FILED
Court of Appeals
Division I
State of Washington
10/3/2019 3:11 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2019
BY SUSAN L. CARLSON
CLERK

97737-2

No. 78053-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

GARY NORDLUND,

Respondent,

And

Defendants,

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

PETITION FOR REVIEW BY SUPREME COURT

DAVIES PEARSON, P.C.

By: Brian M. King, WSBA No. 29197
Ingrid McLeod, WSBA No. 44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondent Nordlund

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1-2

C. ISSUE PRESENTED FOR REVIEW 2

D. STATEMENT OF THE CASE 2-5

E. ARGUMENT 5-19

1. *Statutory framework under chapter 19.52 RCW* 6-8

2. *The Arneson II Court failed to properly conduct the required de novo review of the order summarily dismissing the Trust's statutory usury claim and improperly declined to consider dispositive legal issues that were robustly addressed below* 8-12

3. *The Trust's statutory usury claim is time-barred because actions brought by borrowers to recover statutory usury penalties under RCW 19.52.030 may only be brought through RCW 19.52.032 and are subject to a strict, six-month limitations period.* 12-13

4. *Statutory language in RCW 19.52.080 and non-controlling case law applying it does not vitiate the plain statutory language of RCW 19.52.032 limiting recovery of statutory usury penalties to natural persons* 14-19

F. CONCLUSION 19-20

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Dussault,
181 Wn.2d 360, 333 P.3d 395 (2014)..........16

Arneson v. Nordlund, et al.,
Noted at 186 Wn. App. 1037 (2015) (*Arneson I*) 4

Arneson v. Nordlund, et al.,
Noted at -- Wn. App. -- (2019) (*Arneson II*) ....*passim*

Christensen v. Ellsworth,
162 Wn.2d 365, 173 P.3d 228 (2007)..........16

Duckworth v. City of Bonney Lake,
91 Wn.2d 19, 586 P.2d 860 (1978)..........9-10

Ertman v. City of Olympia,
95 Wn.2d 105, 621 P.2d 724 (1980)..........9-11

ETCO, Inc. v. Dep't of Labor & Indus.,
66 Wn. App. 302, 831 P.2d 1133 (1992)..........18

Folsom v. Burger King,
135 Wn.2d 658, 958 P.2d 301 (1998)..........8-10

In re Stockwell,
179 Wn.2d 588, 316 P.3d 1007 (2014) 18

Johnston v. Beneficial Mgmt Corp. of America,
85 Wn.2d 637, 538 P.2d 510 (1975)..........12

Keck v. Collins,
184 Wn.2d 358, 357 P.3d 1080 (2015)..........8

King Cnty. v. Seawest Inv. Assos., LLC,
141 Wn. App. 304, 170 P.3d 53 (2007)..........9

///

Mackey v. Maurer,
153 Wn. App. 107, 220 P.3d 1235 (2009..............7, 12-13, 15, 20

Nguyen v. Sacred Heart Med. Ctr,
97 Wn. App. 728, 987 P.2d 634 (1999)..................................9

Paulman v. Filtercorp,
127 Wn.2d 387, 899 P.2d 1259 (1995)........................8, 15-20

Plein v. Lackey,
149 Wn.2d 214, 67 P.3d 1061 (2003)..................................9

Plese-Graham, LLC v. Loshbaugh,
164 Wn. App. 530, 269 P.3d 1038 (2011)..........................8-9

State v. Robinson,
171 Wn.2d 292, 253 P.3d 84 (2011)..................................11

Wills v. Kirkpatrick,
56 Wn. App. 757, 785 P.2d 834 (1990)..................................9

Statutes **Page(s)**

Chapter 19.52 RCW 6

RCW 19.52.005 6

RCW 19.52.030 ....*passim*

RCW 19.52.032 ....*passim*

RCW 19.52.080 ....7, 14, 16-19

Other Authorities **Page(s)**

CR 56 8

RAP 2.5...9-11

RAP 13.4 ....5, 12

A. IDENTITY OF PETITIONER

Respondent Gary Nordlund petitions the Court to accept review of the unpublished decision of the Court of Appeals, Division I that is designated in Part B of this Petition for Review.

B. COURT OF APPEALS DECISION

In its September 3, 2019 unpublished opinion, the Court of Appeals, Division I addressed three issues: (1) summary judgment on the Appellant's statutory usury claim, (2) summary judgment on the Appellant's common law usury or assumpsit claim, and (3) the trial court's refusal to give one of the Appellant's proposed jury instructions on the issues submitted to the jury. The Court of Appeals reversed the two appealed summary judgment orders, remanding those issues for further proceedings, and affirmed the trial court's refusal to provide the Appellant's requested jury instruction. A copy of this opinion is attached hereto as Appendix A.

Through this Petition for Review, Mr. Nordlund seeks review only of the Court of Appeals' reversal of the order summarily dismissing the Appellant's statutory usury claim, which presents a focused question of law on the role of appellate courts in conducting de novo review of summary judgment orders and on the proper interpretation of the plain

language statutory limitations on actions for statutory usury penalties under RCW 19.52.032.

C. ISSUE PRESENTED FOR REVIEW

1. The trial court dismissed the Appellant's claim for statutory usury penalties based on the plain language of the controlling statute, RCW 19.52.032. The Court of Appeals reversed but, in doing so, it declined to consider a controlling legal issue raised below. Instead, it relied solely on a distinguishable case that analyzed RCW 19.52.080. Under these circumstances, should this Court accept review to decide this case consistently with existing authority and to clarify the appellate analysis required of dispositive legal issues raised below? YES.

D. STATEMENT OF THE CASE

Penny Arneson and her former husband Kenneth Sweet formed the 6708 Tolt Highlands Personal Residence Trust (the "Trust") in late 2006 as a key component of a complex, multijurisdictional, asset protection plan. CP at 1123, 1193, 2166, 2214-51. Although Ms. Arneson and Mr. Sweet were the sole trustees of the Trust, they were not its beneficiaries. *Id.* CP at 2254-78. Rather, the benefit of the Trust flowed through a Nevada limited partnership to an irrevocable trust based in the Cook Islands. CP at 2166-2251. The Trust's primary asset was real property located at 6708 Tolt Highlands in Carnation, Washington that was improved with a lavish home that included a swimming pool and home theater. CP at 1524, 2334-39.

In their capacities as Trustees, Ms. Arneson and Mr. Sweet took out a series of loans in the Trust's name. CP at 5-6, 1101-04, 2265, 2341-61. The third such loan that Ms. Arneson and Mr. Sweet took out as Trustees of the Trust was a private money loan in the face amount of $375,000 from Gary Nordlund, a boat builder by trade. *Id.*; CP at 274-85.

The Trust's loan from Mr. Nordlund was memorialized by a promissory note and deed of trust that provided that "[a]ll principal and accrued interest were due in full . . . on January 15, 2011." CP at 1104; *see also* CP at 949, 952. But the Trust did not remit any payment on its loan from Mr. Nordlund when due in January 2011. *See* CP at 1107. Through counsel, Mr. Nordlund demanded payment on the Trust's loan in March 2011. CP at 9-10, 13. When the Trust had still not tendered payment on its loan from Mr. Nordlund by August 2011, Mr. Nordlund began nonjudicial foreclosure proceedings on the deed of trust. CP at 1105, 1107. In January 2012, nearly 12-full months after the Trust's loan from Mr. Nordlund came due, Ms. Arneson as Trustee of the Trust commenced this proceeding seeking to enjoin the nonjudicial foreclosure of the deed of trust and recovery on multiple bases, including a claim seeking to recover statutory usury penalties. CP at 1-93.

Pursuant to court order, the nonjudicial foreclosure was enjoined, the Trust's real property was sold on the open market, and the sale proceeds

were deposited into the court registry. CP at 94-95, 1105-07. In 2013, the Trust's complaint was dismissed on summary judgment; however, Division I of the Court of Appeals reversed in part and remanded for further proceedings in an unpublished opinion. *Arneson v. Nordlund*, et al., noted at 186 Wn. App. 1037 (2015) (*Arneson I*).[1]

On remand, Mr. Nordlund moved for summary dismissal of the Trust's statutory usury claim, arguing both that the statutory usury claim was time-barred under RCW 19.52.032 and that the Trust lacked standing to assert a statutory usury claim. CP at 929-39, 1130-35, 1407-16. The trial court granted Mr. Nordlund's motion and summarily dismissed the Trust's statutory usury claim, however, in the order granting Mr. Nordlund's motion for partial summary judgment, the court interlineated the following language: "The Trust, as the debtor who is not a natural person, does not have standing to pursue a claim under the plain language of that statute." CP at 1418-21.

Following a jury trial on certain of the Trust's remaining claims, the Trust appealed the summary dismissal of its statutory usury claim. CP at 5089-99. In its opening brief, however, the Trust elected not to present any argument on the strict, six-month statute of limitations imposed by RCW 19.52.032. *Br. of Appellant* at 15-22; *see also Br. of Resp't* at 12-

[1] For the Court's convenience, a copy of the March 30, 2015 opinion issued in *Arneson I* is appended hereto as Appendix B.

14. Even though the six-month statute of limitations on statutory usury claims under RCW 19.52.032 was vigorously litigated before the court on summary judgment, ignored by the Trust in its opening appellate brief, and raised as a valid legal basis to affirm the trial court, the Court of Appeals in its September 3, 2019 decision in this matter, noted at – Wn. App. 2d – (2019), 2019 WL 4166941 (*Arneson II*), wholly disregarded this dispositive statute of limitations issue. *Arneson II*, slip op. at 11, n.7. Instead, the Court of Appeals posited that there was no ruling on the statute of limitations issue for it to review and it reversed the summary dismissal of the Trust's statutory usury claim based on a flawed reading of law. *Id.* at 8-11.

E. ARGUMENT

This Court will accept review of a Court of Appeals decision terminating review if it is in conflict with a decision of this Court, or in conflict with another Court of Appeals decision, or an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2), (4). The issues before the Court in this Petition for Review narrowly focus on the statutory requirements for a debtor to commence an action seeking recovery of statutory usury penalties under chapter 19.52 RCW, an issue on which precedent is outdated and limited. Perhaps due to scarce precedent, the Court of Appeals' opinion in *Arneson II* is in conflict

with controlling authority and presents an issue of substantial public interest such that review by this Court is proper under RAP 13.4(b).

