTENTS

I. INTRODUCTION

II. RESPONSE TO ISSUES PRESENTED

III. STATEMENT OF THE CASE

IV. ARGUMENT AND AUTHORITY

A. Appellate Review of Summary judgment Order

1. Record before the Court

2. Standard of Review

B. Application of RCW 31.04

C. Interest-Usury Statute RCW 19.52

D. Penny Arneson Individually is not the True Borrower and has no standing to bring this action

E. There are No Issues of Fact regarding the True Borrower of Loan Purpose

F. There are no Disputed Facts regarding the Collateral

G. Judgment for Principal, Usurious Interest, Attorney Fees, etc

V. CONCLUSION

TABLE OF CASES AND AUTHORITY

CASES	Page
<i>Arneson v. Arneson</i> 38 Wn 2d 99, 101, 227 P2d1016 (1951)	29
<i>Barber v. Bankers Life & Cas. Co.</i> 81 Wn 2d 140, 142, 500 P.2d 88 (1972)	13
<i>Highline Sch. Dist. No. 401 v. Port of Seattle</i> 87 Wn 2d 6, 15, 548 P.2d 1085 (1976)	13
<i>In re Marriage of Soriano</i> 44 Wn App 420, 420, 722 P2d 132 (1986)	3,11,24
<i>LaPlante v. State</i> 85 Wn.2d 154, 158, 531 P.2d 299 (1975)	14
<i>McGovern v. Smith</i> 59 Wn App 721, 724, 801 P2d 250 (1990)	17, 22
<i>Mahoney v. Shinpoch</i> 107 Wn 2d 679, 683, 732 P.2d 510 (1987)	13
<i>Mom's v. McNicol</i> 83 Wn 2d 491, 494, 519 P.2d 7 (1974)	13
<i>O'Steen v. Wineberg's Estate</i> 30 Wn App 923, 932, 640 P.2d 28 (1982)	17, 20
<i>Paulman v. Filtercorp</i> 127 Wn 2d 387, 394, 899 P2d 1259 (1995)	7, 22
<i>Ranger Ins. Co. v. Pierce County</i> 164 Wn 2d 545, 552, 192 P.3d 886 (2008)	13
<i>Riverview Cmty. Grp. v. Spencer & Livingston</i> 173 Wn App 568, 576, 295 P3d 258	25
<i>Sourakli v. Kyriakos, Inc.</i> 144 Wn App. 501, 509, 182 P.3d 985 (2008)	14

<i>Wilson v. Steinbach</i>	
98 Wn.2d 434, 437, 656 P.2d 1030 (1982)	13
<i>Young v. Key Pharms., Inc.</i>	
112 Wn 2d 216, 225, 770 P.2d 182 (1989)	14

COURT RULES

CR 56(c)	13
CR 56(e)	14
RAP 9.12	12,13,21,22

WASHINGTON STATE STATUES

RCW 11.98.070(18)	19
RCW 11.98.078(1)	29
RCW11.98.090	19
RCW 11.98.105	19
RCW 19.52	21
RCW 25.10.021(1)	5,17,21
RCW 31.04	2,14,18
RCW 31.04.015(3)	14,15
RCW 31.04.015(18)	14
RCW 31.04.025	15
RCW 31.04.025(2)(e)	2, 15
RCW 31.04.027(1) and (2)	17
RCW 31.04.035	15

RCW 62A.3-103(5) 7

OTHER AUTHORITY

26 USC 2702 5

26 CFR 25.2702-5(d) 5

Black's Law Dictionary, 9th Edition5, 17

76 Am.Jur.2d Trusts § 2 (1975) 17, 20

I. INTRODUCTION

The Sweets were trustees of the 6798 Tolt Highlands Personal Residence Trust ("the "Trust"). The Trust was not a Personal Residence Trust, does not allow the Sweets to reside therein and in fact, makes no mention of a home or residence in the Trust Agreement. The Trust was an irrevocable trust and its beneficiary was the Rose Adorer Family Limited Partnership. The partners of the Limited Partnership were never identified in the record. In 2009 the Trust borrowed \$200,000 from Aldente, LLC ("Aldente"). The Loan Agreement was signed by the Sweets as Trustees of the Trust as was the Note. The Trust pledged Trust property and a Deed of Trust was signed by the Trustees on behalf of the Trust. The Sweets, as trustees of the Trust, directed escrow to make the distribution of the loan proceeds to them and the proceeds was apparently used by the Sweets personally. In 2010, the Sweets borrowed \$375,000 form Gary Nordlund ("Nordlund") a portion of which paid off the Aldente loan. When the Trust was unable to repay that loan, Nordlund started a foreclosure action and Penny Sweet commenced this action and included Aldente as well as a number of other parties.

