

No. 73347-8-I

COURT OF APPEALS,
DIVISION I
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/Plaintiff

v.

CLYDE E. CARLSON and PRISCILLA A. CARLSON

Respondents/Defendants

BRIEF OF RESPONDENTS
CLYDE E. CARLSON AND PRISCILLA A. CARLSON

Marcia P. Ellsworth, WSBA 14334
Joshua D. Brittingham, WSBA 42061
Attorneys for Respondents
Peterson Russell Kelly PLLC
1850 Skyline Tower, 10900 NE 4th St.
Bellevue, WA 98004
(425) 462-4700
E-mail: mellsworth@prklaw.com; jbrittingham@prklaw.com

2015 NOV 16 AM 11:54
COURT OF APPEALS
DIVISION I
CLERK'S OFFICE

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	13
A. The Trial Court’s factual determinations underlying its decision to dismiss Pension Fund’s claims against Carlson are well supported by substantial evidence and should be affirmed.	13
1. The substantial evidence standard applies to review of a trial court’s factual findings.....	13
2. The Trial Court’s findings are supported by substantial evidence viewing the record in the light most favorable to Carlson as the prevailing party and deferring to the Trial Court on witness credibility and conflicting testimony.....	14
3. The Trial Court correctly admitted Exhibits 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68 as they tend to make it more probable than not that Pension Fund had the ability to document that a loan was intended for either a business or commercial purpose, and therefore, the exhibits are relevant to whether the Loans qualify for the business purpose exemption under the Usury Statute; any error in this regard is harmless because such evidence contained in these exhibits was cumulative.....	21

B.	The Trial Court correctly determined as a matter of law that the business purpose exemption under the Usury Statute does not apply to the Loans.....	24
1.	The de novo standard of review applies to questions of law including questions of statutory interpretation.	24
2.	The business purpose exemption to the Usury Statute does not apply because Pension Fund failed to meet its burden of proving that the Loans were for “commercial, investment or business” purposes at the time of their inception.	25
3.	Extrinsic evidence establishing that Carlson actually used the loan proceeds for personal purposes further supports the Trial Court’s determination that the Loans were made for personal purposes at the time of inception.....	36
C.	This Court should affirm the judgment for penalties, costs and reasonable attorneys’ fees in favor Carlson which the Trial Court properly awarded based on Pension Fund’s violations of the Usury Statute.	37
V.	FEES AND COSTS ON APPEAL	38
VI.	CONCLUSION.....	39

TABLE OF AUTHORITIES

Cases

<i>Advanced Silicon Materials, L.L.C. v. Grant County</i> , 156 Wash.2d 84, 124 P.3d 294 (2005).....	27
<i>Aetna Fin. Co. v. Darwin</i> , 38 Wash. App. 921, 691 P.2d 581 (1984).....	30, 31
<i>Auve v. Fagnant</i> , 16 Wash. 2d 669, 134 P.2d 454 (1943).....	32, 36
<i>Base v. Pottenger</i> , 85 Wash. App. 1048 (1997).....	34
<i>Baske v. Russell</i> , 67 Wash. 2d 268, 407 P.2d 434 (1965).....	29
<i>Blaney v. International Association of Machinists And Aerospace Workers</i> , <i>Dist. No. 160</i> , 87 P.3d 757, 151 Wash.2d 203 (Wash.,2004)	24
<i>Brown v. Giger</i> , 111 Wash. 2d 76, 757 P.2d 523 (1988).....	27, 28, 29, 30, 31, 34
<i>Butzberger v. Foster</i> , 151 Wash. 2d 396, 89 P.3d 689 (2004).....	38
<i>Castronuevo v. Gen. Acceptance Corp.</i> , 79 Wash. App. 747, 905 P.2d 387 (1995).....	34
<i>Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.</i> , 159 Wash. 2d 292, 149 P.3d 666 (2006).....	26, 27
<i>Daily Herald Co. v. Department of Employment Security</i> , 91 Wn.2d 559, 588 P.2d 1157 (1979).....	24

<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wash.2d 514, 22 P.3d 795 (2001).....	27
<i>Falk v. Riedel</i> , 102 Wash. App. 1046 (2000).....	34
<i>Franklin Cnty. Sheriff's Office v. Sellers</i> , 97 Wash. 2d 317, 646 P.2d 113 (1982).....	25
<i>Gemperle v. Crouch</i> , 44 Wash. App. 772, 724 P.2d 375 (1986).....	31, 34, 37
<i>Hegwine v. Longview Fibre Co.</i> , 132 Wash. App. 546, 132 P.3d 789 (2006).....	13, 14, 35
<i>Id.</i> at 295, 126 P.3d 802	27
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	13
<i>Jansen v. Nu-W., Inc.</i> , 102 Wash. App. 432, 6 P.3d 98 (2000).....	23, 31, 34, 36, 37, 38
<i>Keever & Assocs. v. Randall</i> , 129 Wn. App. 733, 119 P.3d 926 (2005).....	13
<i>Kim v. Lee</i> , 145 Wash. 2d 79, 31 P.3d 665	24
<i>King v. W. United Assur. Co.</i> , 100 Wash. App. 556, 997 P.2d 1007 (2000).....	38
<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 117 Wash. 2d 37, 811 P.2d 673 (1991).....	38
<i>Ostiguy v. A. F. Franke Const., Inc.</i> , 55 Wash. 2d 350, 347 P.2d 1049 (1959).....	32, 36
<i>Pacesetter Real Estate, Inc. v. Fasules</i> , 53 Wash. App. 463, 767 P.2d 961 (1989).....	31, 34

<i>Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.</i> , 102 Wash. App. 422, 10 P.3d 417 (2000).....	13
<i>Paulman v. Filtercorp</i> , 127 Wash. 2d 387, 899 P.2d 1259 (1995).....	31, 34
<i>Rasmussen v. Employment Sec. Dep't of State</i> , 98 Wash. 2d 846, 658 P.2d 1240 (1983).....	25, 26
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	13
<i>State v. J.P.</i> , 149 Wash.2d 444, 69 P.3d 318 (2003).....	27
<i>Stevens v. Sec. Pac. Mortgage Corp.</i> , 53 Wash. App. 507, 768 P.2d 1007 (1989).....	29, 30, 31, 34
<i>Thweatt v. Hommel</i> , 67 Wash. App. 135, 834 P.2d 1058 (1992).....	31, 34
<i>Trickle Down, Inc. v. Rickel</i> , 91 Wash. App. 1070 (1998).....	34
<i>Trust of Strand v. Wel-Co Grp.</i> , 120 Wash. App. 828, 86 P.3d 818 (2004).....	30, 31, 34
<i>Weyerhaeuser v. Tacoma-Pierce County Health Dep't</i> , 123 Wn. App. 59, 96 P.3d 460 (2004).....	13

Statutes

RCW 19.52.030	2
RCW 19.52.030(1).....	37
RCW 19.52.032	38
RCW 19.52.080	1, 2, 25, 28, 29, 31, 34, 36
RCW 4.84.330	38

Other Authorities

ER 401 23

ER 402 23

ER 406 22, 23

RAP 14.1 3, 38

RAP 18.1 3, 38

I. INTRODUCTION

This appeal arises from a misguided attempt to collect on two facially usurious loans (“Loans”) made by Appellant Key Development Pension Fund (“Pension Fund”)¹ which do not qualify for the limited “business purpose” exemption under the Usury Statute, RCW 19.52.080. The substantial evidence at the two day bench trial established that the Loans from Pension Fund to Respondents Clyde E. Carlson and Priscilla A. Carlson do not qualify for the exemption because they were not made “primarily for commercial, investment or business purposes” at the time of inception.² *See* RCW 19.52.080. The Loans are not otherwise exempt from the protections of the Usury Statute based on the Trial Court’s finding number 21 that Clyde and Priscilla “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.” Accordingly, this Court should affirm the Trial Court’s sound decision and award Carlson attorneys’ fees and costs as the substantially prevailing party on appeal.

¹ Jack A. Johnson (“Jack”) brought the underlying lawsuit in his capacity as the trustee of Pension Fund. As used herein, “Pension Fund” shall collectively refer to Appellant Key Development Pension Fund and its predecessors in interest, G&G Meats Pension Fund and Columbia Meat Products Pension Plan.

² Respondent Clyde E. Carlson and Priscilla A. Carlson are referred to individually by their first names for clarity and together, as “Carlson” in the singular tense for readability.

II. ASSIGNMENTS OF ERROR

Carlson does not assign error with respect to the Trial Court's correctly decided March 18, 2015 Order Granting Judgment in Favor of Defendants (attached hereto as Appendix A), which Pension Fund appeals, or the related Findings of Fact and Conclusions of Law entered on January 29, 2015 (attached hereto as Appendix B). (CP 172-80, 189-91) The following issues pertain to Pension Fund's assignments of error:

1. Whether this Court should affirm the Trial Court's factual determinations underlying its decision to enter the judgment for penalties, costs and reasonable attorneys' fees in favor of Carlson based on Pension Fund's violations of the Usury Statute under RCW 19.52.030 where:
 - a. Viewing the evidence in the light most favorable to Carlson as the prevailing party in the Trial Court, each factual determination is amply supported by substantial evidence in the record on appeal. (*See* Section IV(A)(2), *infra*)
 - b. Pension Fund's evidentiary challenge to the Trial Court's admission of Exhibits 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68 is without merit because the exhibits tend to make it more probable than not that Pension Fund had the *ability* to document that a loan was a business or commercial loan, and therefore, that the exhibits are relevant to whether the Loans qualify for the business purpose exemption under the Usury Statute, RCW 19.52.080. (*See* Section IV(A)(3), *infra*)

///

///

///

///

2. Whether this Court should affirm the Trial Court's determination as a matter of law that the business purpose exemption under the Usury Statute, RCW Ch. 19.52, does not apply to the Loans where:
 - a. Pension Fund failed to meet its burden of proving that the Loans were for "commercial, investment or business" purposes at the time of their inception (*See* Section IV(B)(2), *infra*)
 - b. Carlson's use of the loan proceeds for personal purposes corroborates Clyde's testimony and the terms of the Notes (*See* Section IV(B)(3), *infra*)
3. Whether this Court should award Carlson attorneys' fees and costs on appeal pursuant to RAP 14.1 et seq. and RAP 18.1 where the Notes provide for an award of attorneys' fees and cost to the prevailing party. (*See* Section V, *infra*)

III. STATEMENT OF THE CASE

Jack Johnson, Gary Dahlby and Clyde Carlson have known each other for many years.³ (CP 172; RPI 100:24-25) They went to high school together and were all members of Seattle's Ballard High School Class of 1962. (CP 28-29) After high school, they remained friends. (CP 173)

From about 1978 to 1994 Jack and Gary were involved together in a business known as G&G Meats, and they sold meat on a wholesale basis.