1. *Statutory framework under chapter 19.52 RCW.*

The Usury Act is codified at chapter 19.52 RCW and is designed to "protect the *residents of this state* from debts bearing burdensome interest rates . . . ." RCW 19.52.005 (emphasis added). As such, the Act creates narrow, quasi-punitive penalties that certain borrows *may* be able to recover from lenders on certain loans. *See* RCW 19.52.030(1). These specific statutory usury penalties are established by RCW 19.52.030, which provides:

> If a greater rate of interest than is allowed by statute shall be contracted for or received or reserved, the contract shall be usurious, but shall not, therefore, be void. If in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the creditor shall only be entitled to the principal, less the amount of interest accruing thereon at the rate contracted for; and if interest shall have been paid, the creditor shall only be entitled to the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest; and the debtor shall be entitled to costs and reasonable attorneys' fees plus the amount by which the amount the debtor has paid under the contract exceeds the amount to which the creditor is entitled: ***PROVIDED, That the debtor may not commence an action on the contract to apply the provisions of this section if a loan or forbearance is made to a corporation engaged in a trade or business for the purposes of carrying on said trade or business unless there is also, in connection with such loan or forbearance, the creation of liability on the part of a natural person or that person's***

> ***property for an amount in excess of the principal plus interest allowed pursuant to RCW 19.52.020.*** The reduction in principal shall be applied to diminish pro rata each future installment of principal payable under the terms of the contract.

RCW 19.52.030(1) (emphasis added). When available, the statutory usury penalties under RCW 19.52.030(1) may only be invoked through a proceeding under RCW 19.52.032. *Mackey v. Maurer*, 153 Wn. App. 107, 111-13, 220 P.3d 1235 (2009). In turn, RCW 19.52.032 provides:

> The debtor, ***if a natural person***, or the creditor may bring an action for declaratory judgment to establish whether a loan or forbearance contract is or was usurious, and ***such an action shall be considered an action on the contract for the purposes of applying the provisions of RCW 19.52.030. . . . No such an action shall be commenced after six months following the date the final payment becomes due***, whether by acceleration or otherwise, ***nor after six months following the date the principal is fully paid, whichever first occurs. . . .***

RCW 19.52.032 (emphasis added). Thus, in order for a borrower to commence an action seeking statutory usury penalties, the borrower must (a) be a "natural person," and (b) timely commence the action seeking statutory usury penalties within the brief, six-months limitations period, which is triggered by the *earlier of* the date the final loan payment is due or from the date the loan principal is fully paid. *Id.* The appellate court, however, elected not to consider the dispositive, and heavily litigated, limitations issue. Instead, it reversed the summary dismissal of the Trust's

RCW 19.52.**032** statutory usury claim based on its analysis of RCW 19.52.**030**, RCW 19.52.**080**, and this Court's 24-year-old opinion issued in *Paulman v. Filtercorp*, 127 Wn.2d 387, 899 P.2d 1259 (1995). *Arneson II*, slip op. at 7-11. Thus, the *Arneson II* opinion conflicts with precedent from this Court, other opinions of the Court of Appeals, and presents a matter of substantial public importance that should be clarified by this Court.

2. *The Arneson II Court failed to properly conduct the required de novo review of the order summarily dismissing the Trust's statutory usury claim and improperly declined to consider dispositive legal issues that were robustly addressed below.*

"The purpose of summary judgment is not to cut litigants off from their right to trial if they really have evidence that must be decided by a fact finder at trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exist[s]." *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015). Thus, summary judgment is proper when the pleadings and evidence before the court demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Our appellate courts review orders granting summary judgment de novo, ***meaning the appellate court conducts the same inquiry as the trial court***. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Plese-Graham,*

LLC v. Loshbaugh, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011). In doing so, appellate courts generally "***limit review to claims argued before the trial court***[,]" especially on appeals from summary judgment. *Nguyen v. Sacred Heart Med. Ctr*, 97 Wn. App. 728, 733, 987 P.2d 634 (1999) (emphasis added). As such, any findings of fact and conclusions of law entered by the trial court on summary judgment are superfluous and not binding on the appellate court. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978). Consequently, appellate courts may affirm a trial court's order granting summary judgment on *any basis supported by the record*, even "on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *see also King Cnty. v. Seawest Inv. Assos., LLC*, 141 Wn. App. 304, 310, 170 P.3d 53 (2007). Thus, Washington appellate courts even consider application of statutes not cited below "when necessary to a proper decision." *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834 (1990). Indeed, on appeal, "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Thus, "where a judgment or order is correct, it ***will not*** be reversed merely because the trial court gave the wrong reason for its rendition." *Ertman v.*

City of Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) (emphasis added).

Here, the Court of Appeals acknowledges that one of the two express bases of Mr. Nordlund's motion for summary judgment was the Trust's failure to commence its action for statutory usury damages within the strict six-month statute of limitations under RCW 19.52.032. *Arneson II*, slip op. at 11, n.7. Indeed, the Trust's failure to timely commence a statutory usury action under RCW 19.52.032 was robustly briefed and argued below. CP at 989-1421. But the Court of Appeals simply elected ***not to conduct the same inquiry as the trial court*** because it declined to even consider the fully briefed and dispositive limitations issue. *Arneson II*, slip op. at 11. n.7; CP at 989-1421. As such, the *Arneson II* Court failed to conduct an appropriate de novo review of the summary judgment order, as required by *Folsom* and its progeny. *Supra.*

Instead, the appellate court appears to have given paramount importance to the trial court's interlineation in the order that the Trust lacked standing to bring a statutory usury action because it is not a natural person. *Supra.* Doing so, however, ignored the record and issues actually before the court and improperly attributes controlling weight to what is essentially a superfluous conclusion of law by the trial court. *Duckworth*, 91 Wn.2d at 21-22. It also improperly elevated form over substance and

reversed a legally correct summary judgment order supported by the record based solely on the trial court's interlineation, which is improper under *Ertman* even if the trial court's given basis was wrong (it was not). 95 Wn.2d at 108; *infra.*

Moreover, while the appellate court has discretion *to consider issues not raised below* under RAP 2.5(a), that discretion does not extend to allow the appellate court *to decline to consider dispositive legal issues raised and briefed below and argued on appeal*. *See* RAP 2.5(a). Indeed, the purpose of allowing appellate court discretion under RAP 2.5(a) to decide whether or not to consider issues *not raised below* is designed to promote judicial efficiency and avoid unnecessary appeals. *See e.g., State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). The Court of Appeals' decision here *not to consider* a controlling issue of law that *was briefed and argued below*, however, runs afoul of the purpose of judicial efficiency and will lead to additional litigation. *Id.*; CP at 989-1421. Certainly, if remanded, the appellate court's opinion invites re-filing of a motion seeking summary dismissal of the Trust's statutory usury claim on statute of limitations grounds and, if past is precedent in this case, another appeal is the likely result. At such time, the appellate court will need to address the strict time-bar of the Trust's statutory usury claim under RCW 19.52.032 in a future appeal, which will cause further congestion of our

courts and further delay of the ultimate resolution of this case that has already been pending since January 2012. Accordingly, the *Arneson II* Court's opinion is in conflict with the opinions of this Court and other opinions of the Court of Appeals, and presents a legal issue of substantial public interest such that this court should accept review under RAP 13.4.

3. *The Trust's statutory usury claim is time-barred because actions brought by borrowers to recover statutory usury penalties under RCW 19.52.030 may only be brought through RCW 19.52.032 and are subject to a strict, six-month limitations period.*

An action under RCW 19.52.032 is the sole mechanism for a borrower to seek the statutory usury penalties defined in RCW 19.52.030(1). *Mackey*, 153 Wn. App. at 112-13. Under RCW 19.52.032, however:

> ***No such action shall be commenced after six months following the <u>date the final payment becomes due</u>,*** whether by acceleration or otherwise, ***nor after six months following the <u>date the principal is fully paid</u>, <u>whichever occurs first</u> . . . .***

RCW 19.52.032 (emphasis added). Specific statutes of limitation, like the strict six-month statute of limitations mandated by RCW 19.52.032, control over more general statutes of limitation. *Johnston v. Beneficial Mgmt Corp. of America*, 85 Wn.2d 637, 644-45, 538 P.2d 510 (1975). It is undisputed here that repayment of the Trust's loan from Mr. Nordlund was due in full on January 15, 2011; the Trust failed to repay its loan from

Mr. Nordlund when due in January 2011 such that the January 15, 2011 due date triggered the six-month statute of limitations; the Trust failed to commence this suit seeking imposition of statutory usury penalties until January 5, 2012—nearly 12-full months after the loan came due in full; and the only payments on the Trust's loan from Mr. Nordlund since the January 2010 loan closing were made pursuant to court orders in this nearly eight-year litigation. CP at 1, 9, 23, 949, 952, 1104-05, 1107; *Arneson II*, slip op. at 2-4, 6. As such, the Trust's statutory usury claim is time-barred under RCW 19.52.032 and the Court of Appeals, Division Three *Mackey* case. *Id.*; *see also Mackey*, 153 Wn. App. at 112-13. The *Arneson II* Court's election not to consider this controlling issue is a matter of substantial public importance that this Court should address and it also is inconsistent with *Mackey*.

As such, this Court should accept review and, on review, this Court should address this statute of limitations issue, reverse the appellate court, and affirm summary judgment in favor of Mr. Nordlund on the Trust's statutory usury claim.

///

///

///

4. ***Statutory language in RCW 19.52.080 and non-controlling case law applying it does not vitiate the plain statutory language of RCW 19.52.032 limiting recovery of statutory usury penalties to natural persons.***

In *Arneson I*, the Court of Appeals held that a genuine factual dispute regarding whether the Trust's loan was for a business or commercial purpose, as opposed to a personal or consumer purpose, precluded summary dismissal of the Trust's usury and Consumer Loan Act claims against Mr. Nordlund under the commercial purpose exception to the Usury Act and Consumer Loan Act. *Arneson I*, slip op. at 13-18. Following remand, Mr. Nordlund sought summary dismissal of the Trust's statutory usury claim on *other grounds*, namely that, under RCW 19.52.032, the Trust's claim was time-barred and that the Trust lacked standing to commence an action because it is an entity, rather than a "natural person." CP at 989-39, 1405-17. As such, the purpose of the Trust's loan from Mr. Nordlund was not germane to Mr. Nordlund's 2016 motion seeking summary dismissal of the Trust's statutory usury claim under the plain language of RCW 19.52.032.[2] *See* CP at 989-1421.