Aldente's loan to the Trust is clearly exempt from the

otherwise provisions of RCW 31.04. A loan to an irrevocable Trust, secured by Trust property and used for Trust purposes is exempt from the provisions of the Consumer Loan Act pursuant to RCW 31.04.025(2)(e) which exempts:

“Any person making a loan primarily for business, commercial or agricultural purposes unless the loan is secured by the borrower’s primary residence.”

To avoid the application of the exemption, clear on the face of the loan, Sweet claims that she was the borrower although she only signed the loan documents on behalf of the Trust as its Trustee, that the Trust property was her property and her residence although the property was never in her ownership or name; and that because the Sweets directed escrow to pay the loan proceeds to them, and they used the funds for their personal expenses, that the loan became a personal loan to them rather than a commercial loan to the Trust that was obligated to repay the loan and who’s property secured it.

The primary “evidence” Sweet presents to support her claim is Dissolution Court records from her dissolution from Mr. Sweet describing the property as a family home and authorizing the Sweets to sell the property. That “evidence” is totally irrelevant to this proceeding as neither the Trust nor the Limited Partnership

beneficiary were, or could be, parties to the Sweets dissolution case and that court had no jurisdiction over them or the Trust property.

We abide by the longstanding rule that in dissolution proceedings the superior court has jurisdiction only over the parties to the action. It may not adjudicate the rights of third parties who have an interest in any of the property at issue. *In re Marriage of Soriano*, 44 Wn App 420, 420, 722 P2d 132 (1986)

Sweet's appeal here rests on three unsupportable arguments of which she must convince this court:

1. That the loan in the name of the Trust, upon which the Trust was the Borrower on Loan Agreement and the Maker on the Note, was made, not to the Trust as evidenced and represented, but to the Sweets personally;
2. That Trust Property, that was acquired and sold directly by the Trust and was never in the Sweets name, was, in fact, Sweets individual property and their residence as the Borrower on the loan; and
3. That money loaned to the Trust and paid by the Lender, Aldente, as directed by the Trustees, according to authority of the Trust Agreement, became personal or consumer expenses of the Borrower Trust when the Trustees used the funds for their personal expenses.

If Sweet is incorrect as to any of her arguments, her appeal fails. As was clear to the Trial Court and will be made clear here, Sweet cannot support any of her arguments and the Trial Court Order and Summary Judgment should be affirmed.

III. STATEMENT OF THE CASE

On November 2, 2006, Kenneth William Sweet and Penny Arneson Sweet, (now Penny Arneson) (collectively, the “Sweets”¹) created the 6798 Tolt Highlands Personal Residence Trust by written trust document. CP 124-143. The Trust was an irrevocable trust naming the Sweets as the Trustors and as Trustees. §1.1, 1.6. CP 124-5.² The Trust beneficiary was the Rose Adorer Family Limited Partnership. (The “Limited Partnership”). §1.5. CP 125. At page 1 of her Opening Brief (“Brief”) Sweet claims that she and Mr. Sweet “were the sole partners” of the Limited partnership and cited to CP 125. CP 125 does not support that claim. In fact this is a significant misstatement as the true partners, limited or general, of the Rose Adorer Family Limited Partnership were never identified in

¹ Penny Sweet now goes by the name Penny Arneson. Because she is referred to as Penny Sweet or “Sweet” in the relevant documents and was in the record, she will be so referred to her. This is for clarification and consistency purposes and with no disrespect intended.

² The Trust Agreement allowed the Sweets to add a child or grandchild as beneficiary but they had no authority to name themselves. CP 125, 1.7.

the record and we have no idea of their true identity.³ The Trust provided, among other things, that “The Trustees shall have the power to obligate the trust property for the repayment of any sums borrowed where the best interests of the beneficiaries have been taken into consideration” and to grant a deed of trust securing any such loan. §2.19 (H). CP 133. Although the Trust is titled “The 6708 Tolt Highlands Personal Residence Trust” there is no reference to a residence in the Trust Agreement and there is no indication that it was provided as a residence for the beneficiary, a Limited Partnership, that has no “residence”, or granted anyone else the right to reside there. CP 124–143. Sweet claims that the trust was a testimonial trust [Brief p.4.] but that is not true.⁴ Sweet also claims that the Trust was created for estate planning purposes but that is unlikely as the trust is not a Qualifies Personal Residence Trust under the Internal Revenue Code and provides no tax benefit.⁵ The

³ Even if Sweet’s claim of sole membership were true, and they are not, it would not change the result as “A limited partnership is an entity distinct from its partners.” RCW 25.10.021(1)

⁴ A testamentary Trust is “trust that is created by will and takes effect when the testator dies” Black’s Law Dictionary, 9th Edition. This trust was not so created. CP 124-143.