³ Jack Johnson and Gary Dahlby are referred to herein by their first names for clarity. No disrespect is intended.

(RPI 99:6-17)⁴ Through this business they formed and funded a pension plan for their mutual benefit – the G&G Meats Pension Fund. (RPI 99:23-25, 100:1-10) Beginning in about 1999 and continuing thereafter, the primary investment activity of the G&G Meats Pension Fund was making high interest loans to their friends, family and business acquaintances. (Ex. 74) Jack and Gary were “amateur lenders” as they had no training or experience in making loans, but they made significant money on these high interest loans. (RPI 127:14-19) The pension funds made more than 30 loans over the years; some to businesses, some to individuals and some to friends and family. (RPI 127:20-22; Ex. 24)

Since about 1988, Clyde owned a small float plane business, Northwest Seaplanes, Inc. (“Northwest Seaplanes”), based out of Renton, Washington. *See* Finding No. 2. (CP 173) The business was incorporated, maintained its own set of accounting records and bank accounts, and filed its own corporate tax returns. (CP 173) The seaplane business is seasonal in the Pacific Northwest and Clyde’s personal income was derived from

⁴ The two day trial commenced on October 13, 2014 and reconvened on October 20, 2014. The Report of Proceedings for each of the two days of trial commences with page number 1 so the reference to the Report of Proceedings for the first day of trial on October 13, 2014 will be referred to as “RPI” and the Report of Proceedings for the second and final day of trial on October 20, 2014 will be referred to as “RPII”.

this business. (CP 173) Because of their friendship, Clyde was aware that Jack and Gary made loans from their pension plan. *See* Finding No. 3. (CP 173) In November 2000 Clyde approached Gary and inquired as to whether Jack and Gary would make him a loan. *Id.* (CP 173) He needed additional funds on a short term basis to pay a variety of personal expenses. *See* Deposition of Clyde Carlson at 44:15-25 (CP 61); *see also* Finding No. 5 (CP 173). (RPII 66-69)

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”) (Exhibit 51 and attached hereto as Appendix C). *See* Finding No. 4. (CP 173) The interest rate was 18% for the first six years, and then in 2006 the interest rate was reduced to 14%. *Id.* (CP 173) The loan process was very informal; there was no loan application or documentation required. *Id.* (CP 173) There was no underwriting; there was no credit review. *Id.* (CP 173) A check in the amount of \$149,500 made payable to “Clyde Carlson” was delivered to Clyde, and he deposited it into his personal bank account, and used the proceeds to pay a variety of personal expenses. *See* Deposition of Clyde Carlson at 35-39 (CP 52-56); *see also* Finding No. 5. (CP 173; Ex. 52)

The second note – this time made to Columbia Meat Pension Plan – was executed in April 2002 (“Columbia Meat Note”) (Exhibit 55 and

attached hereto as Appendix D) – also at 18% interest. *See* Finding No. 6. (CP 173) This time Clyde was borrowing money to pay the settlement of a lawsuit he was involved in with his sister involving their father’s estate. (RPII 83:4-8) The \$150,000 check was written to Clyde directly on the Key Development, Inc. (“Key Development”) business account – rather than from the Pension Fund account. *See* Finding No. 6 (CP 173) The timing of the Columbia Meat Note corresponds exactly with the entry of the dismissal order in the estate lawsuit. (RPII 83:4-8)

The terms of the two Notes are summarized below:

Lender	Date	Loan Amount	Int. Rate	Amount Paid
G&G Meat	11/10/2000	\$150,000.00	18%	\$234,020.00
Columbia Meat	4/18/2002	\$150,000.00	18%	\$207,750.00
Total		\$300,000.00		\$441,770.00

See Finding No. 7. (CP 174; Exs. 51, 53, 55, 57)

The borrowers on both of the Notes were Clyde and Priscilla Carlson (personally) and the checks for the loan proceeds were both made to Clyde (personally). (Exs. 51, 52, 55, 56) Although each of the Notes had a one year term, the parties verbally agreed to several changes and modifications of the Notes over the years. *See* Finding Nos. 4, 6. (CP 173-74) As can be seen in the chart above, Clyde paid a substantial amount on

each Note over the years. *See* Finding No. 7. (CP 53, 57, 174) Although they never entered into a new agreement on the specific repayment terms, Jack agreed to extend the Loan payment deadlines to October 2012. *See* Finding Nos. 4, 6. (CP 173-74) When the loans were not paid off by that time, Jack commenced this lawsuit. (CP 6-11)

Clyde testified that the loans were for personal use as opposed to business purpose. *See* Deposition of Clyde Carlson at 44:21-25, 45:1 (CP 61-62). (RPII 82:13-21) Specifically, he testified that in the year 2000 he needed cash to purchase an apartment in Canada and to complete repair/remodeling on his houses. *See* Deposition of Clyde Carlson at 44:21-25, 45:1. (CP 61-62; RPII 66-69) He knew his old friends Jack and Gary made short terms loans from their pension funds, so he asked Gary if they would make him a loan. *See* Finding No. 3. (CP 173) Because they were old friends Jack and Gary decided to give Clyde a discount on their customary interest rate, which was even higher than 18%. (RPI 101:13-17) Jack and Gary had their attorney, Stephan Todd, prepare a promissory note for \$150,000 to Clyde and Priscilla Carlson. (RPI 152:3-5) Carlson signed the note and they received a check for \$149,500 soon thereafter. (Exs. 51-52) Clyde deposited the check into his personal bank account. *See* Finding No. 5. (CP 173) He proceeded to make the personal expenditures that he had planned. *Id.* (CP 173)

The second loan was in April 2002 and Clyde needed some cash to fund a settlement for a lawsuit he was involved in with his sister. *See* Finding No. 6. (CP 173; RPII 82:13-21) The same casual procedure was followed: Clyde asked his friends for a loan, they presented him with a promissory note, he signed it and he received a check. *See* Finding No. 6. (CP 173; Ex. 55) Again the funds were deposited in his personal bank account and disbursed. *Id.* (CP 173-74)

Both of the Loans were unsecured, the borrowers on both of the Notes were Clyde and Priscilla personally, the check was made to Clyde and the funds were deposited into Clyde's personal bank account. *See* Finding No. 4-6 (CP 173; Exs. 51, 52, 55, 56) There was no loan application requested or filled out. *See* Finding No. 4. (CP 173) There was no documentation regarding the specific purpose of the Loans. (Exs. 51, 54, 55) It appears that these lax, or rather non-existent, underwriting procedures continued over the course of the many loans made by Jack and Gary from their pension funds. *See* Finding No. 4 (CP 173). (RPI 14-19; RPII 34:7-11, 35:16-19, 37:8-12)

Review of the limited documents produced by the Pension Fund regarding other loans they made reveals that Jack and Gary (and their attorney) clearly knew how to document a loan when it was for business purposes so they could avoid the claim of usury, as is the standard of

practice in the industry. (Exs. 58, 59, 60, 61) For instance, the documents evidencing the Loan made by Jack Johnson to Lakeside Heating and Brandon Agostinelli in 2004 contain two very important and significant differences when compared with the documents for the Carlson Loans.⁵ (Exs. 63-64) These differences fully support Clyde's contention that his Loans were for personal purposes: neither one of Clyde's Loans contained the critical language found in the Lakeside Heating/Agostinelli and Tonkka loans, specifically:

1. Identification of the Borrower obligated on the Promissory Note.
 - a. Lakeside: Promissory Note and Agreement to Make Secured Loan identify the business "Lakeside Heating and Air Conditioning" as the borrower and the individuals (Brandon and Linnea Agostinelli) as the guarantors. (Exs. 58, 59, 60, 61)
 - b. Tonkka: The borrowers are identified in the Promissory Note as the business Tonkka Trucking and Excavating, LLC, and its owner, Ben Tanielian. (Exs. 63, 64)
 - c. Carlson: The only borrowers of the Carlson Notes are Clyde and Priscilla Carlson – there is no business identified, named or involved. (Exs. 51, 55)

⁵ This loan was one of the three loan "files" that the Pension Fund produced in discovery. Jack claimed that once any loan was paid, he immediately destroyed or caused to be destroyed all of the documentation regarding the loan. Over the years the Pension Fund made over 40 loans. See Finding No. 16. (CP 176)