Nonetheless, the appellate court in *Arneson II* maintained its prior focus on the purpose of the Trust's loan and held that the trial court here

---

[2] As the appellate court correctly noted, whether the Trust's loan from Mr. Nordlund was for a commercial or consumer purpose is disputed. *Arneson II*, slip op. at 11. Of course, as discussed herein, summary dismissal of the Trust's statutory usury claim was proper without regard to the loan's purpose and can be affirmed without further evidentiary proceedings.

erred in concluding that "only a natural person could sue or defend on the basis of a claim of usury—regardless of the purpose of the loan." *Arneson II*, slip op. at 9. In reaching this result, the appellate court passed over the controlling language of RCW 19.52.032, its referring statute RCW 19.52.030, and *Mackey*; instead, the court focused on RCW 19.52.080 and this Court's 1995 *Paulman v. Filtercorp* case harmonizing RCW 19.52.080 and RCW 19.52.030 under distinguishable factual circumstances. *Arneson II*, slip op. at 7-11.

Indeed, RCW 19.52.032 provides: "The debtor, ***if a natural person***, or the creditor may ***bring an action for declaratory judgment*** to establish whether a loan or forbearance contract is or was usurious, and such an action shall be considered an action on the contract for purposes of applying the provisions of RCW 19.52.030. . . ." (Emphasis added). Although RCW 19.52.032 has not been amended since it was enacted in 1967, its referring statute, RCW 19.52.030, the provision that establishes the statutory usury penalties that may be pursued only through proceedings commenced under RCW 19.52.032, also includes "natural person" language has been amended ***and the legislature maintained its "natural person" language when it amended RCW 19.52.030 in 1989.***

Of course, when analyzing statutes, the court's objective is to determine the legislature's intent and, if the statute's meaning is plain on

its face, then the court *must* give effect to that plain meaning as an expression of legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (emphasis added). "Where a statute is unambiguous, a court assumes the legislature means what it says and *will not engage* in statutory construction beyond the plain meaning of the words." *Anderson v. Dussault*, 181 Wn.2d 360, 369, 333 P.3d 395 (2014) (emphasis added).

Nonetheless, here, the Court of Appeals incorrectly disregarded RCW 19.52.032's plain language limiting proceedings that seek statutory usury penalties under RCW 19.52.030 to natural person borrower-plaintiffs. *See Arneson II*, slip op. at 7-11. Instead, the appellate court concluded that RCW 19.52.032's language limiting the ability to commence an action to collect statutory usury penalties to natural person borrower-plaintiffs was vitiated by RCW 19.52.**080** and *Paulman*. *Id.* This is inconsistent with chapter 19.52 RCW and with this Court's opinion in *Paulman*.

Certainly, RCW 19.52.080 limits the permissible universe of statutory usury claims and defenses by prohibiting such claims or defenses in the context of business or commercial purpose loans and expressly limits such claims and defenses to personal or consumer purpose loan transactions. RCW 19.52.080. In *Paulman*, of course, a corporate borrower brought an action seeking to recover statutory usury penalties on an admittedly

commercial purpose loan that was guaranteed by two natural persons. 127 Wn.2d at 393. Thus, the *Paulman* Court analyzed whether the prohibition on usury claims in the context of commercial purpose loans was jeopardized by the proviso of RCW 19.52.030, which states that statutory usury penalties under that section were not available in the context of commercial loan transactions "unless there is also, in connection with such loan . . . , the creation of liability on the part of a natural person . . . ."127 Wn.2d at 388-94.

In its analysis of the admittedly commercial purpose loan transaction, the *Paulman* Court held that, because RCW 19.52.080 was originally enacted two-years after RCW 19.52.030, the more recent RCW 19.52.080 would control and serve as a blanket prohibition on statutory usury claims on commercial loans. *Id.* Thus, the *Paulman* Court specifically held that: "a ***corporation that has taken a loan for a business purpose cannot raise the defense of usury*** regardless of whether the loan is guaranteed by a natural person." *Id.* Consequently, the *Paulman* Court's holding narrowly focused on ***limiting statutory usury claims or defenses to only consumer purpose loans. It does not address any other duly enacted statutory limitations on usury actions***. Thus, *Paulman* does not support the appellate court's opinion and:

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (quoting *ETCO, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) (internal citations omitted)).

Here, *Paulman* does not control because the *Paulman* Court did not have occasion to analyze the interplay between RCW 19.52.030 and RCW 19.52.032, which operate together to define statutory usury penalties, and to limit the circumstances under which such *penalties* may be available to natural person borrower-plaintiffs who timely commence the action within a strict, six-month limitations period. The *Paulman* Court also did not have occasion to observe that RCW 19.52.030 had been amended in 1989—eight-years after the most recent amendment to RCW 19.52.080—and the legislature maintained the "natural person" language in RCW 19.52.030. Thus, *Paulman* does not control the disposition of this case and the appellate court's opinion is in conflict with *Paulman* and Washington law.

Reading chapter 19.52 RCW in harmony with *Paulman* and *Mackey*, then, both statutory usury ***claims and defenses*** are available only in the context of consumer loans; ***affirmative claims*** seeking to impose statutory usury penalties under RCW 19.52.030 may only be brought through proceedings under RCW 19.52.032; and as additional limitations, ***affirmative claims*** seeking statutory usury penalties may be commenced only by a ***natural person borrower-plaintiff*** and such action is further limited in time and must be commenced ***within six-months*** of the earlier of the date the loan comes due or the date the loan principal is paid in full.

Thus, RCW 19.52.080's consumer purpose loan limitation is not the only limitation on affirmative claims seeking to impose statutory usury penalties. Indeed, even without evidentiary proceedings to determine a loan's purpose, actions seeking statutory usury penalties are further limited by RCW 19.52.032, which is in accordance with the Usury Act's purpose of protecting the interests of Washington *residents* and *citizens*. RCW 19.52.032; *see also* RCW 19.52.005.

F. CONCLUSION

This Court should accept review of the portion of the appellate court's opinion reversing summary dismissal of the Trust's untimely statutory usury claim. Review by this Court is warranted because the Court of Appeals failed to conduct the required de novo review on appeal when it

consciously chose *not to consider* a dispositive issue of law that was fully developed, briefed, and argued below. This decision is in conflict with a long line of Washington precedent holding that, on appeal from summary judgment, the appellate court must "conduct the same inquiry as the trial court." Its decision to disregard the time-barred nature of the Trust's statutory usury claim also conflicts with the Division Three *Mackey* case. It also presents a matter of substantial public importance that should be resolved by this Court regarding whether actions seeking to recover statutory usury penalties are limited to proceedings *timely commenced* by *natural person* borrower-plaintiffs. Because the plain language of the controlling statute—RCW 19.52.032—compels such a result and is consistent with its referring statute, RCW 19.52.030, the *Arneson II* Court's opinion to the contrary also conflicts with this Court's opinion in *Paulman*. This court should accept review and affirm summary judgment on the Trust's statutory usury claim.

RESPECTFULLY SUBMITTED this 3rd day of October 2019.

DAVIES PEARSON, P.C.

Brian M. King, WSBA No. 29197
Ingrid McLeod, WSBA No. 44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Gary Nordlund

Court of Appeals, Division One

Unpublished Opinion dated

September 3, 2019

in

Arneson v. Nordlund, et al., No. 78053-1-I

(*Arneson II*)

APPENDIX A

FILED
9/3/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellant,

v.

GARY NORDLUND,

Respondent,

MFE, LLC; COLUMBIA NORTH WEST MORTGAGE; MARK D. FLYNN; L80 COLLECTIONS, LLC; ALDENTE, LLC; ROGER MAY and "JANE DOE" MAY; McGAVICK GRAVES, P.S. and DOE DEFENDANTS 1 through 20,

Defendants.

DIVISION ONE

No. 78053-1-I

UNPUBLISHED OPINION

FILED: September 3, 2019

DWYER, J. — Penny Arneson, in her capacity as trustee of the 6708 Tolt Highlands Personal Residence Trust (the Trust), brought suit against Gary Nordlund to enjoin Nordlund's nonjudicial foreclosure of the Trust's real property and to allege that Nordlund committed usury and unlicensed lending—both violations of the Consumer Protection Act (CPA).[1] The trial court initially enjoined

[1] Chapter 19.86 RCW.

the foreclosure but subsequently granted summary judgment to Nordlund, dismissing all claims. The Trust appealed. We reversed.

On remand, the trial court granted Nordlund's motions for summary judgment dismissal of the Trust's usury and assumpsit claims and, following a jury trial, entered judgment for Nordlund, dismissing the CPA claim predicated upon a violation of the Consumer Loan Act (CLA).[2] The Trust again appeals. We reverse the trial court's grants of summary judgment as to the usury and assumpsit claims but affirm the judgment as to the dismissal of the CPA claim.

I

The underlying facts of the parties' dispute are set forth in our opinion in Arneson v. Nordlund (Arneson I), No. 71148-1-I (Wash. Ct. App. March 30, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/711482.pdf, but will be briefly summarized here. Arneson's former husband Kenneth Sweet, as a co-trustee of the Trust, arranged for a loan from Aldente, LLC, to the Trust. Then, to facilitate repayment of this loan, he arranged a second loan from Gary Nordlund to the Trust in the amount of $375,000.00. Nordlund's loan was secured by a deed of trust against the Trust's real property at 6708 Tolt Highlands Road N.E. in Carnation, Washington. The Trust defaulted on this loan and Nordlund initiated a nonjudicial foreclosure on the deed of trust. Arneson, both as an individual and in her capacity as trustee of the Trust, then filed this suit to enjoin the trustee's sale and to assert CPA claims against Aldente and Nordlund. The trial court granted the Trust's request to enjoin the trustee's sale but ordered the

[2] Chapter 31.04 RCW.

Trust to sell the property securing Nordlund's loan and to deposit the sale proceeds in the court registry.

