NO. 93244-1
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IOAN A. PAUNESCU and DANIELA PAUNESCU, husband and wife,

Appellants,

vs.

GERHARD H. ECKERT and MARGARETHE ECKERT AS TRUSTEES OF THE ECKERT FAMILY TRUST; and SCOTT RUSSON and JANE DOE RUSSON, husband and wife,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE SUZAN CLARK

ANSWER TO PETITION FOR REVIEW

BEN SHAFTON
Attorney for Respondents Eckert
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

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I. Identity of Answering Parties.

This Answer to Petition for Review is submitted on behalf of Gerhard H. Eckert and Margarethe Eckert as trustees of the Eckert Family Trust (the Eckerts).

II. Court of Appeals Decisions.

Ioan Paunescu and Daniela Paunescu (the Paunescus) have sought review of the unpublished decision of the Court of Appeals in this matter filed on May 10, 2016, and attached to their Petition for Review. The Court of Appeals has denied the Paunescus' Motion for Reconsideration.

III. Issues Presented for Review.

The Paunescus have asked the Supreme Court to consider certain issues in their Petition for Review. The Eckerts do not wish to raise any other issues.

IV. Statement of the Case.

In 2005, Mr. Paunescu purchased property located at 5619 NE 56th Street, Vancouver (the Property) as his separate property for $205,000.00. (CP 342; CP 362-65) MIT Lending loaned him the entire purchase price in two loans. Each loan was secured by the Property in first and second deeds of trust. (CP 366-95) Mortgage Electronic Registration Systems, Inc. (MERS) was listed as the as the beneficiary on both deeds of trust. (CP 367; CP 389)

In 2006, the Paunescus obtained a Home Equity Line of Credit with Bank of America in the amount of $60,000.00. They used the proceeds of the loan to pay off the note secured by the second deed of trust to MIT Lending and also to pay off some credit card debt. The loan to Bank of America was secured by what amounted to a new second deed of trust. (CP 343, 397-411)

In 2007, the Paunescus decided to add onto the Property to change it into a duplex or to create enough space for an Adult Family Home. (CP 344) They checked the zoning and other land use requirements for an Adult Family Home or a duplex at the Clark County Department of Community Development. (CP 345) They commissioned an architect to prepare plans for an addition to have an Adult Family Home on the premises. They consulted an engineer to provide input to those plans. (CP 355-56) They ultimately submitted an application for an "Addition for Adult Family Care. . .six new bedrooms and six new bathrooms. . ." together with their plans to the Clark County Department of Community Development. These plans were approved on April 27, 2007. (CP 349-50; CP 355-56; CP 422-24)

The Paunescus then sought construction financing. A mortgage broker suggested that they contact the Eckerts. (CP 344-45) The Paunescus told the Eckerts that they wanted the loan to expand the Property to accommodate an Adult Family Home business. This was a

condition of the loan as far as the Eckerts were concerned. They were not willing to loan for any non-business purpose or personal, family, or household purpose. The Eckerts had other requirements for the loan. First Mr. Paunescu had to execute a Deed of Trust pledging the Property as security. Second, a portion of the proceeds of the loan had to be used to pay off the existing loan to Bank of America so that the loan they were making could be in second position. (CP 461-62)

The loan was consummated in May of 2007. The Paunescus borrowed $290,000.00 and executed a Promissory Note for that sum. Interest was set at twelve percent (12%) per annum on the unpaid balance from May 12, 2007. The Promissory Note called for "interest only" payments in the amount of $2,900.00 per month with the entire balance of interest and principal due on May 12, 2008. It also contained the following provision:

> 17. **COMMERCIAL PROPERTY: (Optional—Not Applicable unless initialed by Holder and Maker to this Note)** Maker represents and warrants to Holder that the sums represented by this Note are being used for business, investment or commercial purposes, and not for personal, family, or household purposes.