2. Representation regarding a “business purpose” in the Agreement.
 - a. Lakeside: In the Agreement to Make Secured Loan, at Section 3.1(e) both Lakeside Heating and the Agostinellis specifically represent and warrant that the **“loan evidenced by the note is for business purposes and the loan funds will be used solely for business purposes.”** (Ex. 59)
 - b. Carlson: The package of documents prepared by Stephan Todd (Jack’s attorney) also contained a document titled “Agreement to Make Secured Loan.”⁶ However, Section 3 of this Agreement, which is otherwise identical to the Lakeside Agreement, **does not contain a representation by the borrower that the loan is for business purposes.** This subsection (e) of Section 3.1 is completely absent from the document. (Ex. 54)

Pension Fund’s only “proof” of the purpose of the loans was Jack and Gary’s subjective (and self-serving) memories of alleged conversations which transpired 12 - 14 years ago. (RPI 101:3-9, 122:7-25, 123:1-3) This testimony was rebutted by Clyde, who testified at trial that he has a clear memory of the purpose of both loans and that they were for personal use. (RPII 66-69, 82-83) He further testified about why he sought short term high interest loans for personal use when a more conventional loan from a bank could have been on more favorable terms. *See*

⁶ Clyde and Jack discussed security for the G&G Meats Note. Mr. Todd prepared security documents. (Ex. 54) The best security Clyde could offer was in some airplanes he was selling. Jack lost interest in having security, and the documents were never executed. (RPI 148-50; Ex. 54)

Deposition of Clyde Carlson at 39:11-17. (CP 56) Clyde's testimony at trial also demonstrates through his business records and tax returns that the proceeds from the Loans were not used by Northwest Seaplanes, and that the business had sufficient banking relationships and lines of credit that it could take care of its own capital needs. (RPII 73-74)

Furthermore, in the years 2000-2002 Clyde, through his businesses, sold a number of aircraft which provided significant cash for Northwest Seaplanes. (RPII 74-76) During this time, Clyde sold a "Beaver" airplane and made about \$500,000 for Northwest Seaplanes. (RPII 75-76) Gary Lien, a certified public accountant, testified that based upon his review of the business and personal tax returns that Clyde did not record these Notes as business liabilities on the tax returns of Northwest Seaplanes; nor did Northwest Seaplanes deduct the interest paid on the Notes on its business tax returns. (RPII 96-98; Ex. 77)

In addition to the two Loans to Clyde, the Pension Fund made many other loans, some for business purposes and some personal. (RPI 133:6-8 ; Ex. 74) Stephan Todd is the attorney who drafted the notes and security documents involved in many of the Pension Fund's loans. (RPII 33:18-19, 36:9-13; Exs. 51, 55) As examples, the Pension Fund made loans to Stephan Todd, Becky Todd and Kris Lavera. (RPI 125:10-16, 128:1-4; RPII 35; Ex. 74) The loans to Kris Lavera were for medical bills,

the loans to Mr. Todd were for home remodeling and some credit card bills, and the loan to Becky Todd was to pay-off her car. (RPI 125:10-16, 128:1-4; RPII 35; Ex. 74)

Given that the Loans at issue in this case were made more than 12 years ago, it is not surprising that the parties have some holes in their memories of what transpired at the inception of the Loans. *See* Finding of Fact No. 8 (CP 174; RPII 30:18-25, 31:1). For example, Jack admitted that he could not provide specific details on any of the other Pension Fund loans due to the passage of time. (RPI 125:10-16, 128:1-4; RPII 35; Ex. 74) The Trial Court correctly recognized that this variance in memory demonstrates so clearly the difficulties in relying solely on one's stale and subjective memory to establish the specific terms and conditions of the Notes. *Id.* (CP 174). Ultimately, the plain evidence shows that the Pension Fund repeatedly made personal loans, including loans to Kris Lavera, Becky Todd and the Frenches, among others. When it suited them, personal loans were made to family and close friends, including to Jack and Gary's longtime friend Clyde Carlson. (CP 172; RPI 100:24-25, 125:10-16, 128:1-4; RPII 35; Ex. 51, 55, 74)

///

///

///

IV. ARGUMENT

A. **The Trial Court’s factual determinations underlying its decision to dismiss Pension Fund’s claims against Carlson are well supported by substantial evidence and should be affirmed.**

1. The substantial evidence standard applies to review of a trial court’s factual findings.

The substantial evidence standard governs review of a trial court’s factual determinations, as follows:

When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court’s conclusions of law. *Keever & Assocs. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). We review only those findings to which appellants assign error; unchallenged findings are verities on appeal.¹¹ *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). On appeal, **we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony.** *Weyerhaeuser v. Tacoma-Pierce County Health Dep’t*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

Hegwine v. Longview Fibre Co., 132 Wash. App. 546, 555-56, 132 P.3d 789, 793-94 (2006) *aff’d*, 162 Wash. 2d 340, 172 P.3d 688 (2007) (emphasis added; italics in original). “The party challenging a finding of fact bears the burden of showing that it is not supported by the record.” *Panorama Vill. Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wash. App. 422, 425, 10 P.3d 417, 420 (2000) (citation omitted).

2. The Trial Court's findings are supported by substantial evidence viewing the record in the light most favorable to Carlson as the prevailing party and deferring to the Trial Court on witness credibility and conflicting testimony.

Again, unchallenged findings of fact are "verities on appeal", *i.e.*, accepted as true by the Court of Appeals. *Hegwine*, 132 Wash. App. at 556. The following findings of fact are unchallenged, and therefore, must be accepted as true on appeal:

No.	Finding 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.
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.
7	[Summarizing the terms and payments of each of the two Notes]

11	<u>The Loan Payment Schedule.</u> 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.
16	<u>Lack of Lender Documentation.</u> 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	<u>The Loan Proceeds were Paid Directly to Mr. Carlson.</u> 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	<u>Plaintiff used Counsel to prepare Loan Documents.</u> 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.
20	<u>Interest Rate.</u> 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 [sic] the door of destitution at that time.

(CP 172-77) (emphasis in original; bracketed text added)

Pension Fund assigns error to the Trial Court's finding of fact numbers 5, 6, 8, 9, 10, 12, 13, 14, 15, 19. *See* Appellant Brief at 1-2. To the contrary, each finding is supported by substantial evidence, as follows:

Finding of Fact No. 5 (CP 173)

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.

Substantial Evidence:

- Check for \$149,500 from G&G Meats Clyde Carlson. (Ex. 53)
- Clyde deposited it into personal account. *See* Deposition of Clyde Carlson at 44:17 (CP 61). (RPII 85:2-5).
- Clyde used the proceeds for personal expenses. *See* Deposition of Clyde Carlson at 44:21-25 and 45:1 (CP 61-62). (CP 52-53, 55-57)
- Pension Fund offered no contrary evidence.

Finding of Fact No. 6 (CP 173-74)

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 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.

Substantial Evidence:

- \$150,000 Promissory Note between Columbia Meat Products Pension and Clyde dated April 18, 2002. (Ex. 55)
- \$150,000 check from Key Development to Clyde, dated April 22, 2002. (Ex.56)
- This check was deposited into his personal bank account. (RPII 86:25)
- Clyde needed the money to pay the settlement of a family dispute with his dad's estate. (RPII 82:13-21)
- The Note was extended by agreement of the parties. (Ex. 82)
- The last payment Clyde made was in 2010. (Ex. 57)
- Pension Fund offered no contrary evidence.

Finding of Fact No. 8 (CP 174)

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.

Substantial Evidence:

- Clyde does not recall having a conversation with Jack and Gary about the purpose of either of the loans. (RPI 26:21-25; RPII 82:9-12)
- Jack made a number of loans to different individuals and business over the years. He does not remember the details of most of the loans outside of the documents. (RPI 125:10-16, 128:1-4; RPII 35; Ex. 74)
- Jack made a loan to the Frenches to buy a boat for personal use, but he does not remember how much the loan was, when the loan was or when it was paid off. (RPI 133:3-19, 145:17-19)
- Jack made a loan to the Frenches in 2007 in the amount of \$10,000. He does not recall the actual reason the Frenches borrowed the money; he thought it was for their down payment, but he could not explain the details. (RPI 138:9-14; Ex. 66)
- Jack did not remember any of the details regarding a loan to the Frenches in May 2009. (RPI 146:12-25, 147:1-9)
- Gary does not remember why the proceeds check on the loan he personally made to Clyde in 2001 was from Jack Johnson's account. (RPI 103:10-14, 112:9-24).
- Gary was not involved in the negotiations for Clyde's 2002 Note. (RPI 104:16-18)
- Gary admitted that although he personally made loans to other people in addition to Clyde, he could not remember who they were. (RPI 106-08) Gary admitted that his memory was not very good. (RPI 111:1-4) Gary admitted that the passage of 14 years since the inception of the loan makes it difficult for him to remember the details. (RPI 113:9-24, 114:1-2)
- Jack does not remember why the check for the 2002 Columbia Meat Note was written on the Key Development account rather than the Pension Fund account. (RPI 157-59; Ex. 56)

Finding of Fact No. 9 (CP 174-75)

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 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.

Substantial Evidence:

- Exs. 25, 26, 27, 28, 29, 32, 33, 34, 35, 77.

Finding of Fact No. 10 (CP 175)

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

Substantial Evidence:

- Clyde borrowed \$200,000 directly from Gary in 2001. He paid off this note in full in 2005. (Ex. 80)

Finding of Fact No. 12 (CP 175)

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.

Substantial Evidence:

- Clyde used the 2002 loan proceeds to pay a settlement of a personal legal matter. (RPII 82:12-21)
- The legal matter settled in April 2002. (RPII 83:4-8)
- Clyde used the 2000 loan proceeds for a variety of personal matters, including to remodel his houses in Chelan and Arizona. (CP 52, 55, 56; RPII 66-69, 82-83)
- Pension Fund offered no evidence to the contrary.