The trial court later dismissed all of the other claims brought by Arneson and the Trust on summary judgment. In the first appeal, we affirmed the trial court in part and reversed in part. Arneson I, No. 71148-2-I, slip op. at 2. Dismissal of Arneson's individual claims was affirmed on the basis that the Trust, not Arneson in her individual capacity, was the borrower on the Nordlund loan. Thus, Arneson lacked standing to assert claims as an individual. Arneson I, No. 71148-2-I, slip op. at 20. However, the trial court's summary judgment dismissal of the Trust's claims against Nordlund and Aldente for violation of the CPA—specifically, claims predicated upon violations of the CLA and the usury statutes[3]—was reversed, as we held that the Trust had presented sufficient evidence to raise competing inferences from the facts. Arneson I, No. 71148-2-I, slip op. at 13, 18. Viewing the facts and all reasonable inferences therefrom in the light most favorable to the Trust, we stated that a fact finder *could* infer that Aldente and Nordlund were in the business of making qualifying loans, subjecting them to the CLA licensing requirement, because they had made at least two secured cash loans in the span of a year. Arneson I, No. 71148-2-I, slip op. at 13. Thus, the Trust's claims were remanded for further proceedings.

The trial court's original judgment had awarded Nordlund $604,371.72: $375,000 in unpaid loan principal, $193,263.43 in prejudgment interest at the default rate specified in the promissory note, $29,955.50 in attorney fees, and

---

[3] Chapter 19.52 RCW.

$6,152.79 in costs. Because, during the pendency of the action, the Trust had sold the property and deposited the proceeds from that sale into the court registry, the trial court entered an order directing the court clerk to disburse funds from the registry so as to satisfy Nordlund's judgment against the Trust. Thus, Nordlund's judgment against the Trust was paid in full.[4] The remaining proceeds from the Trust's sale of the property were then distributed from the registry to the Trust through its counsel.

After we remanded the case, the superior court directed both parties to return to the registry the money that had been distributed to them. Nordlund did so; the Trust did not. The trial court denied Nordlund's motion for an order of contempt after finding that the Trust was unable to comply with the restitution order. Thus, only funds in the amount of Nordlund's original judgment were extant in the registry.

On remand, Nordlund again moved for summary judgment dismissal of the Trust's usury claim. He now argued that the Trust did not have standing to assert a cause of action for usury because a usury statute, RCW 19.52.032, states that "[t]he debtor, if a natural person," may commence an action, and the Trust was not a natural person. The trial court accepted this argument and granted summary judgment dismissal of the statutory usury claim.

Thereafter, the trial court granted the Trust leave to amend its complaint to add a common law assumpsit claim. Nordlund's motion for summary judgment

---

[4] The Trust filed a motion to stay enforcement of the trial court's order. The trial court determined that the motion was moot because the funds had already been disbursed.

dismissal of this claim was also subsequently granted. Before trial, the Trust voluntarily dismissed its claims against Aldente.

The subsequent jury trial concerned the question of whether Nordlund had committed a violation of the CLA and, thus, a per se violation of the CPA, in failing to obtain a lending license. Both parties submitted proposed jury instructions. Among the factual questions submitted to the jury was whether Nordlund was in the business of making qualifying loans under the CLA. The Trust's proposed instruction on this question sought to invoke our statement in Arneson I that, viewing the evidence in the light most favorable to the Trust, making two secured cash loans in a year supported the inference that one was in the business of making qualifying loans. This proposed instruction was not given.

The jury was instructed, instead, that:

> A violation of the Washington Consumer Loan Act relating to consumer lending is an unfair or deceptive act or practice in the conduct of trade or commerce. A violation of this statute also affects the public interest.
>
> Gary Nordlund has admitted and you must accept as true that he did not hold a license under the Consumer Loan Act.
>
> Under the Washington Consumer Loan Act, no person may engage in the business of making secured or unsecured consumer loans of money in excess of 12% per annum without first obtaining and maintaining a license from the Washington State Department of Financial Institutions, unless exempt. The Washington Consumer Loan Act exempts lenders from the Act who made loans "primarily for commercial purposes."
>
> Commercial purpose means actions taken for the purpose of obtaining anything of value for oneself, for an entity or individual for which the individual acts. Consumer transactions are transactions primarily for personal, family or household purposes.
>
> A loan's purpose is principally established by the representations that the borrower makes the lender at the time the loan is procured.

> The burden is on the Lender to show the commercial exception applies.
>
> If you find that a violation of the Consumer Loan Act has occurred, then you must find that the first three elements of a Consumer Protection Act violation have been proved.

Jury Instruction 11.

On its special verdict form, the jury answered the question of whether Nordlund was "engaged in the business of making qualified secured or unsecured loans of money in January 2010[]" in the negative. This finding vitiated the viability of the Trust's CLA claim and, with it, its remaining CPA claim. The trial court entered judgment on this verdict in Nordlund's favor and awarded him attorney fees and costs, plus additional interest accruing from the date of remand to the date of entry of final judgment. Following the trial court's entry of judgment, the funds in the court registry were again disbursed to Nordlund. However, part of Nordlund's judgment remains unsatisfied.

The Trust appeals.

II

The first question is whether a claim or defense of usury can only be advanced by a natural person. The trial court ruled that the answer is yes. We rule that the answer is no.

We review summary judgment rulings de novo, engaging in the same inquiry as the trial court. Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is warranted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d

241, 249, 327 P.3d 614 (2014). The facts and all reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. Ruvalcaba, 175 Wn.2d at 6.

Construction of a statute is a question of law. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). When the language of a statute is clear, legislative intent is derived from the language of the statute alone. Wentz, 149 Wn.2d at 346. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

Additionally, our Supreme Court has stated that

> "Whenever a legislature had used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby."

Champion v. Shoreline Sch. Dist. No. 412 of King County, 81 Wn.2d 672, 677, 504 P.2d 304 (1972) (quoting State ex rel. Am. Piano Co. v. Superior Court for King County, 105 Wash. 676, 679, 178 P. 827 (1919)).

The trial court stated as follows in granting summary judgment dismissal of the Trust's usury claim:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Mr. Nordlund's Motion for Partial Summary Judgment is GRANTED and any statutory usury claims under chapter 19.52 RCW asserted by the Plaintiff, Penny Arneson, f/k/a Penny Arneson Sweet, on behalf of The 6708 Tolt Highlands Personal Residence Trust against Defendant Gary Nordlund are hereby DISMISSED WITH PREJUDICE. The Trust, as the debtor who is

> not a natural person, does not have standing to pursue a claim under RCW 19.52.032, under the plain language of that statute.

The trial court's ruling stems from a misreading of the statute cited. This statute provides:

> The debtor, if a *natural person*, or the creditor may bring an action for declaratory judgment to establish whether a loan or forbearance contract is or was usurious, and such an action shall be considered an action on the contract for the purposes of applying the provisions of RCW 19.52.030. Such an action shall be brought against the current creditor or debtor on the contract or, if the loan or debt has been fully repaid, by the debtor against the creditor to whom the debtor was last indebted on the contract. No such an action shall be commenced after six months following the date the final payment becomes due, whether by acceleration or otherwise, nor after six months following the date the principal is fully paid, whichever first occurs. If the debtor commences such an action and fails to establish usury, and if the court finds the action was frivolously commenced, the defendant or defendants may, in the court's discretion, recover reasonable attorney's fees from the debtor.

RCW 19.52.032 (emphasis added).

Its companion statute provides:

> (1) If a greater rate of interest than is allowed by statute shall be contracted for or received or reserved, the contract shall be usurious, but shall not, therefore, be void. If in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the creditor shall only be entitled to the principal, less the amount of interest accruing thereon at the rate contracted for; and if interest shall have been paid, the creditor shall only be entitled to the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest; and the debtor shall be entitled to costs and reasonable attorneys' fees plus the amount by which the amount the debtor has paid under the contract exceeds the amount to which the creditor is entitled: PROVIDED, That the debtor may not commence an action on the contract to apply the provisions of this section if a loan or forbearance is made to a corporation engaged in a trade or business for the purposes of carrying on said trade or business unless there is also, in connection with such loan or forbearance, the creation of liability on the part of a *natural*

> *person* or that person's property for an amount in excess of the principal plus interest allowed pursuant to RCW 19.52.020. The reduction in principal shall be applied to diminish pro rata each future installment of principal payable under the terms of the contract.
>
> (2) The acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is usurious interest contracted for by the transaction of any agent the principal shall be held thereby to the same extent as though the principal had acted in person. Where the same person acts as an agent of the borrower and lender, that person shall be deemed the agent of the lender for the purposes of this chapter. If the agent of both the borrower and lender, or of the lender only, transacts a usurious loan for a commission or fee, such agent shall be liable to the principal for the amount of the commission or fee received or reserved by the agent, and liable to the lender for the loss suffered by the lender as a result of the application of this chapter.

RCW 19.52.030 (emphasis added).

These two statutes speak to a related question: when may a borrower, who takes out a loan for a business purpose, assert a claim of usury either as an affirmative cause of action or as a defense to a claim? The answer provided is that this may be done when the loan evinces a liability on the part of a natural person.

The trial court plainly misconstrued these statutes as holding that only a natural person could sue or defend on the basis of a claim of usury—regardless of the purpose of the loan. This was wrong, as shown by the plain language of the statutes. Consumer loans do not fall within the ambit of either statute.

But the ruling was wrong for other reasons.

RCW 19.52.080 provides that:

> Profit and nonprofit corporations, Massachusetts trusts, associations, trusts, general partnerships, joint ventures, limited partnerships, and governments and governmental subdivisions, agencies, or instrumentalities may not plead the defense of usury

> nor maintain any action thereon or therefor, and persons may not plead the defense of usury nor maintain any action thereon or therefor if the transaction was primarily for agricultural, commercial, investment, or business purposes: PROVIDED, HOWEVER, That this section shall not apply to a consumer transaction of any amount.
>
> Consumer transactions, as used in this section, shall mean transactions primarily for personal, family, or household purposes.

Obviously, RCW 19.52.080 is inconsistent with RCW 19.52.030 and RCW 19.52.032. The latter statutes were enacted into law in 1967.[5] RCW 19.52.080 was enacted into law in 1969[6] and reenacted on several occasions.