Ms. Paunescu, as her spouse's attorney in fact, initialed this provision to show assent but the Eckerts did not. The Promissory Note referred to Mr. Paunescu as the "the Maker" and "the Eckert Trust" as the "Holder." The loan was secured by a deed of trust on the Property. It named the "Eckert Trust" as beneficiary and Fidelity National Title Insurance Company as

trustee. (CP 346-48; CP 412-19) The money for the loan came from a money market account in the name of the Eckert Family Trust at Columbia Credit Union in Vancouver. (CP 745-46)

The Paunescus made no objection to the form of either the Promissory Note or the Deed of Trust. Had they made any objection, the loan would not have been made unless the objection was resolved. (CP 462)

The Paunescus received the net proceeds of the loan after charges, closing costs, and full payment of the loan to Bank of America. (CP 349; CP 421) They used the proceeds to add onto the Property for an Adult Family Home according to the plans from their architect and the permit obtained from Clark County. (CP 349)

Ms. Paunescu obtained a license from the State of Washington to operate an Adult Family Home on February 15, 2008. (CP 351; CP 425) She continued in that business thereafter as is reflected in the couple's federal income tax returns for 2008-2012. (CP 353-54; CP 426-42)

The Paunescus made the required monthly payments for the first year of the loan. They did not pay the entire principal balance when it was due on May 12, 2008. They continued to make some monthly payments of thereafter but stopped in May of 2013. (CP 463)

The Eckerts and the Paunescus discussed the obligation after May of 2008. The Paunescus wrote to the Eckerts in May of 2009. As is pertinent, the letter reads as follows:

> Dear Mr. and Mrs. Eckert:
>
> We are responding to the letter that we received from you about the amount we owe. We are not disputing that we owe that amount. We do want to pay it back in full. It depends on our situation if I have residents and if my husband has loads (for his long haul trucking business) If that happens we will pay the past due amount. We took out the private loan from the beginning with the thought that we will do the Adult Foster Care Home. This is what you knew the money was for. The loan was used all for the construction for the home we did not use the money to pay out the cars or the semi-truck or to take a vacation. . .

(CP 463-64)

On October 31, 2013, Margarethe Eckert, as trustee of the Eckert Trust, executed a document appointing Scott Russon as Successor Trustee. Mr. Russon subsequently issued a Notice of Default and Notice of Foreclosure. He saw to the recording and serving of a Notice of Trustee's Sale. It set the Trustee's Sale for February 7, 2014. The sale occurred on that date. A Trustee's Deed was issued to the Eckert Trust. The Eckerts then executed a quitclaim deed to Gerhardt Eckert and Margarethe Eckert as Trustees of the Eckert Family Trust "for no consideration but for a mere change in identity." (CP 443-60; CP 668-86; CP 699-708)

Prior to the sale, the Paunescus commenced no action to restrain the sale or for any other relief. (CP 463)

After the Trustee's Sale, the Paunescus did not immediately vacate the premises. The Eckerts commenced an unlawful detainer action against them. They obtained the Findings of Fact; Conclusions of Law; and Order for Judgment and Immediate Writ of Restitution (the Eviction Order) on March 28, 2014. CP 467-70; CP 621-37; CP 722-27) The Paunescus did not appeal.

The Paunescus filed suit against the Eckerts and Mr. Russon in June of 2014, and subsequently filed an amended complaint. They sought to quiet title to the Property, establish a homestead exemption, and obtain damages. (CP 14-34) Both sides subsequently filed motions for summary judgment. (CP 35-36, 94) The trial court denied the Paunescus' motion, granted the Eckerts' summary judgment motion, dismissed the Paunescus' complaint, and awarded attorney's fees to the Eckerts. (CP 167-69; 754-57)

The Eckerts' motion for attorney's fees was heard by the Court on January 30, 2015.[1] Ms. Paunescu argued against an award of fees for the Eckerts. (RP-January 30, 2015 7-9)

[1] The Paunescus did not supply the Court in the Clerk's Papers with the motions for attorney's fees, the declarations in support of those motions or the related briefing. This discussion will be taken from the transcript of the proceedings on that day which the Paunescus did order.

The Paunescus appealed, and the Court of Appeals affirmed in an unpublished opinion. The Court of Appeals also denied the Paunescus' motion for reconsideration without calling for a response.

V. Argument.

a. Introduction.

Notwithstanding the requirements set out in RAP 13.4(c)(7), the argument section of the Paunescus' Petition for Review does not address the considerations for granting review set out in RAP 13.4(b). The Eckerts will nonetheless address the relevant considerations as best they can. Each of the issues raised by the Paunescus will be addressed in turn. Suffice it to say that none of the considerations militating in favor of review by the Supreme Court apply. Therefore, review should be denied.

b. The Paunescus' Claims for Damages under RCW 61.24.127 Are Precluded Because the Loan was a "Commercial Loan."