Finding of Fact No. 13 (CP 175)

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.

Substantial Evidence:

- The Notes were to Clyde and Priscilla personally. (Exs. 51, 55)
- The checks were made payable to Clyde personally. (Exs. 52, 56)

Finding of Fact No. 14 (CP 175-76)

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 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.

Substantial Evidence:

- The Agreement to make a secured loan prepared by Steve Todd for Lakeside Heating's loan had a clear statement that the loan was for a business purpose. (Ex. 59, ¶ 3.1(e))
- The Agreement to make a secured loan prepared by Steve Todd for Clyde's Nov. 2000 loan did not contain a representation regarding business purpose. (Exs. 54, ¶ 3.1)
- Section 3 of Ex. 54 and Ex. 59 are otherwise the same.
- The same attorney (Stephan Todd) prepared both of Clyde's Notes as well as the Lakeside Note. (RPI 163:7-9)
- There is no representation regarding business purpose in either of Clyde's Notes. (Exs. 51, 55)
- Pension Fund offered no evidence to the contrary.

Finding of Fact No. 15 (CP 176)

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.

Substantial Evidence:

- The borrower in the Lakeside loan was Lakeside Heating & Air Conditioning LLC, and guaranteed by its members. (Exs. 60-61)
- The borrower in the Tonkka loans was Tonkka Trucking and Excavating and its member B. Tanielian. (Exs. 63-64)
- The French loans were to the Frenches personally and were related to the purchase of a boat for personal use and a new duplex, which they resided in. (RPI 133:6-10; Ex. 66)
- Pension Fund offered no evidence to the contrary.

Finding of Fact No. 19 (CP 177)

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.

Substantial Evidence:

- No interest deduction was taken by Clyde's businesses related to interest paid on the Notes. (Exs. 25, 26, 27, 28, 29, 77)
- Gary Lien, CPA testified that Northwest Seaplanes did not deduct the loan interest on its tax returns. (RPII 96:15-21, 96:22-25, 97:1-3)
- Pension Fund offered no evidence to the contrary.

3. The Trial Court correctly admitted Exhibits 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68 as they tend to make it more probable than not that Pension Fund had the ability to document that a loan was intended for either a business or commercial purpose, and therefore, the exhibits are relevant to whether the Loans qualify for the business purpose exemption under the Usury Statute; any error in this regard is harmless because such evidence contained in these exhibits was cumulative.

Despite the Pension Fund's protestations to the contrary,⁷ the Trial Court properly relied upon Exhibits 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68 in support of its finding of fact numbers 14 and 15, *i.e.*, finding that Pension Fund had the ability to document business loans and ultimately concluding that if Pension Fund "truly understood" the Loans "to be business or commercial loans, [Pension Fund] had the ability through its counsel, to document that the loan was a business or commercial loan." *See* Findings 14 and 15. (CP 175-76)

The exhibits in question document loans which Pension Fund, or its Trustee Jack, made to various parties after making the Carlson Loans. *See* Exs. 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68. They demonstrate that when business purpose was intended, the loan documents would reflect this intent. *Id.* For example, the documents evidencing a loan made by

⁷ *See* Appellant Brief at 10-12.

Jack to Lakeside Heating and Brandon Agostinelli in 2004 state that the borrower is a business (*i.e.*, Lakeside Heating & Air Conditioning, LLC) and, in Section 3.1(e) of Agreement to Make Secured Loan (Ex. 59), contain the clear and bold proclamation that **“loan evidenced by the note is for business purposes and the loan funds will be used solely for business purposes.”** *See* Exs. 58, 59, 60, 61. Documents for other such loans similarly identify a business as the borrower. *See* Exs. 63, 64. In contrast, when Jack wished to make a personal loan, the documents identified individuals as the borrower. *See* Ex. 65; *see also* 66, 67 and 68.

Pension Fund argues that these exhibits are not admissible under ER 406 as evidence of the “habit” or “routine practice” of Pension Fund or Jack because the documents are not “relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. *See* Appellant Brief at 10-12; *see also* ER 406. The objection is without merit because the later loan documents are not evidence of habit/routine practice, but of Jack and Pension Fund’s *ability* to document a loan as a business loan exempt from the protections of the Usury Statute (*i.e.*, rather than a personal loan subject to the borrower protections in the Usury Statute) when the borrower intended a business purpose for the loan funds. *See* Exs. 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68. Such evidence is relevant and admissible because it tends to

make it “more probable...than it would be without the evidence” that the Carlson Loans are personal loans because the Loan documents “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”, as the Trial Court correctly decided. *See* ER 401 and ER 402; *see also* Finding Nos. 14-15 and Conclusion Nos. 25, 27. (CP 175-76, 178) In turn, the personal nature of the Loans is relevant to the central inquiry as to whether the business purpose exemption applies. *Jansen v. Nu-W., Inc.*, 102 Wash. App. 432, 440, 6 P.3d 98, 103 (2000), *as amended on reconsideration* (Sept. 21, 2000) (“We characterize the loan based on the borrower's manifestations of intent at the time the parties entered into the loan contract.”)

In short, there was no evidence admitted by the Trial Court in violation of ER 406 or otherwise. All evidence admitted by the Trial Court was relevant and properly admitted. Further, the exhibits were cumulative evidence, and in addition to, other relevant and admissible evidence which also tends to make it more probable that the Loans were for a personal purpose, including (i) evidence that Pension Fund and Key Development paid the Loans to Carlson personally; and (ii) evidence that Carlson actually used the Loan proceeds for various personal uses. *See* Finding Nos. 12, 17. (CP 175-76) In light of this additional evidence supporting

the Trial Court's determination that Carlson intended the Loans for personal use, any error in admitting the exhibits was harmless and does not provide grounds for reversal. *Blaney v. International Association of Machinists And Aerospace Workers*, Dist. No. 160, 87 P.3d 757, 761, 151 Wash.2d 203, 211 (Wash.,2004).

B. The Trial Court correctly determined as a matter of law that the business purpose exemption under the Usury Statute does not apply to the Loans.

1. The de novo standard of review applies to questions of law including questions of statutory interpretation.

Questions of law are subject to de novo review. *Kim v. Lee*, 145 Wash. 2d 79, 86, 31 P.3d 665, 668, *as amended* (Dec. 12, 2001), *opinion corrected*, 43 P.3d 1222 (Wash. 2001) (citations omitted). Mixed questions of law and fact are subject to the following standard of review:

Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. As we said in *Daily Herald Co. v. Department of Employment Security*, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979), mixed questions of law and fact exist “where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term”. We have invoked our inherent power to review de novo those issues. [...] De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency's decision, and apply it to the facts as found by the agency and upheld on review by this court.

Franklin Cnty. Sheriff's Office v. Sellers, 97 Wash. 2d 317, 329-30, 646 P.2d 113, 119 (1982) (bracketed ellipsis added); *see also Rasmussen v. Employment Sec. Dep't of State*, 98 Wash. 2d 846, 849-50, 658 P.2d 1240, 1242 (1983) (citation omitted).

2. The business purpose exemption to the Usury Statute does not apply because Pension Fund failed to meet its burden of proving that the Loans were for “commercial, investment or business” purposes at the time of their inception.

Pension Fund does not challenge the Trial Court’s (correct) determination that because the 18% interest rate on the Loans exceeded the statutorily-allowed maximum rate, the Loans are usurious on their face. *See* Appellant Brief. As a result, Pension Fund correctly admits it 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. *See* Appellant Brief at 2, 9-12. As set forth in Section IV(A), *supra*, the Trial Court relied on substantial evidence in making the factual findings in support of the conclusion of law that the Loans do not qualify for the business purpose exemption under RCW 19.52.080, and therefore the Loans violated the Usury Statute.

Despite the inapplicability of the business purpose usury exemption, Pension Fund argues on appeal the Usury Statute was not

intended to protect someone in the position of Clyde and Priscilla Carlson based on the Trial Court's finding number 21 that they "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." *See* Appellant Brief at 17 (citing Finding No. 21). (CP 177) In other words, Pension Fund argues for a broad expansion of the business purpose exemption whereby the protections of the Usury Statute would not apply to a loan for personal use if the borrower "did not need to borrow money at any cost." *See* Appellant Brief at 17.

The flawed position is contrary to the plain language of the Usury Statute and would eliminate from its protections all borrowers, save those in the most desperate of financial situations. *See* RCW Ch. 19.52. The Usury Statute does not state, suggest, or event hint at the notion that its protections only apply to borrowers who resort to taking a usuriously high interest rate loan out of "adversity" and/or "necessity". *See* RCW Ch. 19.52. Indeed, the terms "adversity" and "necessity" are nowhere to be found in the Usury Statute. *Id.*

The absence of any express language in the Usury Statute even remotely supporting Pension Fund's proposed "adversity and necessity" rule is noteworthy. In this regard, *Cosmopolitan Eng'g Grp., Inc. v. Ondeo*

Degremont, Inc., 159 Wash. 2d 292, 149 P.3d 666, 669-70 (2006),

provides the following guidance:

Our purpose when interpreting a statute is to “ ‘discern and implement the intent of the legislature.’ ” *Id.* at 295, 126 P.3d 802 (quoting *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003)). Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Id.* In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent. *Id.*; *Advanced Silicon Materials, L.L.C. v. Grant County*, 156 Wash.2d 84, 89–90, 124 P.3d 294 (2005); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 519, 22 P.3d 795 (2001). When a statute is ambiguous, we then resort to aids of construction, including legislative history. *City of Olympia*, 156 Wash.2d at 295, 126 P.3d 802; *Advanced Silicon*, 156 Wash.2d at 90, 124 P.3d 294.