One case is dispositive. The Supreme Court addressed the conflict between RCW 19.52.080 and RCW 19.52.030 in Paulman v. Filtercorp, 127 Wn.2d 387, 899 P.2d 1259 (1995). RCW 19.52.030(1) permits usury as a claim or defense for corporate debtors when the underlying business loan creates "liability on the part of a natural person . . . for an amount in excess of the principal plus interest allowed." Filtercorp asserted that this allowed it to bring a usury action based on a business transaction, notwithstanding RCW 19.52.080's prohibition, because the loan was guaranteed by a natural person. Paulman, 127 Wn.2d at 391. The Supreme Court rejected this argument, concluding instead that "the enactment of RCW 19.52.080 represents a calculated legislative decision not to afford the protection of the usury laws to either a corporation or a natural person who borrows money for business purposes." Paulman, 127 Wn.2d at 392.

---

[5] LAWS OF 1967, Ex. Sess., ch. 23, § 5, 6.
[6] LAWS OF 1969, 1st Ex. Sess., ch. 142, § 1.

Thus, the Supreme Court rejected the notion that a borrower's status (as a corporation or a natural person) has significance. Instead, the court stressed that it is the borrower's purpose in obtaining the loan that is the paramount question in determining whether the borrower may employ usury as a claim or defense.

We employ the same analysis. The "natural person" language in RCW 19.52.032—relied upon by the trial court in dismissing the Trust's usury claim—is a nullity for the same reason as that language in RCW 19.52.030 is a nullity. Under the rule announced in Paulman, it is the purpose of the loan that controls. The borrower's existence as a natural person or a corporation is without significance.

The parties continue to dispute whether the Nordlund loan was a business loan or a consumer loan. This presents a question of fact for the trier of fact.

The trial court erred by dismissing the statutory usury claim.[7]

III

Next, we address the trial court's dismissal of the Trust's common law assumpsit claim. Nordlund urges that we affirm the trial court, averring that the Trust presented no evidence to support its claim. This assertion is baseless. Because the Trust presented evidence to support each element of its claim, the trial court erred by dismissing it.

[7] As an alternative ground for dismissal, Nordlund argued below that any statutory usury claim was barred by a six-month statutory limitation period. The Trust, for its part, argued that the CPA's four-year limitation period, and not the usury statute's shorter period, governed this action. The trial court did not rule on Nordlund's limitation period defense. Nevertheless, Nordlund urges this as an alternative basis for affirmance. However, there is no ruling for us to review. We decline to weigh in on the question in the first instance.

The assumpsit claim, of course, is subject to a three-year limitation period. Flannery v. Bishop, 81 Wn.2d 696, 702, 504 P.2d 778 (1972).

Again, we review summary judgment rulings de novo. Ruvalcaba, 175 Wn.2d at 6. The party seeking summary judgment must demonstrate the absence of a genuine question of material fact, Ruvalcaba, 175 Wn.2d at 6, and the moving party is entitled to summary judgment only when there is a "'complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial.'" Cho v. City of Seattle, 185 Wn. App. 10, 15, 341 P.3d 309 (2014) (internal quotation marks omitted) (quoting Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

The essential elements of an assumpsit claim are: "(1) a loan or forbearance, either expressed or implied, of money, or of something circulating as such; (2) an understanding between the parties that the principal shall be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law." Flannery v. Bishop, 81 Wn.2d 696, 698, 504 P.2d 778 (1972).

The availability of assumpsit as a cause of action has not been foreclosed by enactment of the usury statutes. Lee v. Hillman, 74 Wash. 408, 412, 133 P. 583 (1913). A plaintiff's remedy on a successful assumpsit claim is "in assumpsit for money had and received." Edwards v. Surety Fin. Co. of Seattle, 176 Wash. 534, 536, 30 P.2d 225 (1934) (citing Lee, 74 Wash. at 412).

Assumpsit is an equitable remedy.

> "Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."
>
> . . . .
>
> "Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the

> receiver as for money received to the other's use; and this as well where the money is received through mistake, under color, and upon an apprehension though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver.'"

Soderberg v. King County, 15 Wash. 194, 199-200, 45 P. 785 (1896) (quoting Bayne v. United States, 93 U.S. 642, 642, 23 L. Ed. 997 (1876) and Attorney General v. Perry, 2 Com. 481 (Gr. Brit. 1725)).

Here, Nordlund premised his motion for summary judgment dismissal on the contention that the Trust could not establish any of the last three elements of the assumpsit claim. To the contrary, the Trust presented evidence on each. First, it pointed to the terms of the promissory note to support the proposition that the loan was repayable absolutely.[8]

---

[8] There is no genuine dispute that the loan was "repayable absolutely." Nordlund's assertion that such a dispute exists is premised on the Trust's alternative pleading, in its second amended complaint, of a claim for rescission. The practice of pleading in the alternative is accounted for in our civil rules:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

CR 8(e)(2).

"'[I]n light of the liberal policy embodied in Rule 8(e)(2), we hold that a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case.'" Port of Seattle v. Lexington Ins. Co., 111 Wn. App. 901, 919, 48 P.3d 334 (2002) (quoting Molsbergen v. United States, 757 F.2d 1016, 1019 (9th Cir. 1985)). Nordlund's argument relies on the notion that a claim, once pleaded by a party, effectively estops that party from asserting *any* inconsistent claims. This notion is without any merit.

Nordlund also misunderstands the term "repayable absolutely." This phrase means that the repayment obligation is not conditional and does not depend on a contingency. See Embola v. Tuppella, 127 Wash. 285, 287, 220 P. 789 (1923) ("'If it is payable only on some contingency, then the transaction is not usurious.'" (quoting 27 R.C.L. § 21, p. 220)). The Trust has never claimed that the obligation to repay the principal amount due was conditioned on an event that did not occur.

Next, it offered a HUD-1[9] Settlement Statement to show that the effective interest rate was 28 percent, tending to prove that the loan was constructed to exact a profit greater than that allowed by law. In addition, it pointed to the trial court's 2013 award of principal and accrued interest at the contract rate of 18 percent to show that Nordlund did in fact exact this profit.[10] The Trust also offered the parties' Private Money Term Sheet to show that Nordlund intended to violate the law by mischaracterizing a personal loan as one for business purposes.

The only element genuinely in dispute is whether Nordlund has exacted a greater profit than that allowed by the law. An inference exists that Nordlund has *already received*, from the court registry, a sum of money that, viewed in the light most favorable to the Trust, included the challenged interest. If, on remand, the Trust can prove this, prove that the usury statutes apply to its loans, and prove that the interest rate charged was greater than that permitted by the usury statutes, it will have established all elements of its assumpsit claim. There is evidence or inferences on each of these elements. The trial court erred by dismissing this claim.

IV

The Trust next assigns error to the trial court's refusal to give its proposed jury instruction. We find no error in the trial court's decision.

---

[9] United States Department of Housing and Urban Development.

[10] Although the money once disbursed to Nordlund was refunded to the court registry, it has again been disbursed to Nordlund.

Whether to give a proposed jury instruction is within a trial court's discretion. We review the decision for an abuse of discretion. Christensen v. Munsen, 123 Wn.2d 234, 248, 867 P.2d 626 (1994); Seattle W. Indus., Inc. v. David A. Mowat Co., 110 Wn.2d 1, 9, 750 P.2d 245 (1988); Thomas v. Wilfac, Inc., 65 Wn. App. 255, 264, 828 P.2d 597 (1992) (citing Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983)). The propriety of a jury instruction is governed by the facts of the particular case. Housel v. James, 141 Wn. App. 748, 759, 172 P.3d 712 (2007). As a whole, jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and properly inform the jury of the applicable law. Housel, 141 Wn. App. at 758.

At trial, the Trust requested the following instruction:

> A lender making at least two secured cash loans within a year supports the inference that the lender is engaged in the business of making qualifying loans under the Washington State Consumer Loan Act.

The language of this instruction is lifted from our prior opinion, in which we stated that evidence of Aldente making two cash loans within a year "supports at least an inference that Aldente was, in fact, in the business of making qualifying loans." Arneson I, No. 71148-2-I, slip op. at 13. The Trust asserts that this language reflects the law of the case and, thus, the trial court's refusal to give the proposed instruction was reversible error. This argument is without merit.

The law of the case doctrine provides that "once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation." State v. Schwab, 134 Wn. App. 635, 644, 141 P.3d 658

(2006), aff'd, 163 Wn.2d 664, 185 P.3d 1151 (2008). The doctrine is not applicable here because the language in our previous holding did not enunciate a principle of law. Rather, we merely stated that evidence of a lender making two secured loans within a year—when viewed in the light most favorable to the Trust—raised an inference sufficient to create an issue of fact that precluded summary judgment. Arneson I, No. 71148-2-I, slip op. at 13.

This does not mean that the trier of fact was required to draw that inference. "Since the jury may have drawn such an inference, it takes the plaintiffs' case past a nonsuit and to the jury. However, when the case is tried to the court, the trier of the facts is in a position to say, at the conclusion of the plaintiffs' case, that it does or does not, draw an inference [supporting plaintiffs]." Tuengel v. Stobbs, 59 Wn.2d 477, 477-78, 367 P.2d 1008 (1962) (citations omitted). That the trier of fact was a jury changes nothing.

Moreover, both parties were able to argue their theories of the case to the jury. The Trust was not barred from making arguments encouraging the jury to draw the inference it wished. Indeed, in its closing argument, the Trust urged:

> There's a secondary issue that we need to address, and that is whether or not Mr. Nordlund was in the business of doing loans. So what do we have for that? Well, first of all, as I mentioned just a few minutes ago, Mr. Nordlund was, in fact, involved in a boat building business, but he was also involved in other businesses. His testimony, he admitted it freely and accurately.
>
> But we have more than that. Aside from those businesses, it would appear that Mr. Nordlund was, in fact, engaged in the business of making loans, to the extent that he made two loans for profit. One was paid, and from the testimony, one is to be paid, based upon the jury's determination, from money that's sitting in the court registry.
>
> . . . .