The Paunescus sued for damages among other things. Such claims are allowed by RCW 61.24.127 even if the grantor of the deed of trust has not attempted to enjoin a trustee's sale. But RCW 61.24.127 precludes such relief when the deed of trust secures a "commercial loan." RCW 61.24.127(5) The term "commercial loan" is defined as follows in RCW 61.24.005(4):

> "Commercial loan" means a loan that is not made primarily for personal, family, or household purposes.

The Paunescus have asked the Supreme Court to consider whether the Court of Appeals erred in upholding the trial court's decision on summary judgment that the Eckerts' loan to the Paunescus was a "commercial loan." The ruling of the Court of Appeals was consistent with decisions of the Supreme Court and the Court of Appeals to the effect that summary judgment is warranted when there is no genuine issue of material fact and that reasonable persons could reach only one conclusion on the issues presented. See, e.g. *O.S.T. ex rel. G.T. v. Regence Blueshield,* 181 Wn.2d 691, 703, 335 P.3d 416 (2014); *Reed-Jennings v. Baseball Club of Seattle, LP,* 188 Wn.App. 320, 327, 351 P.3d 887 (2015) The Paunescus obtained the loan for the express purpose of adding onto the Property to make it into an Adult Family Home. Ms. Paunescu initialed a provision in the Promissory Note stating that the loan was for commercial purposes. In 2009, the Paunescus wrote to the Eckerts stating that they obtained the loan to begin an "Adult Foster Care Home;" that the Eckerts knew what the purpose of the loan was; and that all of the proceeds of the loan were used for construction of the addition. Ms. Paunescu subsequently obtained an Adult Family Home License and went into that the Adult Family Home business. Based on these facts, reasonable persons could conclude only that the loan was a commercial loan for the purposes of RCW 61.24.005(4) and RCW 61.24.127(5). The decision of the Court of Appeals therefore does not conflict with any decision of the

Court of Appeals or the Supreme Court. That means that review is not warranted under RAP 13.4(b)(1), (2)

The Paunescus refer the Court to *Brown v. Giger,* 111 Wn.2d 76, 757 P.2d 523 (1988), for the proposition that the lender cannot "rig" documents to avoid usury laws by suggesting a commercial purpose where none exists. The decision states, however, that the commercial purpose of a loan is determined by objective evidence and by the debtor's representations at the time that the loan was made. 111 Wn.2d at 83-84 Here, the Paunescus obtained plans for an addition to the Property to conduct an Adult Family Home business; advised the Eckerts that the loan was for the purpose of constructing the addition; spent all of the proceeds of the loan to build the addition; and then utilized the addition for the Adult Family Home business. The objective evidence here shows clearly that the loan was for commercial purposes. The decision of the Court of Appeals therefore does not conflict with and is in perfect harmony with the decision in *Brown v. Giger, supra.*

Since the decision of the Court of Appeals on this question does not conflict with any decision of the Supreme Court or the Court of Appeals, review on this issue is not warranted.

c. The Promissory Note and Deed of Trust Are Not Invalid.

The Paunescus next contend that the promissory note and deed of trust are both invalid because the holder of the promissory note and the beneficiary of the deed of trust was listed as "the Eckert Trust" rather than the Eckerts in their capacities as trustees of the Eckert Family Trust. It is recognized that a trust is a legal entity consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries. Restatement (Third) *Trusts* §2, *Comment a.* This is illustrated by a number of Washington statutes some of which were discussed by the Court of Appeals on page 8 of its unpublished decision.

The funds for the loan came from an account in the name of the Eckert Family Trust. But "The Eckert Trust" is listed as the beneficiary of the Deed of Trust and the holder of the Promissory Note. As the Court of Appeals pointed out on page 8 of its unpublished decision, this is a scrivener's error. The proper reference should have been to "the Eckert Family Trust." The fact that the beneficiary is named "The Eckert Trust" as opposed to "The Eckert Family Trust" has no significance.

At worst, the name "the Eckert Trust" is a fictitious name of the "the Eckert Family Trust." If a person enters into a contract under a fictitious name, the contract is still valid. Furthermore, a person may any name that he or she wishes in the absence of fraud. 52 Am.Jur.2d *Names* §

64. There is no fraud here. The Paunescus received monies from the Eckert Family Trust that they agreed to repay. The money was loaned to them in good faith.