⁵ To qualify as a Qualifies Personal Residence Trust (“QPRT”), the trust must be an irrevocable trust limited to a specific term and allowed to only be allowed to contain the personal residence of the testators. This trust is not limited in term, makes no reference to a personal residence except in the name of the trust, makes no restriction as to the property that may be within the trust (it allows the trust to purchase farm equipment and farm animals among other things Paragraph 2.19 (A) CP 131) and allows for the possible sale of the residence. It is not a QPRT. 26 USC 2702, 26 CFR 25.2702-5(d), Ex. 4.

property is simply a Trust asset and based on the naming of a Limited Partnership as a beneficiary was more likely an asset protection attempt. One which Sweet now wishes to disclaim.

On November 2, 2006, the Trust acquired property commonly known as 6798 Tolt Highlands, Carnation, WA, for an indicated purchase price of \$1,865,000 by statutory warranty deed. CP 300–305. Sweet claims that she and her husband acquired the trust property and that she and her husband were the owners of the residence [CP 213 Ln 8-9, 18-19.]; but neither is true. The trust acquired the property directly from the sellers and it was never owned by the Sweets individually or ever in their name. CP 300-305 [the Deed of conveyance to the Trust], CP 142-3 [Deed of conveyance from the Trust]. On May 14, 2009, the Trust entered into a Loan Agreement with Aldente to obtain a \$200,000 loan to be secured by Trust property. The stated “purpose of the loan is for a cash-out refinance of the real property by borrower”. Loan Agreement, Paragraph 1.1. CP 145. The Borrower was identified in the Loan Agreement as the “6708 TOLT HIGHLANDS RESIDENTIAL TRUST”. CP 150. When the Sweets signed the Loan Agreement for the Borrower Trust, they signed the Loan Agreement in their representative capacity as follows:

BORROWER

TOLT HIGHLANDS PERSONAL
RESIDENCE TRUST

By:

KENNETH WILLIAM SWEET, Co-Trustee

By:

PENNY ARNESON SWEET, Co-Trustee

The Sweets also individually guaranteed the loan. When they signed the Loan Agreement in their individual capacity they signed very differently:

GUARANTORS

By: _____
KENNETH WILLIAM SWEET, individually

By: _____
PENNY ARNESON SWEET, individually⁶

A Promissory Note was prepared dated May 19, 2009. CP 154-5. Ms. Sweet claims that the Sweets individually were the makers on the Note but that is not true.⁷ The Trust was maker with the Co-Trustees, the Sweets, signing for the Trust in their representative capacity as follows at CP154:

⁶ Emphasis added as to "individually". "It is inconsequential that two natural persons were guarantors on the loan" Paulman v. Filtercrop, 127 Wn 2d 387, 394, 899 P 2d 1259 (1995).

⁷ "'Maker' means the person who signs or is identified in a note as the person undertaking to pay" RCW 62A.3-103(5).

MAKER

TOLT HIGHLANDS PERSONAL
RESIDENCE TRUST

By:

KENNETH WILLIAM SWEET, Co-Trustee

By:

PENNY ARNESON SWEET, Co-Trustee

The Trust was the borrower and was liable on the Note and not its trustees signing on its behalf.

As security for the Loan to the Trust, the Trust granted Aldente, a Deed of Trust of the Trust property. CP 156-158. The Deed of Trust was signed on behalf of the Trust owner of the property by Mr. Sweet in his representative as "CO-Trustee". CP 157.

A Closing Statement shows the distribution and that it was approved by the Sweets in their representative capacity as Co-Trustees for the Trust borrower. CP 160-162. The Sweets directed escrow to pay the \$133,253.90 in loan proceeds to the Sweets as Co-Trustees. CP 160-162.

The Trust repaid the Loan in January, 2010 with proceeds from a \$375,000 loan from Defendant, Gary Nordund. CP 28. That loan was apparently not paid according to its terms and a

foreclosure action was begun. CP 32-48. A trustee's sale date was set for February 3, 2012. CP 40. This action was commenced on January 5, 2012. Immediately thereafter, Sweet moved for a Temporary Restraining Order to prevent the trustee's sale. CP 19-53. Aldente, LLC, was not a party at that time and did not participate in the action.

Aldente moved for Summary Judgment on May 3, 2013, arguing that the Trust was the borrower securing the loan with Trust property and that the proceeds of the Aldente loan were paid as directed by the Trustees of the Trust. The Sweets as Co-Trustees directed that the proceeds of the loan to the Trust to be paid to them as they had authority to do under the trust document and Aldente was obligated to comply. CP 133 § H. Although Sweet claims that the proceeds were used by them for personal expenses, the Borrower was the Trust, not the Sweets and the loan was made to the Trust not the Sweets. The fact that the Trustees directed that the Trusts loan proceeds be directed to the Trustees themselves did not change the fact that the loan was from Aldente to the Trust. That loan was a commercial loan to an irrevocable Trust with a Limited Partnership beneficiary that could not have any personal or consumer expenses. Although the Sweets claimed to be living on

the Trust property, the property was not the "Residence" of the Trust Borrower as it has no residence but only a situs.