> So what are we asking for? We're asking for the jury to determine that Mr. Nordlund was in the business of providing loans. In fact, both loans were done by Mr. Flynn, brokered by Mr. Flynn.
>
> We're asking the jury to find that the loan violated the Consumer Loan Act; that the loan itself exceeded the 12 percent interest rate that was permissible for such loans; that the loan was for consumer purposes, not commercial purposes, as based upon the orders of the Court in the family law proceedings, and render a decision and judgment in favor of my client, Ms. Arneson.

Here, the trial court's jury instructions both presented an accurate summary of the law and allowed the Trust's counsel to extensively argue the Trust's theory of the case (that making two loans within one year constituted engagement in the business of making loans under the CLA). The trial court did not abuse the discretion afforded to it. There was no error.

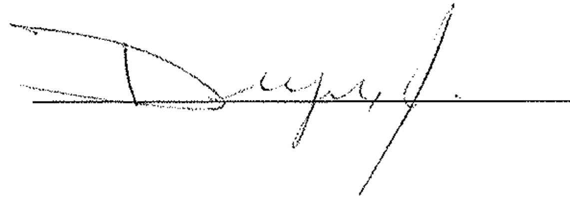
V

Finally, we address the issue of attorney fees and costs. The trial court awarded attorney fees and costs to Nordlund after entering judgment on the jury's verdict. On appeal, both parties request an award of fees. "A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party." Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).

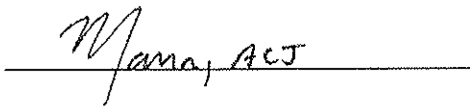
As two of the Trust's claims are remanded for further proceedings, an award of appellate attorney fees is premature—the substantially prevailing party has not yet been determined. In addition, our conclusion that such an award is premature also requires that the trial court's previous award of attorney fees and costs to Nordlund be vacated.

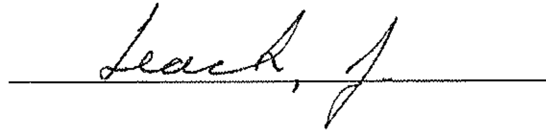
The judgment of dismissal of the CLA claim, and the CPA claim premised upon a violation of the CLA, is affirmed. The dismissals of the statutory usury and assumpsit claims are reversed. The award of attorney fees and costs is ordered to be vacated.

Affirmed in part, reversed in part, and remanded.



WE CONCUR:





Court of Appeals, Division One

Unpublished Opinion dated

March 30, 2015

in

Arneson v. Nordlund, et al., No. 71148-2-I

(*Arneson I*)

APPENDIX B

STATE OF WASHINGTON
2015 MAR 30 AM 10:3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellant,

v.

GARY NORDLUND and ALDENTE, LLC,

Respondents,

MFE, LLC; COLUMBIA NORTH WEST MORTGAGE; MARK D. FLYNN; L80 COLLECTIONS, LLC; MCGAVICK GRAVES, P.S.; and DOE DEFENDANTS 1 through 20, inclusive,

Defendants.

DIVISION ONE

No. 71148-2-I

UNPUBLISHED OPINION

FILED: March 30, 2015

DWYER, J. — The 6708 Tolt Highlands Personal Residence Trust obtained loans from Aldente, LLC and Gary Nordlund in 2009 and 2010, respectively. This lawsuit, brought by Penny Arneson, one of the trustors of the Trust and one of two co-trustees at the time of the loans, is related to these loan transactions. Arneson asserts claims, both in her individual capacity and as co-trustee, pursuant to the Consumer Loan Act and the usury act, alleging that the lenders were not licensed to make the loans and that the loan interest rates exceeded rates allowed by statute. In separate orders, the trial court granted summary judgment in favor of each lender. Arneson appealed from each order. As

concerns the claims of the Trust, we reverse both of them. As concerns Arneson's individual claims, we affirm each of them.

I

Arneson and her then-husband, Kenneth Sweet, established the 6708 Tolt Highlands Personal Residence Trust on October 31, 2006.[1] From its formation, Arneson and Sweet were both trustors and trustees of the Trust. The sole beneficiary of the Trust was another entity, the Rose Adorer Family Limited Partnership (the Partnership). Additionally, the Trust instrument granted Arneson and Sweet the discretion to designate additional beneficiaries of the Trust, so long as the additional designated beneficiary was one of their children or grandchildren. The trust instrument did not grant Arneson and Sweet the authority to designate themselves as trust beneficiaries.

The trust instrument did grant Arneson and Sweet broad discretionary powers in their capacities as trustees, including borrowing and encumbrance powers.

> The Trustees may borrow money upon such terms and conditions as it shall deem advisable . . . .
>
> The Trustees shall have the power to obligate the trust property for the repayment of any sums borrowed where the best interests of the beneficiaries have been taken into consideration.
>
> The Trustees shall have the power to encumber the trust property, in whole or in part, by a mortgage or mortgages, deeds of trust, or by pledge, hypothecation or otherwise, even though such encumbrance may continue to be effective after the term of any trust or trusts created in this agreement.

[1] The parties dispute whether the trust is irrevocable or testamentary. This dispute is of no moment here.

These discretionary powers were required to "be exercised by the Trustees solely in a fiduciary capacity and subject always to the Trustees' fiduciary obligations."

Shortly after the Trust's formation, third party sellers conveyed title to real property located at 6708 Highlands Road NE in Carnation, Washington (the Property) directly to the Trust. Although the Trust was officially named the "6708 Tolt Highlands Personal Residence Trust," the Trust instrument makes no other reference to the Property. Moreover, the Trust instrument makes no provision for Arneson or Sweet to occupy the Property. Nonetheless, Arneson, Sweet, and their children apparently did occupy the Property.

In 2009, Sweet was arrested on suspicion of sexually abusing one of Arneson's children.[2] Arneson filed for divorce immediately after Sweet's arrest.[3] This turmoil was the backdrop for the loans at the center of this case.

In May of 2009, Sweet arranged for a loan through Aldente, LLC (Aldente) in the amount of $200,000.00. The loan was approved by the superior court and was to be secured by a deed of trust against the subject Property. The proceeds of the loan were to be used to pay living expenses, spousal maintenance, child support, taxes, divorce and criminal lawyers, and other family expenses.

On May 19, 2009, the loan with Aldente closed. According to the loan agreement, "The purpose of the loan is for a cash-out refinance of the real property owned by Borrower." The loan documents included a promissory note, which obligated the Trust, with Arneson and Sweet as guarantors, to repay the

[2] Sweet was subsequently convicted of various felony charges arising from his misconduct. See State v. Sweet, King County Superior Court No. 09-1-06102-1 SEA.

[3] In re Marriage of Sweet, King County Superior Court No. 09-3-01590-6 SEA.

sum of $200,000.00 at the rate of 10 percent per annum and to be paid in full on or before November 1, 2010. The closing of the Aldente loan is evidenced by a HUD-I settlement statement. According to entries on this form, in addition to the 10 percent interest rate called for in the promissory note, Aldente received an additional "loan fee" of 3 percent, thus making the effective interest rate 13 percent. Arneson alleges that additional "loan payments" were withheld as well.

In January of 2010, Sweet arranged for a second loan, this from Nordlund, in the amount of $375,000.00. Sweet arranged for this loan with the assistance of mortgage broker Mark Flynn, who was an acquaintance of Nordlund and who approached Nordlund regarding loaning funds to the Trust. This loan was also approved by the superior court, in orders dated October 15, 2009, November 17, 2009, and January 13, 2010. Repayment of this loan was to be secured by a deed of trust against the subject Property. The proceeds of the loan were to be used to satisfy the Aldente loan and fund various of Sweet's personal expenses.

On January 15, 2010, the Nordlund loan closed. The loan documents included a promissory note, whereby the Trust was obligated to repay the sum of $375,000.00 at the rate of 12 percent per annum and to be paid in full on or before January 15, 2011. The promissory note states that the "sums represented by [the] Note are being used for business, investment or commercial proposes, and not for personal, family or household purposes." Arneson and Sweet separately initialed this provision. The closing of the Nordlund loan is evidenced by a HUD-I settlement statement. According to entries on this form, in addition to the 12 percent interest rate called for in the promissory note, charges for making

the loan added an additional "loan fee" of 16 percent. Also according to entries on this form, Sweet's divorce lawyer and his criminal defense lawyer were paid directly from escrow, as was a parenting evaluator. The balance of the funds, to the "borrower," was paid directly to Sweet. Nordlund would have had to approve these disbursements through escrow instructions.

On January 19, 2011, the superior court in the Arneson and Sweet dissolution action entered a decree of dissolution that provided "[t]he real properties awarded to wife are held in the 6708 Tolt Highlands Personal Residence Trust . . . . In addition to [the real property held by the Trust,] the following other entit[y is] also awarded to wife: Rose Adorer Family Limited Partnership (NY)."

All principal and interest accrued were due in full on the Nordlund loan on January 15, 2011. After the Trust failed to fulfill its obligation on the loan, Nordlund made a demand on Arneson for payment of the Trust's loan. When the Trust still had not fulfilled its loan obligations to Nordlund by August 2011—nearly eight months after all principal and interest were due in full—Nordlund issued a notice of default to the Trust. Nordlund issued an amended notice of default for the Trust's debt, plus attorney fees and costs, in September 2011 and, eventually, a successor trustee to the deed of trust provided the Trust with notice of foreclosure under chapter RCW 61.24 and recorded a notice of trustee's sale.

The trustee's sale of the Property was scheduled to occur on February 3, 2012. Shortly before the sale, Arneson filed this lawsuit seeking to enjoin the trustee's sale of the Property and recover damages. In her amended complaint,

Arneson alleged violations of the Consumer Loan Act, the usury act, the Consumer Protection Act, the deeds of trust act, and asserted common law claims for intentional or negligent misrepresentation. The trial court granted Arneson's request for a preliminary injunction and, thus, the trustee's sale of the Property scheduled for February 3, 2012 was cancelled. Instead, the Trust was ordered to proceed with marketing and selling the Property and to deposit the sale proceeds into the court registry.

In support of her claims for recovery, Arneson argued that she and her husband, rather than the Trust, were the true owners of the Property and that the Trust's loans from Aldente and Nordlund were really personal, consumer loans to her and Sweet in their individual capacities and not commercial loans to the Trust. Arneson further argued that she was the true borrower and personally liable on the promissory note conveyed to Nordlund. In advancing these claims, Arneson relied extensively on terminology used by the superior court in the dissolution of marriage action between her and Sweet.