Cosmopolitan Engineering Group, Inc., 149 P.3d at 669-70

The absence of any language in the Usury Statute that could be interpreted as limiting its protections to borrowers who resort to taking a usuriously high interest rate loan out of “adversity” and/or “necessity” is consistent with discussion of the evolution of the business purpose exemption over time in the portions of the opinion in *Brown v. Giger*, 111 Wash. 2d 76, 757 P.2d 523 (1988) quoted extensively by Pension Fund. See Appellant Brief at 12-14 (quoting *Brown*, 111 Wash. 2d at 79-81). Specifically, Pension Fund quotes verbatim, and relies heavily on, dicta in *Brown v. Giger* summarizing the history of legislative enactments which

successively broadened the business purpose exemption over time to its present form. At this time the exemption applies to transactions of any amount (a change from the \$50,000 minimum in a prior version of the Usury Statute) made “primarily for agricultural, commercial, investment, or business purposes”. *Brown*, 757 P.2d at 525 (quoting RCW 19.52.080).

Attempting to persuade this Court to dramatically broaden the scope of the exemption intended by the legislature, Pension Fund misconstrues the following dicta in *Brown v. Giger*:

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.”

* * *

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.

Brown, 757 P.2d at 526 (citation omitted) (emphasis added).

According to Pension Fund, the above language means that the business purpose exemption to the protections of the Usury Statute does not apply to borrowers “who by adversity and necessity of economic life” are “driven to borrow money at any cost.” See Appellant Brief at 14 (quoting *Brown*, 757 P.2d at 526). Quite opposite, the above-quoted portion of *Brown v. Giger* actually establishes that “[o]ne 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.” *Brown*, 757 P.2d at 526. In other words, a borrower who obtains a debt for a primarily business purpose is not afforded the protections of the Usury Statute because, by definition, such a “business purpose” borrower is not borrowing “out of adversity and necessity of economic life.” *Id.* The inverse claim of Pension Fund – that a showing of “adversity and necessity of economic life” is a prerequisite to the protections of the Usury Statute (regardless of the purpose of the loan) – is not a logical corollary, and not supported by the plain language of the Usury Statute.⁸ *Id.*; *see also* RCW Ch. 19.52.

Aside from Pension Fund’s strained reading of the dicta in *Brown v. Giger*, that case, along with the *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wash. App. 507, 516, 768 P.2d 1007 (1989) case on which Pension Fund

⁸ The folly of concluding that *Brown v. Giger* stands for the proposition that only a borrower facing “adversity and necessity of economic life” should receive Usury Statute protections is further shown in light of the fact that the opinion directly quotes *Baske v. Russell*, 67 Wash. 2d 268, 273, 407 P.2d 434, 437 (1965), decided in 1965 when the business purpose exemption was limited in that it only “denied the defense of usury to certain entities and persons ‘in the business of lending money or the development or improvement of real estate’”. *Brown*, 757 P.2d at 526 (quoting prior enactments).

misplaces reliance, are readily distinguishable. See Appellant Brief at 12-17. Specifically, in both *Brown v. Giger* and *Stevens*, the loan documents indicated the loan was for a *business* purpose. *Brown*, 757 P.2d at 525; *Stevens*, 53 Wash. App. at 516. In contrast, there is no indication in the Carlson Loan documents that the Loans are for a business purpose, a significant omission establishing that the Loans were for personal use, *i.e.*, a determination bolstered by extrinsic evidence that Carlson used the loans for personal uses, as set forth in Sections IV(B)(3), *infra*.

Other cases addressing the applicability of the business purpose exemption do not support the position that Carlson should be exempted from the protection of the Usury Statute in this case. *Aetna Fin. Co. v. Darwin*, 38 Wash. App. 921, 924-25, 691 P.2d 581 (1984); *see also, Trust of Strand v. Wel-Co Grp.*, 120 Wash. App. 828, 835, 86 P.3d 818 (2004). “[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.” *Aetna Finance Co.*, 38 Wash. App. at 924-25; *see also Trust of Strand*, 120 Wash. App. at 835. “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.” *Aetna Finance Co.*, 38 Wash. App. at 927-28 (“The lender’s purpose for the loan, which is almost always is a

business purpose, is irrelevant”); *Brown*, 111 Wash. 2d at 82 (quoting *Aetna Finance Co.*, 38 Wash. App. at 927).

“Washington cases consistently have noted the importance of objective indications of purpose in determining the applicability of the ‘business purpose’ exemption.” *Brown*, 111 Wash. 2d at 82. Moreover, in all cases where the business purpose exemption under RCW 19.52.080 has been satisfied, there has been a written representation by the individual borrower in the loan documents indicating that the loan was intended for a business purpose or it has been undisputed that the loan was intended for a business purpose.⁹

In Washington, it is the “general rule that, for the purposes of showing usury in a written contract, parol or extrinsic evidence is

⁹ We have uncovered no reported Washington cases that have applied the business purpose exemption based upon the lender’s testimony alone. See *Paulman v. Filtercorp*, 127 Wash. 2d 387, 394, 899 P.2d 1259 (1995) (undisputed that loan proceeds were intended for borrower’s business purposes); *Brown*, 111 Wash. 2d at 82 (loan documents include borrower’s representations that loan was for a business or commercial purpose); *Trust of Strand*, 120 Wash. App. at 832 (loan agreement included representation from borrower that the loan was to be used exclusively for business purposes); *Jansen*, 102 Wash. App. at 435 (borrower representation in note that loan proceeds were to be used for business or commercial purposes); *Thweatt v. Hommel*, 67 Wash. App. 135, 138, 834 P.2d 1058 (1992) (borrower signed affidavit for business purpose in connection with loan); *Stevens*, 53 Wash. App. at 516 (loan documents indicated loan was for business purposes); *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wash. App. 463, 472, 767 P.2d 961 (1989) (borrower’s acknowledgement of commercial loan in note and commercial borrower); *Gemperle v. Crouch*, 44 Wash. App. 772, 773, 724 P.2d 375 (1986) (undisputed that loan was for commercial purposes).

admissible, the parol evidence rule not being applicable to such a situation.” *Ostiguy v. A. F. Franke Const., Inc.*, 55 Wash. 2d 350, 358, 347 P.2d 1049, 1053-54 (1959), citing *Auve v. Fagnant*, 16 Wash. 2d 669, 134 P.2d 454 (1943).

However, Pension Fund lacks the necessary evidence that the Loans were intended “primarily” for “commercial, investment or business purposes” at the inception. The Notes are issued to the Carlsons and the checks representing the proceeds of the Loans are the only objective documentary evidence available for the Loans from the time they were issued.¹⁰ The Pension Fund did not engage in any underwriting prior to issuing the Loans to the Carlsons and, although a security agreement was drafted by Mr. Todd at least with respect to the G&G Meats Note, it was never signed by the parties.¹¹ Notably, the borrowers on the Notes were Mr. and Mrs. Carlson personally and the Notes lack any representation by the Carlsons that the proceeds from the Loans were to be used for

¹⁰ The reason that there is limited documentary evidence available with respect to the Loans, in part, is due to the fact that Pension Fund and/or Key Development intentionally destroyed a significant portion of its loan records, including the records with respect to the Loans. (RPI 162:6-25)

¹¹ It is worth noting that the draft of the security agreement that was circulated by Mr. Todd does not contain any representations from Carlson that the loan proceeds were to be used for business purposes. (Ex. 54)

commercial or other business purposes as is the customary practice for business loans. Similarly, the checks were made payable to Clyde personally, not to a business.

The Notes were drafted by the Pension Fund's attorney, Mr. Todd. (RPI 152:3-5; Ex. 55) Mr. Todd was clearly aware of Washington's usury laws yet did not request that Carlson represent that the Loan proceeds were to be used for commercial or business purposes.¹² (Exs. 51, 55) In fact, in the documentation for subsequent loans made by the Pension Fund and by Jack, Mr. Todd specifically requested that the borrower represent that the loan funds will be used solely for business purposes. (Exs. 58, 59, 60, 61) This evidence establishes that Mr. Todd knew to include such representations when a loan was to be used by a borrower for business purposes at the time it was issued.

The only evidence available supporting the notion that the Loans were intended for business purposes at their inception is the testimony of Jack and Gary, which was insufficient to establish that Carlson intended to use the Loan proceeds for business purposes at the inception. As discussed above, Washington Courts that have determined that a loan was primarily

¹² Mr. Todd was admitted to the Washington State Bar in 1982.

for a business purpose under RCW 19.52.080, have done so by relying on representations made by a borrower in the loan documents themselves.¹³ Additionally, the testimony of Jack and Gary is undeniably stale as they both admit their memories as to details of the Pension Fund loans are poor. *See* Finding of Fact No. 8 (CP 174; RPI 125:10-16, 128:1-4, 157-59; RPII 30:18-25, 31:1, 35; Ex. 74). For example, Jack admitted that he could not give details on any of the other Pension Fund loans due to the passage of time. (RPI 125:10-16, 128:1-4; RPII 35; Ex. 74)

With respect to the G&G Meats Note, Jack and Gary testified to events that took place approximately fourteen years prior to trial, and with

¹³ *See Paulman*, 127 Wash. 2d at 394 (undisputed that loan proceeds were intended for borrower's business purposes); *Brown*, 111 Wash. 2d at 82 (loan documents include borrower's representations that loan was for a business or commercial purpose); *Trust of Strand*, 120 Wash. App. at 832 (loan agreement included representation from borrower that the loan was to be used exclusively for business purposes); *Jansen*, 102 Wash. App. at 435 (note included a business purpose declaration from borrower); *Falk v. Riedel*, 102 Wash. App. 1046 (2000) (loan documents described the business venture which the loan proceeds were used for); *Trickle Down, Inc. v. Rickel*, 91 Wash. App. 1070 (1998) (borrower's representation that loan funds would be used to purchase artwork at his gallery); *Castro-nuevo v. Gen. Acceptance Corp.*, 79 Wash. App. 747, 905 P.2d 387 (1995) (borrower representation that loan proceeds were to be used for business or commercial purposes in note); *Thweatt*, 67 Wash. App. at 138 (borrower signed affidavit for business purpose in connection with loan); *Stevens*, 53 Wash. App. at 516 (loan documents indicated loan was for business purposes); *Pacesetter Real Estate, Inc.*, 53 Wash. App. at 472 (borrower's acknowledgement of commercial loan in note and commercial borrower); *Gemperle*, 44 Wash. App. at 773 (undisputed that loan was for commercial purposes). *Cf Base v. Pottenger*, 85 Wash. App. 1048 (1997) (the note did not contain any language explaining that it was for commercial or business purposes and was therefore not a commercial or business loan)

respect to the Columbia Meat Note, the Jack and Gary testified to events that took place over twelve years ago. Not surprisingly, the Jack and Gary subjectively remember the purpose of the Loans in a light that is most favorable to the Pension Fund.