Sweet claimed that the residence was the property of the Sweets personally and that the court should ignore the fact that they created the irrevocable trust and that it had title to the property and it had never ever been in the Sweets name or ownership and allow her standing to individually bring this action.⁸ Sweet also claimed that since the Sweets individually ultimately made personal use of the Trust Loan proceeds that the fact that the loan was to the Trust, that the Trust was the Borrower on the Loan Agreement and Maker on the Note, should be ignored and the loan should be viewed as if it was made to them personally. Aldente demonstrated, as a matter of law, that the loan was made to the Trust and the fact that the Trustees directed escrow to pay the proceeds to them, did not make the loan the consumer loan to the Trust. The focus was on the Borrowers use of the proceeds not any use made by the Sweets after the Trust had made a distribution, as directed by the Trustees, over which the Aldente, as lender, would have no control. Sweet also argues that the Dissolution Court's reference to the Trust asset as the Sweets

⁸ Penny Sweet was the sole Trustee at the time she brought this action.

residence should be binding on the trial court even when there was no evidence that the Dissolution Court ever knew that the Trust was the true owner of the property or that the Limited Partnership was its beneficiary or that either were parties to the action or even had notice of it. The designation of the Trust property as the Sweets residence was never adjudicated but was simply a designation adopted by the Sweets and the Court to identify the asset and nothing more.⁹ According, the court granted Summary Judgment dismissing Penny Sweet as an individual party and the action of the Trust against Aldente.

IV. ARGUMENT AND AUTHORITY

A. Appellate Review of Summary judgment Order.

1. Record before the Court.

Appellants Complaint named several parties, principally Aldente and Nordlund, Respondents here. The parties share some issues but not all. Aldente was dismissed by Order on Summary Judgment, CP 306-308, while the record in the Nordlund matter

⁹ The Dissolution Court only had jurisdiction over the Sweets and could not actually enter any order affecting the Trust or the Limited Partnership beneficially not a parties to the action. *In Re Marriage of Soriano*, 44 Wn App 420, 4290, 422, 722 P 2d 132 (1986). This was ignored by the Sweets as Trustees.

continued for 700 more pages.¹⁰ Only the record and the arguments advanced in the Trial Court as to the Aldente cause may be considered by the Court on Appeal. RAP 9.12. The Record before the Court as to the Aldente appeal includes the following:

CP 19 – 52	Declaration of Penny Arneson
CP 57 – 75	Amended Complaint ¹¹
CP 105 – 108	Aldente's Answer
CP 109 – 120	Aldente's Motion for Summary Judgment
CP 121 – 164	Declaration of Michael DeBeau in Support of Summary Judgment Documents
CP 201 – 211	Plaintiff's Memo in Opposition to Summary Judgment
CP 212 – 273	Declaration of Penny Arneson
CP 292 – 297	Reply of Aldente re Summary Judgment
Cp 298 – 305	Declaration of Gary Abolofia in support of Documents
CP 306 – 308	Order on Summary Judgment Dismissing Aldente
CP 309 – 322	Plaintiff's Motion for Reconsideration
CP 391 – 397	Aldente's Response to Plaintiff's Motion for Reconsideration
CP 734 – 749	Reply to Aldente's Response
CP 752 – 753	Order Denying Plaintiff's Motion for Reconsideration ¹²

Only this limited record should be considered as to Aldente as it

¹⁰ Appellants made a Motion for Reconsideration that, with Response, Reply and Order Denying the Motion for Reconsideration continued for 37 additional pages.

¹¹ Aldente was not served with the Complaint [CP 1-18] and was not a party to the earlier proceedings.

¹² That Order is dated May 19, 2013 but was actually entered June 19, 2013.

was not a party to the case following its dismissal and the Nordlund claim included other issues not associated with Aldente.

2. Standard of Review.

The Appellate Court reviews a Summary Judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary Judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Mom's v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). All evidence and reasonable inferences are construed in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Appellate Court will consider solely evidence and issues the parties called to the trial court's attention. RAP 9.12.

Sourakli v. Kyriakos, Inc., 144 Wash._App. 501, 509, 182 P.3d 985 (2008)

Initially, the moving party bears the burden of proving no genuine issue of material fact exists. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Then, the burden shifts and the nonmoving party must present admissible evidence showing a genuine issue of material fact exists. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); CR 56(e).

B. Application of RCW 31.04.

The Appellant cites RCW 31.04.015(3) and (18) in an attempt to support Sweet's position that the Sweets, individually, were Borrowers under the Loan Agreement thus:

(3) "Borrower" means any person who consults with or retains a licensee or person subject to this chapter in an effort to obtain or seek information about obtaining a loan, regardless of whether that person actually obtains such a loan.