Aldente and Nordlund each moved for summary judgment, arguing both that Arneson lacked standing to bring the action in her individual capacity because she was not individually a party to either loan transaction, and that the Trust's claims against them must fail because the underlying loans to the Trust were business loans and, as such, were exempt from the usury statutes and the Consumer Loan Act. The trial court agreed and granted each defendant's motion for summary judgment, dismissing the claims against them.

Based on the provision in the promissory note requiring the Trust to pay Nordlund's costs and attorney fees, the trial court also entered judgment in favor of Nordlund and against the Trust in the sum of: (1) $375,000 in unpaid principal, (2) $193,263.43 in prejudgment interest accruing from the Trust's default on January 16, 2011 at the default rate specified in the promissory note, (3) $29,955.50 in attorney fees, and (4) $6,152.79 in costs. Because, during the pendency of Arneson's action, the Trust had sold the Property and deposited the proceeds from that sale into the court's registry, the court ordered the clerk of court to disburse funds from the registry so as to satisfy Nordlund's judgment against the Trust. Thus, Nordlund's judgment against the Trust was paid in full. The remaining proceeds from the Trust's sale of the Property were distributed from the registry to the Trust through its counsel.

II

Arneson alleged a cause of action pursuant to the Consumer Protection Act (CPA), chapter 19.86 RCW. This cause of action is premised (at least in part) upon alleged violations of two other statutes: the Consumer Loan Act (CLA), chapter 31.04 RCW, and the usury act, chapter 19.52 RCW. A violation of either statute constitutes a per se violation of the CPA. See RCW 19.52.036; RCW 31.04.208.

A

The CLA has been frequently amended since its 1991 enactment. Indeed, different versions of the CLA—neither of which was cited by the parties in their briefing to us—apply to the two loans at issue herein.

The following statutory provisions applied to the May 19, 2009 Aldente loan. Pursuant to former RCW 31.04.035 (2008), entitled "License required," anyone engaged in the business of loaning money was required to maintain a CLA license: "No person[4] may engage in the business of making secured or unsecured loans of money, credit, or things in action without first obtaining and maintaining a license in accordance with this chapter."[5] Another provision listed exceptions to the licensing requirement for certain entities or types of loans.

> This chapter shall not apply to any person doing business under and as permitted by any law of this state or of the United States relating to banks, savings banks, trust companies, savings and loan or building and loan associations, or credit unions, nor to any pawnbroking business lawfully transacted under and as permitted by any law of this state regulating pawnbrokers, nor to any loan of credit made pursuant to a credit card plan.

---

[4] "'Person' includes individuals, partnerships, associations, limited liability companies, limited liability partnerships, trusts, corporations, and all other legal entities." Former RCW 31.04.015(1) (2008).

[5] This provision had been amended in 2008. Prior to that amendment, the licensing requirement applied only to those engaged in making loans "at interest rates authorized by [the CLA]." Former RCW 31.04.035 (1991). The CLA permitted licensees to "[l]end money at a rate that does not exceed twenty-five percent per annum." Former RCW 31.04.105 (2008). By contrast, the highest rate generally permitted under the usury statute was 12 percent. Former RCW 19.52.020 (2008). Thus, under the 1991 version of the statute, a license was generally required only to facilitate loans bearing interest rates between 12 and 25 percent.

In 2009, in response to the 2008 amendments to the CLA, the agency charged with administering and interpreting the CLA, the Department of Financial Institutions, adopted regulations that hewed to the prior statutory language by indicating that the CLA licensing requirement applied only to those engaged in the business of loaning money at rates above the rates permitted by the usury act. See former WAC 208-620-230 (2009). However, "[a]n administrative agency . . . cannot modify or amend a statute by regulation." Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 428, 833 P.2d 375 (1992). These regulations were contrary to the plain meaning of the statute as amended and, therefore, were invalid. Unsurprisingly, the agency changed tack soon thereafter, and regulations that became effective in 2010 reflect the general licensing requirement dictated by the 2008 legislative amendments.

In the 2009 regulations, the agency also improperly modified the CLA by limiting the definition of "borrower" to "any natural person." See former WAC 208-620-010 (2009). However, by defining "borrower" as "any person . . ." and "person" to include "individuals, partnerships, associations, . . . trusts, corporations, and all other legal entities," RCW 31.04.015, the legislature had made the meaning of borrower plain. Accordingly, the agency was without authority to interpret the statute to mean otherwise. Again, unsurprisingly, the agency has since changed this definition and it is no longer limited to natural persons. See former WAC 208-620-011 (2014).

Former RCW 31.04.025 (2008). There was also an exception for retail installment contracts made under the authority of chapter 63.14 RCW. See former RCW 31.04.025 (2008).

Thus, when the Aldente loan was made, anyone in the business of loaning money who did not qualify for one of the exceptions listed in the statute was required to hold a CLA license. Given that there is no dispute that Aldente did not hold a license at the time it made the relevant loan to the Trust, the sole remaining question is whether Aldente was engaged in the business of making qualifying loans at the time.

The CLA was amended once again prior to the January 15, 2010 Nordlund loan. These amendments changed the statute in two material ways. First, the interplay between RCW 31.04.025 and RCW 31.04.035 was made explicit—specifically, that RCW 31.04.025 lists exceptions to the general licensing requirement contained in RCW 31.04.035. The amended statute provided:

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

Former RCW 31.04.035 (2009). Thus, the only entities exempted from the CLA licensing requirement were those exempted by RCW 31.04.025.

RCW 31.04.025 was also amended. Those entities that had been exempt under the previous iteration of the statute remained exempt and new exemptions were added. These included an exemption for: "[a]ny person making loans primarily for business, commercial, or agricultural purposes, or making loans

made to government or government agencies or instrumentalities, or to organizations as defined in the federal truth in lending act." Former RCW 31.04.025(e) (2009).

As with Aldente, there is no dispute that Nordlund did not hold a CLA license. However, in his case, there are two relevant questions: first, whether Nordlund was engaged in the business of making qualifying loans, and, second, whether the loan at issue was a consumer transaction or, as contended by Nordlund, a business transaction.

B

Unlike the CLA, the same provisions of the usury statute apply to both of the loans made by Aldente and Nordlund, respectively.

Interest rates above 12 percent are generally usurious: "(1) Any rate of interest shall be legal so long as the rate of interest does not exceed . . . : (a) Twelve percent per annum." RCW 19.52.020.[6]

The act includes an exception for loans to certain entities, including trusts. However, the exception does not apply to consumer transactions.

> Profit and nonprofit corporations, Massachusetts trusts, associations, *trusts*, general partnerships, joint ventures, limited partnerships, and governments and governmental subdivisions, agencies, or instrumentalities may not plead the defense of usury nor maintain any action thereon or therefor. . . : PROVIDED,

---

[6] To be more specific, the usury act permits any rate of interest so long as it does not exceed the higher of 12 percent or

> (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate.

RCW 19.52.020(1)(b).

> HOWEVER, That this section shall not apply to a consumer transaction of any amount.

RCW 19.52.080 (emphasis added). Consumer transactions are "transactions primarily for personal, family, or household purposes." RCW 19.52.080. A consumer transaction is contrasted with a transaction "primarily for agricultural, commercial, investment, or business purposes." RCW 19.52.080.

The effective interest rate on each of the loans is not here at issue. Neither Aldente nor Nordlund presently disputes that the interest rate on the loans at issue exceeded the highest rate generally permitted. Instead, the relevant concern for each loan is whether the loan was a consumer transaction and, thus, subject to the provisions of the usury statute, or a business transaction and, therefore, excepted therefrom.

III

Both defendants prevailed on summary judgment. We review a grant of summary judgment de novo. Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn. App. 490, 495, 311 P.3d 1285 (2013). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Am. Express Centurion Bank v. Stratman, 172 Wn. App. 667, 673, 292 P.3d 128 (2012). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Stratman, 172 Wn. App. at 673. A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. Parks v. Fink, 173 Wn. App. 366, 374, 293 P.3d 1275 (2013).

"A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). It is our duty to apply the correct version of a statute, even if that version of the statute was not cited below. Chmela v. Dep't of Motor Vehicles, 88 Wn.2d 385, 393, 561 P.2d 1085 (1977).

> Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970); accord In re Dependency of G.C.B., 73 Wn. App. 708, 717, 870 P.2d 1037 (1994) ("Although neither party brought this statute to our attention, it is the duty of an appellate court to apply a dispositive statute to the undisputed facts of a case notwithstanding the parties' failure to call the statute to the attention of the court."). "This rule may be applied to reverse the trial court." Bitzan v. Parisi, 88 Wn.2d 116, 126, 558 P.2d 775 (1977).

A

Aldente contends that it was proper for the trial court to grant summary judgment in its favor. This is so, it asserts, because the "loan transaction upon which this complaint was brought was an exempt transaction under the [CLA]." Specifically, relying on an inapplicable version of the CLA, Aldente contends that its loan was exempt as a transaction with a business or commercial purpose. However, as set forth above, there was no such exception to the CLA licensing requirement at the time of the Aldente loan. Applying the correct version of the

CLA, we hold that summary judgment in Aldente's favor was improperly granted.

As previously explained, the question here is whether Arneson presented sufficient evidence that Aldente was "engage[d] in the business of making [qualifying] loans," including secured or unsecured loans of money. There is evidence in the record that Aldente made at least two secured cash loans during this time, including the loan herein at issue.[7] This evidence supports at least an inference that Aldente was, in fact, in the business of making qualifying loans. Thus, Arneson presented sufficient evidence to create an issue of material fact and summary judgment in Aldente's favor was improper.[8,9]

B

As with Aldente, Nordlund contends that summary judgment was properly granted in his favor. This is so, he asserts, because the loan was exempt from both the CLA and the usury act because the transaction had a business purpose. We disagree.

As set forth above, at the time the Nordlund loan was made, lenders making loans for business or commercial purposes were exempt from the CLA.

---

[7] The other was made in March 2009. Arneson does not allege any statutory violations arising from that loan transaction.

[8] As a violation of the CLA also constitutes a per se violation of the CPA, RCW 31.04.208, the trial court's dismissal of both the CLA claim and the CPA claim is reversed.