The critical issue is whether "the Eckert Trust" is a proper beneficiary capable of appointing Scott Russon as the substitute trustee to proceed with foreclosure. The beneficiary must be the holder of the promissory note as required by RCW 61.24.005(2), and as discussed in *Bain v. Metropolitan Mortgage Group, Inc.,* 175 Wn.2d 83, 285 P.3d 34 (2012). The note states that the "holder" is "the Eckert Trust." Therefore, "the Eckert Trust" is a proper beneficiary.

In any event, the Paunescus have not explained how the ruling of the Court of Appeals on this issue conflicts with any other decision of the Court of Appeals or any decision of the Supreme Court. In point of fact, it does not. Therefore, the Supreme Court should deny review on this issue.

d. The Paunescus Cannot Rely on the Homestead Exemption.

While they did not list this question as an issue, the Paunescus argue that they were entitled to assert the homestead exemption in connection with the foreclosure of the deed of trust and that the Court of Appeals erred by ruling to the contrary. The homestead exemption applies when a person's residence is subject to a "forced sale." The Supreme Court ruled in *Felton v. Citizens Federal Savings and Loan Association of*

Seattle, 101 Wn.2d 416, 423, 679 P.2d 928 (1984), that a trustee's sale pursuant to non-judicial foreclosure is not a "forced sale." The Court of Appeals' decision was consistent with recognized authority from the Supreme Court. Therefore, review is not warranted on the basis that the decision of the Court of Appeals conflicts with any decision of the Supreme Court or any other decision of the Court of Appeals.

e. Ms. Paunescu's Deposition Could Be Considered.

The Paunescus claim that the trial court erred in considering Ms. Paunescu's deposition in connection with the Eckerts' motion for summary judgment when it was scheduled after their attorney withdrew but before they obtained other counsel. The Court of Appeals did not consider this question because it was raised for the first time in a reply brief. Opinion, p. 5 fn. 6. This ruling follows from and does not conflict with other decisions of the Court of Appeals and decisions of the Supreme Court. See, e.g. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Dykstra v. County of Skagit,* 97 Wn.App. 670, 676, 985 P.2d 424 (2001)

In any event, this argument has no substantive merit. The Paunescus based this argument on CR 30(b)(2). That pertinent parts of CR 30 are set out below:

> **(a) When Depositions May Be Taken.** After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by

> deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required . . . if special notice is given as provided in subsection (b)(2) of this rule. . .
>
> **(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Video Tape Recording.**
>
> > (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party....
> >
> > (2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification.
> >
> > If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

As can be seen, the provisions of CR 30(b)(2) apply when the plaintiff seeks to take a deposition within thirty days of service of the complaint.

That rule has no applicability here since Ms. Paunescu's deposition was sought by the defendants.

f. There Was No Impropriety in Connection with the Hearing on the Eckerts' Motion for Attorney's Fees.

The Paunescus claim that the trial court did not allow them to be heard in connection with the Eckerts' motion for attorney's fees. The Court of Appeals did not consider this contention because the Paunescus did not support it with any argument. Opinion, p. 5 fn. 6 This ruling was consistent with other decisions of the Court of Appeals and decisions of the Supreme Court. *Hollis v. Garwall,* 137 Wn.2d 683, 689, fn.4, 974 P.2d 836 (1999); *West v. Thurston County,* 168 Wn.App. 162, 187, 275 P.3d 1200 (2012) In any event, the Paunescus argument does not square with the facts. They were allowed to argue orally on the Eckerts' motion for attorney's fees as noted above.

g. Any Error Based on Garnishment Proceedings Cannot Be Considered.

The Paunescus argue, based on CR 60(b), that the trial court committed error in connection with garnishment proceedings to enforce the award of attorney's fees. They did not appeal from any garnishment order and have never filed a CR 60(b) motion. This contention was also raised for the first time in the Paunescus' reply brief. The Court of Appeals appears to have refused to consider that claim on

that basis although it relates the argument to the trial court's summary judgment order as opposed to the garnishment order. Opinion, p. 7 fn. 8

This issue is governed by RAP 2.4(b). That rule reads as follows:

> The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

The Paunescus' notice of appeal stated that they were appealing from the Order on Motion for Attorney's Fees and Judgment entered on behalf of the Eckerts on January 30, 2015, and contained at CP 167-69. Any garnishment order was necessarily entered after the judgment and could not possibly have affected the January 30, 2015, order and judgment because it was entered after those decisions were made.[2] Therefore, any garnishment order could not be considered under RAP 2.4(b), and any issue related to garnishment proceedings was not properly before the Court of Appeals.