Moreover, Clyde testified that he did not recall having any conversation with the lenders about his intended use of the proceeds from the Loans and, in any event, that the Loans were always intended (and ultimately used) for personal purposes. (RPI 26:21-25; RPII 66-69, 82-83) Clyde's testimony was supported by his subsequent use of the proceeds from the Loans and the tax positions taken by his company, Northwest Seaplanes. The Trial Court properly exercised its broad discretion in determining that Jack and Gary's memories were lacking, they had difficulties remembering events that long ago, and therefore, their testimony was not convincing or determinative as to the purpose of the Loans at their inception. (CP 174) *Hegwine*, 132 Wash. App. at 555-56.

Gary Lien, a certified public accountant, testified that Northwest Seaplanes did not carry the Notes on its books nor did it deduct the interest for the loans on its tax returns. (Ex. 77) The payments were made by Northwest Seaplanes because that is where the money was, and it was easier to make the note payments from the corporations' accounts rather than transferring it to his personal account to make payments. (Ex. 77) The

respective adjustments between Clyde personally and the corporations would be made by the accountant at year end, which was in fact the case. (Ex. 77) There was no evidence offered to the contrary.

3. Extrinsic evidence establishing that Carlson actually used the loan proceeds for personal purposes further supports the Trial Court's determination that the Loans were made for personal purposes at the time of inception.

The purpose of a loan under RCW 19.52.080 is established from evidence of the use to which the borrower intended to put the loan proceeds at the inception of the transaction. *Ostiguy*, 55 Wash. 2d at 358 (citing *Auve*, 16 Wash. 2d 669). It is “immaterial” for purposes of establishing the business purpose exception that the borrower, once having the funds in hand, used them for personal or business purposes. *Jansen*, 102 Wash. App. at 441. Although Carlson's subsequent use of the Loan proceeds is not, as a matter of law, relevant under RCW 19.52.080 (which focuses solely on the borrower's intended use of the loan proceeds at the inception of the loan), the fact that Carlson used the proceeds from the Loans for personal purposes is evidence which supports and bolsters Clyde's testimony that at inception the Loans were intended for personal purposes. (RPII 66-68, 82-83; Exs. 25-29, 77)

In this regard, extrinsic evidence may be of aid in discerning the borrower's intended use of the loan proceeds and, in this regard, the Court

may consider the borrower's subsequent use of the loan proceeds. *Jansen*, 102 Wash. App. at 441. Specifically, the undisputed evidence demonstrated that Clyde needed (and used) the funds from the G&G Meats Loan to purchase an apartment in Canada and to repair and remodel his home in Ballard and Chelan. (RPII 66-69) With respect to the Columbia Meats Loan, the evidence shows that Clyde needed (and used) the money to fund a settlement in a lawsuit that he was involved in with his sister. (RPII 82-83) Additionally, Mr. Lien, an accounting expert, reviewed the tax returns filed by Northwest Seaplanes, Inc. for the years 2000-2004 and the Loans were not listed on the tax returns of Northwest Seaplanes, as would have been the customary practice at the time for business loans. (Ex. 77) In short, the documentary and expert evidence establishes that the proceeds from the Loans were used by Carlson for personal purposes, thereby substantiating Clyde's testimony and the documentation for the Loans.

C. This Court should affirm the judgment for penalties, costs and reasonable attorneys' fees in favor Carlson which the Trial Court properly awarded based on Pension Fund's violations of the Usury Statute.

Because the Loans are usurious, Carlson is entitled to recover amounts available pursuant to RCW 19.52.030(1), which sets forth the formula for computing the usury penalty. *Gemperle*, 44 Wash. App. at 775.

The Trial Court determined that Carlson is entitled to an award \$441,770, plus costs and reasonable attorneys' as a result of the Loans being usurious. Pension Fund does not challenge this calculation on appeal. *See* Appellant Brief.

V. FEES AND COSTS ON APPEAL

Both of the Notes provide that the prevailing party in a collection action is entitled to an award of attorneys' fees and costs. (Exs. 51, 55) RCW 4.84.330 awards attorney fees authorized by contract. The Usury Statute, RCW 19.52.032, is complementary to, and not in conflict with, RCW 4.84.330. *Jansen*, 6 P.3d at 104 (citing *King v. W. United Assur. Co.*, 100 Wash. App. 556, 561, 997 P.2d 1007 (2000)). Accordingly, per RAP 14.1 *et seq.* and RAP 18.1, Carlson requests, and should be entitled to, an award of attorney fees and expenses on appeal. *Jansen*, 6 P.3d at 104; *see also Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37, 51-54, 811 P.2d 673, 680-82 (1991); *Butzberger v. Foster*, 151 Wash. 2d 396, 413-14, 89 P.3d 689 (2004).

///

///

///

VI. CONCLUSION

For the reasons set forth above, this Court should affirm the Trial Court's decision to enter judgment against Pension Fund for its violations of the Usury Statute. Consequently, Carlson is entitled to award of attorneys' fees and costs as the substantially prevailing party on appeal.

Respectfully submitted this 12th day of November, 2015.

PETERSON RUSSELL KELLY PLLC

By: 

Marcia P. Ellsworth, WSBA No. 14334
Joshua D. Brittingham, WSBA No. 42061
mellsworth@prklaw.com
jbrittingham@prklaw.com
Attorneys for Respondents
10900 NE Fourth Street, Ste. 1850
Bellevue, WA 98004-8341
(425) 462-4700

APPENDIX A

March 18, 2015 Order Granting Judgment in Favor of Defendants

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2015 MAR 18 AM 9:22

1 I, MAVIS E. BETZ, Clerk of the Superior Court of
2 the State of Washington, for Skagit County, do
3 hereby certify that this is a true copy of the original
4 now on file in my office. Dated 3/18/15



MAVIS E. BETZ, County Clerk

By: [Signature]
Deputy Clerk

6 SUPERIOR COURT OF WASHINGTON IN AND FOR SKAGIT COUNTY

7 JACK A. JOHNSON, in his capacity as the trustee
8 of KEY DEVELOPMENT PENSION, f/k/a G & G
9 Meats Pension Fund and Columbia Meat Products
10 Pension Plan,

Plaintiff,

v.

11 CLYDE E. CARLSON and PRISCILLA A.
12 CARLSON, husband and wife, and the marital
13 community composed thereof,

Defendants .

NO. 12-2-02034-8

ORDER GRANTING JUDGMENT IN
FAVOR OF DEFENDANTS

[CLERK'S ACTION REQUIRED]

14 JUDGMENT SUMMARY

- 15 1. Judgment Creditor: Clyde E. Carlson
16 Priscilla A. Carlson
- 17 2. Judgment Debtor: ~~Jack A. Johnson, in his capacity as the~~ *SM*
18 trustee of Key Development Pension and
Key Development Pension.
- 19 3. Principal Judgment Amount: \$441,770.00
- 20 4. Attorneys' Fees: \$ 89,004.25
- 21 5. Costs: \$ 4,313.46
- 22 6. Total Judgment: \$ 535,087.71
- 23 7. Total of all judgment amounts to bear interest at 12% per annum from and after date of judgment.
- 24 8. Attorney for Judgment Creditor: Marcia P. Ellsworth
25 Peterson Russell Kelly PLLC
26 10900 NE Fourth Street
27 Bellevue, Washington 98004-8341
Telephone (425) 462-4700

ORDER GRANTING JUDGMENT IN FAVOR OF
DEFENDANTS - 1

102835 101 #28cm05bj.002

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower - 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

ORDER

THIS MATTER having come on for hearing before the undersigned judge, and the court having conducted a trial, entered findings of fact and conclusions of law awarding Defendants the amount of \$441,770.00 and the court determining that Defendants are the prevailing party in the above captioned claim, and therefore are entitled to an award of attorneys' fees and costs pursuant to the terms of the Notes and RCW 19.52.030 in the amount of \$89,004.25, costs of \$4,313.46, for a total judgment amount of \$535,087.71. The Court further having determined that the Defendants are entitled to entry of a judgment against Plaintiff in this total amount, and that there is no just reason to delay because the Court finds that no additional findings are required and that, therefore, a final judgment should be entered; now, therefore,

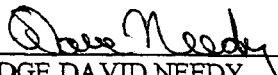
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered against Plaintiff ~~Jack A. Johnson in his capacity as the trustee~~ SM of Key Development Pension ("Plaintiff") in the principal amount of \$441,770.00, plus attorney fees in the amount of \$89,004.25, costs of \$4,313.46, for a total judgment amount of \$535,087.71. The total of all judgment amounts shall bear interest at the rate of 12% per annum from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Defendant shall have the right to recover additional attorneys' fees and costs as may be incurred in executing upon this Judgment and may apply for any supplemental judgments to enforce this Judgment.