(18) "Person" includes individuals, partnerships, associations, limited liability companies, limited liability partnerships, trusts, corporations, and all other legal entities.

Based on these statutes, Sweet argues:

Clearly, Ms. Arneson as well as the Trust are "persons", within the terms of *RCW 31.04.015(18)*,

and "borrowers", within the terms of *RCW 31.04.015(3)*, for purposes of applying the provisions of the CLA. If the Trust can be a "person" and a "borrower" within the terms of the CLA, it follows that the Trust could negotiate a loan for personal or consumer purposes. Brief, p. 19.

Appellant Sweet misconstrues and misapplies the statute and applies faulty logic in an attempt to avoid the obvious exception to the statutes application exempting this loan to the Trust.

RCW 31.04.025(2)(e) states:

(2) This chapter does not apply to the following:

(e) Any person making a loan primarily for business, commercial, or agricultural purposes unless the loan is secured by a lien on the **borrower's** primary residence. [Emphasis added]

RCW 31.04.035 states the license requirements under the Act.

No person may engage in the business of making secured or unsecured loans of money, credit, or things in action, or servicing residential mortgage loans, without first obtaining and maintaining a license in accordance with this chapter, **except those exempt under RCW 31.04.025**. [Emphasis added]

The exemption from the statute is clear on the face of the loan. The Loan was made to an Irrevocable Trust for Trust purposes and it was secured by Trust property. RCW 34.04.025 provides that the burden of claiming an exemption is on the person claiming it however here the exemption is clear of the face of the

loan and Sweet has provided no credible evidence that the Statute even applies. To avoid the clear application of Aldente's exemption under the statute, Sweet must present some credible evidence that this irrevocable Trust with a Limited Partnership beneficiary, borrowing money for a stated Trust purpose, was, really, a Natural Person or that the Trustees who signed the Loan documents only in their representative capacity were really the borrowers under the loan and that the Trusts property, never owned by the Trustee's, was actually owned by the Sweets. This Sweet cannot do.

Here the Trust entered into a Loan Agreement with Aldente. CP 145-154. Because the Trust is not a natural person and has no voice or physical existence of its own, the loan was negotiated by its legal representatives, the Sweets, as its Trustees. The Sweets did not apply for a loan for the Sweets individually but applied for a loan for the Trust. To the extent that the Sweets consulted with Aldente about a loan, they did so as representatives of the Trust and not as the Sweets individually. There was no evidence that the Sweets ever consulted with Aldente about an individual loan and they were not borrowers under the statute as to the Trust loan in any event. There was only one loan here and that was to the Trust.

Sweet next argues that since the Trust is a "Person" under

the Consumer Loan Statute, RCW 31.04, that the money this Trust borrowed could be for "Personal Expenses". Sweet's logic is again faulty. By defining "... trust, corporations and all other legal entities" as Persons under the Act the intention was to allow all entities to be covered by the act, regardless of form.¹³ It did not make a "Person" for purposes of the Act a "Natural Person" under the law. Here we have an irrevocable Trust¹⁴ with a distinct separate entity Limited Partnership¹⁵ as beneficiary making a loan in the Trust's name with the Trust as Borrower under the Loan Agreement and Maker under the Note. CP 145-154, 152-154. The loan proceeds were paid as escrow was directed by the Trustees. CP 220-222. As to the Trust, the proceeds were used for Trust purposes, and were not and could not be used for personal or consumer purposes of the Trust. A "Consumer transaction is defined as a transaction primarily for personal, family or household purposes." *McGovern v. Smith*, 59 Wn App 721, 724, 801 P2d 250 (1990). An irrevocable Trust, with a Limited Partnership as

¹³ Person" is used 60 times in the act and in only 2 cases does it arguably confer benefits on a borrower, in RCW 31.04.027(1) and (2). The other 58 times it is used relates to the requirements of the lenders or the power of the Director to enforce the Act and the Director wanted this power over all entities, regardless of form.

¹⁴ An Irrevocable Trust is a "Trust that cannot be terminated by the settler once it is created." Black's Law Dictionary, 9th Edition. An Irrevocable Trust is an entity separate from its Trustees. 76 Am.Jur.2d Trusts § 2 (1975); *O'Steen v. Wineberg's Estate*, 30 Wn. App. 923, 932, 640 P.2d 28,(1982).

¹⁵ A limited partnership is an entity distinct from its partners. RCW 25.10.021(1).

beneficiary, as here, is not a Natural Person, has no family or household and, accordingly, as a matter of law, can have no personal, family or household expenses. The Aldente loan is clearly exempt from the requirements of the Consumer Loan Act, RCW 31.04 *et sec.*

The subsequent use of the Trust's proceeds of the loan cannot change the purpose of the loan to the Trust. Aldente had no control over the subsequent use of the Trust loan proceeds and that use cannot change the nature of the loan to the Trust.