[2] The Paunescus did not make any garnishment order part of the Clerk's papers. Therefore, counsel cannot rely on any part of the record to show that the order was entered after the Court of Appeals accepted review. In that regard, review is accepted when the notice of appeal is filed. RAP 6.1

h. No Other Grounds for Review Apply.

The Paunescus have set out RAP 13.4(b) in its entirety in their Petition for Review. This requires the Eckerts to address whether review would be appropriate because the appeal presents a question of constitutional law or an issue of substantial public interest. RAP 13.4(b)(3), (4) Neither of those matters are present here.

This case is a private dispute resolved in an unpublished opinion. There is no issue of substantial public interest.

There is also no substantial constitutional question. The Paunescus' may claim that their due process rights to a hearing were violated by their inability to argue on the question of attorney's fees. The transcript of the hearing belies that argument.[3]

i. Conclusion.

In conclusion, none of the grounds for review set out in RAP 13.4(b) are present. Therefore, the Supreme Court should deny review in this matter.

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[3] The Paunescus may only be concerned about the attorney's fee award to Mr. Russon. As the transcript shows, the trial court gave counsel for the Russons the opportunity to submit an additional and more comprehensive declaration concerning time spent on the case. The trial court allowed the Paunescus an opportunity to make written comment on any additional declaration. The trial court indicated that it would decide the matter without further oral argument. The Paunescus did not object. (RP-January 30, 2015 11-12) This procedure does not offend due process. *Rivers v. Washington State Conference of Mason Contractors,* 145 Wn.2d 674, 697, 41 P.3d 1175 (2002)

VI. Request for Attorney's Fees.

The Eckerts request attorney's fees for responding to the Paunescus' Petition for Review pursuant to RAP 18.1(j). A party is entitled to an award of attorney's fees if a statute, contractual provision, or rule of equity entitles that party to such relief. *Durland v. San Juan County,* 182 Wn.2d 55, 76, 340 P.3d 191 (2014) The Paunescus have made several different claims concerning the Deed of Trust in their Petition for Review. That document contains the following language:

> To protect the security of this Deed of Trust, Grantor covenants and agrees:
>
> . . .
>
> (5) to pay all costs, fees, and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligations secured hereby and Trustee's and attorney's fees actually incurred as provided by statute.

(CP 417) This provision applies here. This action is clearly related to and connected with the Deed of Trust. Furthermore, a contractual provision for attorney's fees supports an award of attorney's fees on appeal. *Granite Equipment Leasing Corp. v. Hutton,* 84 Wn.2d 320, 327-28, 525 P.2d 223 (1974) Based on this provision and RAP 18.1(j), the Eckerts are entitled to an award of attorney's fees for responding to the Petition for Review.

VII. Conclusion.

The Court should deny the Paunescus' Petition for Review. It should also award the Eckerts their attorney's fees for responding to the Petition for Review.

DATED this 7 day of July, 2016.

BEN SHAFTON WSB#6280
Of Attorneys for the Eckerts

NO. 47265-1-II
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DIVISION II

IOAN A. PAUNESCU and DANIELA PAUNESCU, husband and wife,

Plaintiffs/Appellants,

vs.

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APPEAL FROM THE SUPERIOR COURT

HONORABLE SUZAN CLARK

DECLARATION OF MAILING

BEN SHAFTON
Attorney for Respondents Eckert
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

COMES NOW AMY ARNOLD and declares as follows:

1. My name is AMY ARNOLD. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On July 7, 2016, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the ANSWER TO PETITION FOR REVIEW to the following persons:

Anthony R. Scisciani III
Rebecca Reed Morris
Scheer & Zehnder LLP
701 Pike Street, Suite 2200
Seattle, WA 98101-2358

Ioan Paunescu and Daniela Paunescu
P.O. Box 87847
Vancouver, WA 98686

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 7 day of July, 2016.

AMY ARNOLD