JUDGMENT

The Clerk is directed to enter judgment against Plaintiff in the sums stated above. The total of all judgment amounts shall bear interest at 12% per annum from and after date of judgment.

DONE IN OPEN COURT this 18 day of March, 2015.



JUDGE DAVID NEEDY
Skagit County Superior Court

1 Presented by:

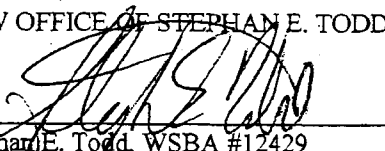
2 PETERSON RUSSELL KELLY PLLC

3 

4 By: Marcia P. Ellsworth
5 Marcia P. Ellsworth, WSBA #14334
6 Attorney for Defendants

6 Copy Received, Approved as to Form, Notice of
7 Presentation waived:

8 LAW OFFICE OF STEPHAN E. TODD

9 

10 By: Stephan E. Todd
11 Stephan E. Todd, WSBA #12429
12 Attorney for Plaintiffs

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

APPENDIX B

Findings of Fact and Conclusions of Law entered on January 29, 2015

J4

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
Hon. Judge David Needy
2015 JAN 29 AM 11:16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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,

NO. 12-2-02034-8

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

CLYDE E. CARLSON and PRISCILLA A. CARLSON, husband and wife, and the marital community composed thereof,

Defendants .

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.

ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1
102833 101 ok1 16005g7.003

PETERSON RUSSELL KELLY PLLC
1830 Skyline Tower - 16900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-8714

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2
102833 101 ok1 16005g7.003

Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-8714

1 2. Since about 1988, Clyde owned a float plane business, Northwest Seaplanes, Inc.
2 (the "Corporation") based out of Renton, Washington. The business was incorporated, maintained
3 its own set of accounting records, bank accounts and filed its own corporate tax returns. The
4 seaplane business is seasonal in the Pacific Northwest and Defendant's personal income was
5 derived from this business.
6

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

10 4. The first note in the amount of \$150,000 was executed in November 2000 in
11 favor of G & G Meats Pension Fund ("G&G Meats Note"). The interest rate was 18% for the
12 first six years, and then in 2006 the interest rate was reduced to 14%. The loan process was
13 very informal; there was no loan application or documentation of any kind required. There
14 was no underwriting; there was no credit review. This Note was originally due in November
15 2001, but the parties extended the due date multiple times until October 2012 when Plaintiff
16 demanded final payment. Defendants did not make the payment as requested.
17

18 5. G&G Meats issued a check in the amount of \$149,500 made payable to "Clyde
19 Carlson", and he deposited it into his personal bank account, and used the proceeds to pay a
20 variety of personal expenses.
21

22 6. The second Note, this time made to Columbia Meat Pension Plan, was executed in
23 April 2002 ("Columbia Meat Note") – also at 18% interest for the first four years, and then in
24 2006 the interest rate was reduced to 14%. The \$150,000 check was written to Clyde Carlson
25 personally, on the Key Development Corporation account – rather than from the "pension"
26 account. He again deposited it into his personal bank account and used the proceeds to pay
27

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

4 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

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

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

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

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

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

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

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

20 14. The Lender had the Ability to Document Business Loans. It is clear to this Court
21 that the Plaintiff had the ability to document business loans when he chose, specifically, the
22 Lakeside Heating and Air Conditioning Loan, prepared by Plaintiff-Lender and its counsel,
23 expressly provided in its documents that the "loan evidenced by the note is for business
24
25
26
27

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

3 15. Additionally, in the Lakeside Loan and the Tonkka Loan, the Plaintiff-Lender
4 identified the business entity as the borrower and the individuals as co-borrowers or guarantors.
5 This is more indicative of a business loan than having only the individuals as the borrower, when
6 the individuals also are the owners of a business. The Plaintiff made other loans within two years
7 of the Columbia Meats Loan where the documentation specifically stated that the loan was for a
8 business purpose. If Plaintiff truly understood the Carlson loans to be business or commercial
9 loans, Plaintiff had the ability through its counsel, to document that the loan was a business or
10 commercial loan.
11

12 16. Lack of Lender Documentation. Over the years Plaintiff and its predecessors have
13 made over 40 loans. However, Plaintiff only had loan files and documents in its possession
14 relating to loans that had not yet been paid off. These loans were the Carlson Loans, the Lakeside
15 Loan, the French Loans and the Tonkka Loan. All other loan files and documents had been
16 destroyed or returned to the borrower once the loan was repaid. The destruction of the loan
17 documents is noted only to point out that the Court did not have the benefit of seeing how the
18 Plaintiff documented other loans contemporaneously with the Carlson Loans.
19

20 17. The Loan Proceeds were Paid Directly to Mr. Carlson. In exchange for the
21 Notes, the Plaintiff issued the payment directly to Mr. Carlson, not to his corporation. The
22 facts are undisputed that these checks were deposited into Mr. Carlson's personal account.
23

24 18. Plaintiff used Counsel to prepare Loan Documents. Mr. Johnson indicated that
25 he believed the loans were for a business purpose, yet he controlled the preparation of the
26 loans and used his counsel to prepare the Loans.
27

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

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

7 27. "[W]hen a loan is usurious on its face, as in the present case, the burden is upon the
8 lender to prove that its loan qualifies for the narrow transaction exemption."¹ "The borrower's
9 intended use for the loan proceeds must be characterized according to the manifestations of intent,
10 if any, that the borrower made to the lender *at the time the parties entered into the loan contract.*"²
11 As enumerated in the above findings of fact, the testimony of the parties is neither determinative
12 nor helpful with regard to the purpose of the loans. The only contemporary documentation are the
13 two notes themselves and the payments of the loan proceeds to borrower. Neither of the Carlson
14 Notes specifies a business or commercial purpose.³ The Plaintiff paid the loan proceeds to Mr.
15 Carlson personally. The Plaintiff lender has not carried its burden in proving that these loans
16 qualify for the narrow transaction exemption.
17

18 28. The lawful rate of a personal loan is twelve percent (12%), in this case, the Loans
19 were usurious because they each bear a stated interest rate of eighteen percent (18%).
20

21 29. Because the Loans are usurious, the Defendants are entitled to recover their court
22 costs and reasonable attorneys' fees in connection with this lawsuit and the interest in the amount
23

24 ¹ *Aetna Finance Co. v. Darwin*, 38 Wn. App. 921, 924-25 (1984), review denied, 103 Wn 2d 1019 (1985).

25 ² RCW 19.52.025. See also, *Trust of Strand v. Wel-Co Group*, 120 Wn. App. 828, 835 (Wn. App. 2004).

26 ³ *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).

27 ⁴ *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);

1 of \$441,770.00 that has been paid to the Lenders pursuant to RCW 19.52.030. RCW 19.52.030
 2 provides, in relevant part, the following:

3 If any action on such contract proof be made that greater rate of interest has been
 4 directly or indirectly contracted for or taken or reserved, the creditor shall only be
 5 entitled to the principal, less the amount of interest accruing thereon at the rate
 6 contracted for; and if interest shall have been paid, the creditor shall only be
 7 entitled to principal less twice the amount of interest paid, and less the amount of
 8 all accrued and unpaid interest; and the debtor shall be entitled to costs and
 9 reasonable attorneys' fees plus the amount by which the amount the debtor has paid
 10 under the contract exceeds the amount to which the creditor is entitled⁴

11 30. To date Mr. and Mrs. Carlson have paid \$234,020.00 on the \$150,000.00 G&G
 12 Meats Note and \$207,750.00 on the \$150,000.00 Columbia Meats Note. The amounts paid by the
 13 Carlsons on the Notes consist solely of interest payments. The following charts illustrate the
 14 damages calculations based upon the formula in the usury statute, RCW 19.52.030:

Statute	Penalty Calculations	Lenders' Credit for Principal	Total Due Plaintiff
"Creditor shall only be entitled to Principal"		\$150,000.00—G&G Meats \$150,000.00—Columbia Meats	
"Less twice the amount of interest paid"	\$468,040.00- G&G Meats \$415,500.00 – Columbia Meats		
"And less the amount of all accrued and unpaid interest"	N/A		
Total Due Plaintiff			\$0

Statute	Due Carlsons
"The Debtor shall be entitled to costs and reasonable attorneys' fees"	Tba
"plus the amount by which the amount he has paid under the contract" exceeds the amount to which the creditor is entitled" (from above)	\$234,020.00 - G&G Meats \$207,750.00 – Columbia Meats
Total Due Carlsons	\$441,770.00 + attys fees and costs

27 ⁴ RCW 19.52.030(1). See *Gemperle v. Crouch*, 44 Wn. App. 772, 775 (Wa. App. 1986) ("RCW 19.52.030 provides the formula for computing the penalty).

APPENDIX C

G&G Meat Note

PROMISSORY NOTE

\$150,000.00

November 10, 2000
Mill Creek, Washington

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, and the successors and assigns of such lender ("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. Principal and interest shall be payable in lawful money of the United States, to Lender at P.O. Box 12983, Mill Creek, Washington 98082 or at such other place as any holder hereof may designate in writing.