Plaintiff alleges that the loan transaction was not a commercial loan because "The proceeds from this loan were not used for a business purpose, but rather to fund the living expenses for Mr. Sweet, paying taxes, paying the divorce lawyers and other family expenses." Amended Complaint 2.4 Ln 22-24. CP 62. This is also not true. The Loan was made to the Trust and its rights and responsibilities are defined in the Trust Agreement. It is not a natural person and it has no personal expenses.

Sweet fails to focus on the actual loan and argues that escrow's payment to the Sweets should be considered. Again Sweet is wrong. Escrow's payment to the Sweets, as directed by the Sweets as Trustees was not only proper as part of the loan to

the Trust but protected as a matter of law.

RCW11.98.090. Nonliability of third persons without knowledge of breach.

In the absence of knowledge of a breach of trust, no party dealing with a trustee is required to see to the application of any moneys or other properties delivered to the trustee. [Emphasis Added]

The Act focuses on the Loan and that was to the Trust and not how the Trustees directed the proceeds be paid, over which the lender would have no control. Here, the Sweets, as Trustees of the Trust, had the power to enter into loan transactions for the Trust. CP 130, RCW 11.98.070 (18). Aldente has no right or obligation to question the authority of the Co-Trustees to make this loan, to insure that the loan did not exceed their authority, or that the loan proceeds were properly applied by the Trustees.

11.98.105. Nonliability of third persons without knowledge of breach.

(1) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(2) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(3) A person who in good faith delivers assets to a trustee need not ensure their proper application.

If the Trust made an improper distribution or the funds were not properly applied for Trust purposes, it was at the direction of the Sweets themselves as trustees. The loan was proper, the distribution was as directed by the Trustees under actual authority under the Trust Agreement and it was protected as a matter of law. If there is liability associated with the Sweets actions, the liability for that is with the Sweets personally not the Lender, Aldente.

Sweet repeatedly claims "The Trust held nominal title to Ms. Arneson's and Mr. Sweet's personal residence". Brief p.1-2. This is a false statement as the Residence was never the property of the Sweets individually. It is also totally backwards as a matter of law. "A fundamental characteristic of a trust is that legal and equitable ownership of the trust property is divided between two parties; the trustee has bare legal title and the beneficiary has the equitable or beneficial ownership. 76 Am.Jur.2d Trusts § 2 (1975)." *O'Steen v. Wineberg's Estate*, 640 P.2d 28, 30 Wn. App. 923, 932 (1982). Here the Sweets as Trustees had only "bare legal title" while the Beneficiary, the Rose Adored Family Limited Partnership, a distinct legal entity, held the real beneficial ownership. Sweet claimed that

she and her ex-husband were the sole partners of the Limited Partnership however there is no evidence in the record, at all, to support that claim. However, even if so, it would not matter, as “A limited partnership is an entity distinct from its partners.” RCW 25.10.021(1). The Sweets, at most, could only hold a monomial “bear legal” interest in the trust property and then ONLY as Trustees in their representative capacity and not as individuals.

C. Interest-Usury Statute RCW 19.52

A usury violation was never pled, alleged or argued as to Aldente, EVER, in any pleading and may not be argued here, on appeal for the first time. RAP 9.12. No usury claim against Aldente was ever raised in the Complaint [CP 1-18], the Amended Complaint [CP 57-75], the other Amended Complaint [CP 76-94], Aldente’s Motion for Summary Judgment [CP 109-120], Sweets Memo in Opposition to Summary Judgment [CP 201-211], Aldente’s Reply [CP 292-297], before the trial court in the summary Judgment or its Order [CP 306-7], the Sweets Motion for Reconsideration [CP 309-322], Aldente’s Response to the Motion of Reconsideration [CP391-397], Sweets Reply to Aldente’s Response to Motion for Reconsideration [CP 734-749] or the Courts Order Denying Motion for Reconsideration [CP 752-753].

The sole claim before the trial court and here relates to Appellant's claim that Aldente violated the Washington Consumer Loan Act, RCW 31.04.*et seq.* There was no usury claim against Aldente before the trial court and there is none here. RAP 9.12.