Borrower shall make interest only payments of Six Thousand Seven Hundred and Fifty Dollars (\$6750.00) to Lender on July 30, 2001, August 30, 2001, September 30, 2001 and October 30, 2001. The principal balance and all accrued and unpaid interest shall be due in full on November 10, 2001 (the "Maturity Date").

Borrower shall have the option, if not in default under this Note, to extend the Maturity Date of this Note until November 10, 2002. All terms and conditions of this Note shall govern Borrower's obligations during any extension period.

Borrower shall not be permitted to prepay all or any of the principal amount of this Note before November 10, 2001, unless Borrower pays Lender a penalty calculated by multiplying \$2250.00 by the number of months remaining on the initial term of this Note.

The obligations of this Note shall be joint and several. Except as expressly provided in this Note, Borrower and its successors and assigns, and all endorsers and persons liable or to become liable on this Note, severally and expressly waive diligence, presentment, demand, protest, notice of any kind whatsoever, and any exemption under any homestead exemption laws or any other exemption or insolvency laws.

This Note has been issued pursuant to and is secured by that certain Security Agreement dated concurrently herewith, between Borrower and Lender (the "Security Instrument"). Such Security Instrument and all other instruments evidencing or securing the indebtedness hereunder are hereby made part of this Note and are deemed incorporated herein in full. Any default which continues beyond any applicable grace period stated in the Security Instrument in any condition, covenant, obligation, or agreement contained in the Security Instrument shall constitute a default under this Note and shall entitle Lender to accelerate the maturity of the entire indebtedness hereunder and take such other actions as may be provided for in the Security Instrument or in this Note.

If default is made in the payment of principal or interest hereunder when due, or upon maturity hereof, by acceleration or otherwise, and such default is not cured within ten (10) days after receiving written notice thereof from Lender or the holder hereof, the outstanding principal balance of this Note and, to the extent permitted by law, any overdue payment of interest hereunder, shall become due and payable upon notice to Borrower, at the election of Lender or the holder of this Note. In the event any payment under this Note is five (5) or more days delinquent, Borrower shall pay Lender a late charge of five percent (5%) of the installment then owing as compensation to Lender for the damages caused as a result of such late payment including, without limitation, administrative expenses. In addition, from and after the date of any default under this Note, all remaining unpaid principal and interest under this Note, and any other amounts due under this Note, shall bear interest at the lesser of twenty five percent (25%) per annum or the maximum rate permitted by law, until paid in full.

In any action or proceeding to recover any sum herein provided for, no defense of adequacy of security or that resort must first be had to security or to any other person shall be asserted. All of the covenants, provisions, and conditions herein contained are made on behalf of, and shall apply to and bind the respective distributees, personal representatives, successors, and assigns of the parties hereto, jointly and severally. Each and every party signing or endorsing this Note binds himself as principal and not as surety.

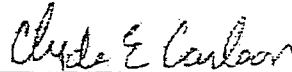
It is the intent of Borrower and Lender to comply at all times with the usury and other applicable United States federal laws or laws of the State of Washington (to the extent not preempted by federal law, if any) now or hereafter governing the interest payable on this Note or the Security Instruments, to the extent any of the same are applicable hereto. If the laws of the State of Washington or the United States are revised, repealed, or judicially interpreted so as to render usurious any amount called for under this Note or the Security Instruments, or any other instrument contracted for, charged, taken, reserved, or received with respect to the indebtedness secured or evidenced hereby, or the maturity of this Note is accelerated as herein provided, or if any prepayment by Borrower results in Borrower's having paid any interest in excess of that permitted by law, then it is Borrower's and Lender's intent that, notwithstanding any provision to the contrary contained in this Note or in the Security Instrument (a) all excess amounts theretofore collected by Lender be credited to the principal balance of this Note (or, if this Note has been paid in full, refunded to Borrower), and (b) the provisions of this Note immediately be deemed reformed, and the amount thereafter collectible hereunder and thereunder reduced, without necessity of the execution of any new document, so as to comply with the then applicable law.

The nonexercise by the holder of any of the holder's rights hereunder in any instance shall not constitute a waiver thereof in that or any subsequent instance. 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.

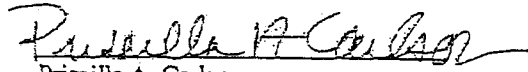
Time is of the essence of this Note and of the payments and performances hereunder and under the Security Instruments in connection herewith.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, MODIFY OR AMEND ANY TERMS OF THE LOAN DOCUMENTS, RELEASE ANY GUARANTOR, FORBEAR FROM ENFORCING REPAYMENT OF THE LOAN OR THE EXERCISE OF ANY REMEDY UNDER THE LOAN DOCUMENTS, OR MAKE ANY OTHER FINANCIAL ACCOMMODATION PERTAINING TO THE LOAN ARE ALL UNENFORCEABLE UNDER WASHINGTON LAW.

This Note is to be construed in all respects and enforced according to the laws of the State of Washington.



Clyde E. Carlson



Priscilla A. Carlson

APPENDIX D

Columbia Meat Note

copy

PROMISSORY NOTE

\$150,000.00

April 18, 2002
Mill Creek, Washington

FOR VALUE RECEIVED, Clyde E. Carlson and Priscilla A. Carlson (collectively, "Borrower" herein) promises to pay to the order of Columbia Meat Products Pension Plan, and the successors and assigns of such lender ("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. Principal and interest shall be payable in lawful money of the United States, to Lender at P.O. Box 12983, Mill Creek, Washington 98082 or at such other place as any holder hereof may designate in writing.

The principal balance and all accrued and unpaid interest shall be due in full on April 17, 2003 (the "Maturity Date").

The obligations of this Note shall be joint and several. Except as expressly provided in this Note, Borrower and its successors and assigns, and all endorsers and persons liable or to become liable on this Note, severally and expressly waive diligence, presentment, demand, protest, notice of any kind whatsoever, and any exemption under any homestead exemption laws or any other exemption or insolvency laws.

This Note has been issued pursuant to and is secured by that certain Security Agreement dated concurrently herewith, between Borrower and Lender (the "Security Instrument"). Such Security Instrument and all other instruments evidencing or securing the indebtedness hereunder are hereby made part of this Note and are deemed incorporated herein in full. Any default which continues beyond any applicable grace period stated in the Security Instrument in any condition, covenant, obligation, or agreement contained in the Security Instrument shall constitute a default under this Note and shall entitle Lender to accelerate the maturity of the entire indebtedness hereunder and take such other actions as may be provided for in the Security Instrument or in this Note.

If default is made in the payment of principal or interest hereunder when due, or upon maturity hereof, by acceleration or otherwise, and such default is not cured within ten (10) days after receiving written notice thereof from Lender or the holder hereof, the outstanding principal balance of this Note and, to the extent permitted by law, any overdue payment of interest

hereunder, shall become due and payable upon notice to Borrower, at the election of Lender or the holder of this Note. In the event any payment under this Note is five (5) or more days delinquent, Borrower shall pay Lender a late charge of five percent (5%) of the installment then owing as compensation to Lender for the damages caused as a result of such late payment including, without limitation, administrative expenses. In addition, from and after the date of any default under this Note, all remaining unpaid principal and interest under this Note, and any other amounts due under this Note, shall bear interest at the lesser of twenty five percent (25%) per annum or the maximum rate permitted by law, until paid in full.

In any action or proceeding to recover any sum herein provided for, no defense of adequacy of security or that resort must first be had to security or to any other person shall be asserted. All of the covenants, provisions, and conditions herein contained are made on behalf of, and shall apply to and bind the respective distributees, personal representatives, successors, and assigns of the parties hereto, jointly and severally. Each and every party signing or endorsing this Note binds himself as principal and not as surety.

It is the intent of Borrower and Lender to comply at all times with the usury and other applicable United States federal laws or laws of the State of Washington (to the extent not preempted by federal law, if any) now or hereafter governing the interest payable on this Note or the Security Instruments, to the extent any of the same are applicable hereto. If the laws of the State of Washington or the United States are revised, repealed, or judicially interpreted so as to render usurious any amount called for under this Note or the Security Instruments, or any other instrument contracted for, charged, taken, reserved, or received with respect to the indebtedness secured or evidenced hereby, or the maturity of this Note is accelerated as herein provided, or if any prepayment by Borrower results in Borrower's having paid any interest in excess of that permitted by law, then it is Borrower's and Lender's intent that, notwithstanding any provision to the contrary contained in this Note or in the Security Instrument (a) all excess amounts theretofore collected by Lender be credited to the principal balance of this Note (or, if this Note has been paid in full, refunded to Borrower), and (b) the provisions of this Note immediately be deemed reformed, and the amount thereafter collectible hereunder and thereunder reduced, without necessity of the execution of any new document, so as to comply with the then applicable law.

The nonexercise by the holder of any of the holder's rights hereunder in any instance shall not constitute a waiver thereof in that or any subsequent instance. 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.

Time is of the essence of this Note and of the payments and performances hereunder and under the Security Instruments in connection herewith.

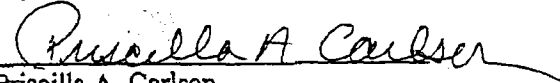
ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, MODIFY OR AMEND ANY TERMS OF THE LOAN DOCUMENTS, RELEASE ANY GUARANTOR, FORBEAR FROM ENFORCING REPAYMENT OF THE LOAN OR THE EXERCISE OF ANY REMEDY UNDER THE LOAN DOCUMENTS, OR MAKE ANY

OTHER FINANCIAL ACCOMMODATION PERTAINING TO THE LOAN ARE ALL UNENFORCEABLE UNDER WASHINGTON LAW.

This Note is to be construed in all respects and enforced according to the laws of the State of Washington.



Clyde E. Carlson



Priscilla A. Carlson