D. Penny Arneson Individually is not the True Borrower and has no standing to bring this action.

Sweet claims to be the Borrower on the Aldente loan although she did not sign the Note individually, but only in her representative capacity as Trustee and although she was not obligated on the Note¹⁶. Sweet misreads *McGovern v. Smith*, 59 Wn 2d 721, 8091 P2d 250 (1990) as providing support for her claim that as follows:

An additional important and relevant point is demonstrated by *McGovern*: one can sign a note and *not* be the borrower for the purpose of the statute; and one need not sign the note to be *actual borrower*. In *McGovern*, the Marinos signed the promissory notes, not McGovern, although McGovern received the proceeds of the loan. Thus, reasoned the court, the Marinos were not the borrowers, but merely sureties to the extent of the value of the pledged real property, McGovern was the true borrower. *McGovern* at 735-736. [Emphasis added] Brief 27-28.

That is not a correct statement of the facts in the *McGovern*

¹⁶ The Sweets did sign as guarantors on the loan but that does not make them borrower under the loan. "It is inconsequential that the two natural persons ... were guarantors on the loans" *Paulman v. Filtercorp*, 127 Wn 2d 387, 394, 899 P2d 1259 (1995)

case. The court actually stated that both McGovern and the Merlinos signed the Note:

The loan amount of \$90,000 was evidenced by two deed of trust notes in the amounts of \$68,500 and \$21,500. As with the GAC loan, the Marinos alone signed the deeds of trust, while both the Marinos and McGovern signed the deed of trust notes. Only McGovern signed the loan agreement and only McGovern received the loan proceeds. [Emphasis added]. *McGovern, Supra*, at 727.

Sweet argues *McGovern* claiming that there McGovern was determined to be the true Borrower although he did not sign the Notes on the basis of receiving the loan proceeds only. That is not what the case says. McGovern, unlike Sweet, did sign the Notes and was obligated on the loans. He was the borrower. Here Sweet did not sign the Note individually but only as Trustee for the Trust. *McGovern* is further distinguished. There, only individuals were involved. McGovern was the borrower and McGovern received the loan proceeds. Here that is not the case. The irrevocable Trust with a Limited Partnership as beneficiary was the borrower and the loan proceeds were paid as directed by the Trustees but none-the-less to the trust. Sweet was simply not the Borrower on the Aldente Loan to the Trust.

Sweet additionally argues that she has standing because the

Decree of Dissolution between she and Mr. Sweet, the other Trustee, granted her the Trust as her separate property. That Sweets Dissolution Decree or the other rulings of the Dissolution court are neither relevant nor binding here.

We abide by the longstanding rule that in dissolution proceedings the superior court has jurisdiction only over the parties to the action. It may not adjudicate the rights of third parties who have an interest in any of the property at issue. *In re Marriage of Soriano*, 44 Wn App 420, 420, 722 P2d 132 (1986)

The dissolution court has no power over the property as to the rights of third parties claiming an interest in the property. *In re Marriage of Soriano, supra*, at 422.

The Dissolution could determine the rights of the Sweets as to any property of theirs but it did not, and could not, determine the rights of parties other than the Sweets who were not and could not be made a part to their dissolution. The Trust was a separate entity apart from the Sweets as was the Rose Adorer Family Limited Partnership and neither was before the court and the rights of neither were or could be determined there. The Divorce Decree gave Sweet no individual standing in an action involving the Trust as borrower and Aldente as Lender to which she was not a borrower.

"The real party in interest is the person who possesses the right sought to be enforced." *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn App 568, 576, 295 P3d 258. Here, only the Trust was a party to the loan. Only it could enforce its terms or claim a breach of its terms. Sweet had no liability on the Note and has no standing to bring an action claiming violations of the Consumer Loan Act as to the Loan. She was a guarantor of the Loan but she was never called upon to make a payment and she has made no claim based on the Guarantee. She has no standing in this cause and the Trial Courts grant of Summary judgment so stating should be affirmed.

E. There are No Issues of Fact regarding the True Borrower of Loan Purpose.

Sweet argues that there are disputed facts as to the true borrower, she or the Trust. There are no disputed facts and Sweet was not the borrower, the Trust was. Sweet is not the Borrower on the Aldente loan because she only dealt with Aldente as a Trustee of the Trust and never as an individual. There is only one Aldente loan before the court and that loan was made to the Trust as borrower and not the Sweets.

Sweet recites the details of the Nordlund loan but to the extent it is intended to apply to Aldente, Sweets position is not well taken. She continues to claim that the Dissolution Courts decision should somehow bind parties not before the court there or control the result of the trial court or this court here. The Sweets divorce Decree is not relevant to the decision of the court here.

Sweet attempts to make much of the fact that the Sweets as Trustees directed escrow to distribute the loan proceeds of the Trust loan to them personally. It is not unusual in loan transactions that persons other than the borrowers receive all or a large portion of the loan proceeds and that does not change the fact that the Borrower is the person obligated to repay the loan. In a refinance, for example, the old loan will be paid off through the escrow with the Borrower never see the funds. That is because the Borrower directed the payment of the loan proceeds. It does not make the Old Lender the Borrower because it received the loan proceeds any more than a distribution of the funds to the Sweets would make them a Borrower under the Aldente loan. The same is true here. The Loan was to the Trust and the funds were paid through escrow as directed by the Trustees of the Trust. It did not make the Trustees that directed the loan proceeds be paid to themselves the

borrowers any more than the Old Lender in the example above. The proceeds were legally paid to the Trust with the Trustees directing escrow to distribute them to the Trustees. CP 220-222.

F. There are no Disputed Facts regarding the Collateral.

There are no disputed facts regarding the character of the trust property. It is trust property not the property of the Sweets and that is the fact. Sweet claims that the trust property was “purchased with community funds at the outset” but there is nothing in the record to support this. The fact is that the Trust acquired the trust property directly from the seller and it was never owned by the Sweets individually. CP 300–305. Sweet refers to the paragraph 1.3 of the Trust Agreement [CP 124] that provides that assets conveyed to the Trust shall retain their community or separate property status, to support her claim of individual ownership of the Trust property. This has no application to the ownership issue as any property conveyed to this irrevocable Trust, was beyond the Sweets ownership control and whether an asset was community or separate before it went in, it was Trust property after. Additionally, since the property went directly into the Trust, there is no evidence in the record to establish if the Sweets contributed to the property’s

acquisition or to the extent of any community or separate property interest if they did.

Sweet claims that Aldente had no standing to claim any breach of the Trust Agreement. That is true, Aldente was not a party to the Trust Agreement as Sweet individually was not a party to the loan to the Trust. Neither would or should have such standing. Aldente however never sought to be a party in any claim of a possible breach of the Trust Agreement.

What Aldente did do was point out that if, as Sweet now claims, the Sweets were the borrower of the funds and that they were borrowed for their personal purpose, then the Sweets did, in fact, violate the trust Agreement and their fiduciary responsibilities as trustees under the law. The Sweets had authority, as Trustees under the Trust Agreement, to enter into a loan agreement with Aldente for a loan to the trust. Trust Agreement § 2.19. CP 130. The Trust Agreement does not give the Sweets, as Trustees, any authority to make a personal loan for their benefit using the Trust assets as collateral and binding the Trust to the repayment. CP 130 § 2.18. If Sweet made such a loan as she now appears to be arguing then that loan was a breach of the Trust agreement and Washington law. **A trustee shall administer the trust solely in**

the interests of the beneficiaries. RCW 11.98.078(1). If Sweet made a personal loan as she now claims and breached her duty to the Trust and the Beneficiary as she now claims, she should not be allowed to profit from her actions.

Sweet continued to argue the relevance of the Dissolution Courts characterization of the Trust asset as a family home. But the Dissolution Court had no authority to determine the actual ownership or nature of the Trust asset because neither the Trust nor the Trust beneficiary, the Rose Adorer Family Limited Partnership were before the court nor could they be. "Other persons cannot be made parties to the action by any statutory form, nor can they intervene therein....The judgment can neither conclusively determine their rights, nor be made available on their behalf as a basis for any of the provisional remedies." *Arneson v. Arneson*, 38 Wn 2d 99, 101, 227 P2d1016 (1951). The dissolution decree was only relevant to the Sweets divorce and has no relevance here.

**G. Judgment for Principal, Usurious Interest,
Attorney Fees, etc.**

This argument relates to Respondent Nordlund and not to Aldente. No response is required.

V. Conclusion.

The trial court Order on Summary Judgment dismissing Sweet individually for lack of standing and the Trust for a lack of cause was and is proper and should be affirmed by this court.

Sweet was not a party to the Aldente loan. Her attempt to interject her Divorce Decree findings and judgments into this case should be ignored. The Dissolution Sweets court had jurisdiction only over the Sweets and did not have jurisdiction over the Trust, the Limited Partnership, Trust beneficiary or any other party and could not decide any property issues involving them.

To the extent that the Sweets were involved in the Aldente, it was only as the Trust Trustees in their representative capacity and not in their individual capacity. They signed all documents in their representative capacity as trustees except the guarantee which they signed with a different signature noting their individual capacity. The difference is clear and significant. See 150. The parties understood the difference and there was no confusion or mistake as the true Borrower on the loan. The fact that the loan proceeds were directed to be paid to the Trustees pursuant to their authority under the Trust did not change the fact that the Loan was

made to the Trust not the Trustees personally or make Trust payments personal or consumer expenses of the Trust. The distribution of funds from an Irrevocable Trust with a Limited Partnership beneficiary, as here, is for commercial or non-consumer trust purposes and is not personal expenses of the Trustee recipients.

The Trial Court Judgment should be affirmed.

Respectfully submitted this 29th day of May, 2014.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT ALDENTE**, postage prepaid, via U.S. mail and via e-mail on this 29th day of May 2014 to:

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DATED this 29th day of May 2014.

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