[9] Aldente correctly notes that Arneson's amended complaint did not plead a cause of action against Aldente for violation of the usury act. Furthermore, although Arneson did plead a CPA claim against Aldente, and a violation of the usury act can constitute a violation of the CPA, RCW 19.52.036, Arneson's amended complaint did not assert such a connection. Similarly, nothing in Arneson's pleadings submitted in opposition to Aldente's summary judgment motion contended that Arneson's CPA claim against Aldente was predicated upon a claimed violation of the usury act. Instead, the CLA was the focus of each party's briefing.

Thus, although the parties argue at length in their appellate briefing concerning whether the Aldente loan at issue was (or was not) made for a business purpose, that issue is not properly before us. Although this would be an appropriate inquiry had a usury act violation been alleged, no such allegation was pleaded. Moreover, as we have discussed, an exemption for business or commercial loans was not included in the version of the CLA in effect at the time the challenged Aldente loan was made.

Similarly, loans with a business or commercial purpose were exempt from the usury statute. However, both the CLA and the usury act apply to loans made for primarily personal, family, or household purposes (consumer transactions). Thus, Arneson's CLA and usury act claims against Nordlund[10] converge on a single issue—whether the purpose of the loan was consumer or business. Summary judgment in Nordlund's favor was proper only if there was no genuine dispute as to whether the loan was for a business purpose.

A loan's purpose "is principally established by the representations the borrower makes to the lender at the time the loan is procured." Brown v. Giger, 111 Wn.2d 76, 82, 757 P.2d 523 (1988); accord Jansen v. Nu-West, Inc., 102 Wn. App. 432, 439, 6 P.3d 98 (2000). "The issue is a factual one to be answered after examining the circumstances surrounding the transaction." Castronuevo v. Gen. Acceptance Corp., 79 Wn. App. 747, 751-52, 905 P.2d 387 (1995). "The lender's purpose for the loan, which almost always is a business purpose, is irrelevant." Aetna Fin. Co. v. Darwin, 38 Wn. App. 921, 928, 691 P.2d 581 (1984). "[T]he burden is on the lender to show the business exception applies." Marashi v. Lannen, 55 Wn. App. 820, 823, 780 P.2d 1341 (1989); see also Sparkman & McLean Income Fund v. Wald, 10 Wn. App. 765, 768, 520 P.2d 173 (1974).

"Washington cases consistently have noted the importance of objective indications of purpose in determining the applicability of the 'business purpose' exemption." Brown, 111 Wn.2d at 82. Courts "focus on the purpose the

---

[10] Unlike Aldente, Nordlund does not dispute that both CLA and usury act claims were asserted against him.

borrower actually represented at the time, not what was written on the application." Jansen, 102 Wn. App. at 439-40. "[W]hen other representations of the borrowers are inconclusive, written statements in the loan documents may be dispositive." Marashi, 55 Wn. App. at 824. However, other evidence may contradict the written representations, thus creating a factual question for the trier of fact. Jansen, 102 Wn. App. at 440. A direct conflict in the evidence on the issue of the loan's purpose creates an issue for the trier of fact. Marashi, 55 Wn. App. at 824.

"Determination of the purpose is for the jury, and the question of whether that purpose constitutes a business purpose is a question of law to be decided by the court." Marashi, 55 Wn. App. at 824 n.3. Put differently, while "[a] jury decides the factual question of what the parties understood the funds were going to be spent on," it is for the court to "decide as a matter of law whether the[] proposed expenditures constitute business purposes." Jansen, 102 Wn. App. at 441.

Moreover, the purpose of a given loan transaction is not determined by what type of entity the borrower happens to be. Thus, in Paulman v. Filtercorp, Inc., 127 Wn.2d 387, 899 P.2d 1259 (1995), our Supreme Court treated the purpose of a loan to a for-profit corporate entity as presenting a fact question. The court noted that the consumer loan exemption "represents a calculated legislative decision not to afford the protection of the usury laws to either a corporation or a natural person who borrows money for business purposes." Paulman, 127 Wn.2d at 392. The court's analysis recognizes that non-natural

"persons" may have a personal or consumer purpose in taking out a loan. Thus, it is possible for a trust to do so. Additionally, the fact that entities other than natural persons, by their nature, must engage in loan transactions through representatives does not alter the inquiry. We look to objective indications of the borrower's purpose, as manifested by those acting on the borrower's behalf.

Here, Nordlund presented evidence supporting his assertion that the loan transaction had a business purpose. In particular, he points to the following statement in the promissory note: "Maker represents and warrants to Holder that the sums represented by this Note are being used for business, investment or commercial purposes, and not for personal, family or household purposes." This statement was separately initialed by Arneson and Sweet as co-trustees.

However, Arneson presented evidence to the contrary, supporting her assertion that the loan had a consumer purpose. First, Arneson points to a document entitled "Private Money Term Sheet," which was signed by Nordlund. This document must have been created before the terms of the promissory note were finalized, because it includes a notation to include the business purpose term in the promissory note. The document also includes the following statement indicating that Nordlund was aware of the family court proceedings going on at the time: "Mr. Sweet is allowed to pull $65,000 in cash to him. Mrs. Sweet is required by court order to sign the loan documents or the court will sign for her." Additionally, it includes the following notes regarding how some of the loan proceeds were to be distributed: "Other Items- . . . . Back taxes of approximately $19,900 will be paid from proceeds."

Second, Arneson points to the HUD-I settlement statement, which demonstrates that a portion of the loan proceeds were to be used for consumer purposes. The list of individuals to receive disbursements from the loan proceeds included Sweet's attorneys from the ongoing family law and criminal cases and the family law parenting evaluator. Arneson contends that the settlement statement would have been completed by and present at the loan closing. Additionally, Arneson asserts, Nordlund would have approved these disbursements through escrow instructions. The private money term sheet and the HUD-I settlement statement tend to prove that Nordlund had direct knowledge of the consumer purpose of the loan.

Third, Arneson points to evidence that Nordlund's agent, Mark Flynn,[11] knew of the consumer purpose of the loan. The fact that Flynn made a declaration that was submitted in the family law case leads to an inference that he was aware of the family court's involvement in the loans, including the court's limitations on how the loan proceeds were to be used. As an agent's knowledge is generally imputed to the principal if that knowledge is relevant to the agency relationship, at least for the purpose of Nordlund's summary judgment motion, Flynn's apparent knowledge of the purpose of the loan must be imputed to Nordlund. See Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., 125 Wn. App. 227, 235, 103 P.3d 1256 (2005).

Because the burden of persuasion is ultimately on Nordlund to show that the loan transaction had a business purpose and because there is a fact question

[11] Nordlund does not dispute this relationship in his appellate briefing.

as to whether this was the case, summary judgment should not have been granted.

IV

Arneson contends that the trial court erred in concluding that she had no standing to bring claims against Aldente and Nordlund on her own behalf and thus dismissing her individual claims against them. This is so, Arneson asserts, because she was the "true borrower" on both of the loans. We disagree.

It is undisputed that Arneson and Sweet chose to create the Trust during their lifetimes and to use the Trust to hold title to various assets. It is undisputed that third party sellers conveyed the Property directly into the Trust. It is undisputed that, with the approval of the court in their dissolution matter and with the apparent guidance of their legal counsel, the Trust entered into the loan transactions with Aldente and Nordlund. It is undisputed that Arneson and Sweet made the promissory notes to Aldente and Nordlund and supporting deeds of trust solely in their capacities as co-trustees of the Trust. It is undisputed that neither Arneson nor Sweet signed any loan document regarding the Trust's transaction with Nordlund in their individual capacities. It is also undisputed that Arneson and Sweet signed loan documents regarding the Trust's transaction with Aldente in their individual capacities only as guarantors.

Nevertheless, Arneson urges us to conclude that she was the "true borrower" on the loans. Arneson purports to find the "true borrower" concept in McGovern v. Smith, 59 Wn. App. 721, 801 P.2d 250 (1990). In that case, the borrower, Jack McGovern, signed a loan agreement that contained an express

representation and warranty that he would use the loan proceeds "solely for business or commercial purposes." McGovern, 59 Wn. App. at 726. McGovern's aunts, the Marinos, signed a deed of trust securing his loan and, along with McGovern, they signed a promissory note. But the Marinos did not sign the loan agreement. McGovern, 59 Wn. App. at 726-27. After McGovern defaulted on the loan and the lender initiated foreclosure proceedings on the deed of trust, McGovern and the Marinos sought injunctive relief and asserted a claim of usury. McGovern, 59 Wn. App. at 728. The lender responded by arguing that the loan transaction was exempt from the usury statute, as it was for a business or commercial purpose and not for a consumer or household purpose. McGovern, 59 Wn. App. at 729. The court held that the Marinos were not "borrowers" for purposes of determining whether the business exemption from the usury statute applied because "[t]hey were not liable for any cash payments, and [the lender's] sole recourse against the Marinos was to foreclose upon the real estate." McGovern, 59 Wn. App. at 735. Accordingly, the court only looked to McGovern's purpose in determining whether the business exemption from the usury statute applied. McGovern, 59 Wn. App. at 735.

Arneson contends that McGovern stands for one specific and one general proposition relevant to this case. The specific proposition urged is that "one need not sign the note to be [the] *actual borrower*." Appellant's Br. at 27. However, the facts of McGovern do not sustain this proposition. The actual borrower therein, McGovern, did, in fact, sign the note. Similarly, the actual borrower

herein, the Trust—through its legal representatives, Arneson and Sweet—signed the loan documents.

The general proposition urged is that courts "prefer[] substance over form" when it comes to the usury statute. Appellant's Reply Br. at 12. The implication of the proposition is that, even though Arneson and Sweet made the strategic economic decision to hold certain property in trust, appointed themselves co-trustees of the trust they created, then, as co-trustees, engaged in loan transactions on behalf of the Trust, using trust property as security on the loans, we should hold that Arneson and Sweet—and not the Trust—were the true borrowers on the loans. We will do no such thing. Having made the conscious decision to place the 6708 Tolt Highlands property in trust, Arneson must live with the economic impact of that decision—both when it is of benefit to her and otherwise.

It is clear from both loan agreements that the Trust was the borrower, not Arneson. Thus, the trial court did not err by dismissing Arneson's individual claims based upon her lack of standing.

V

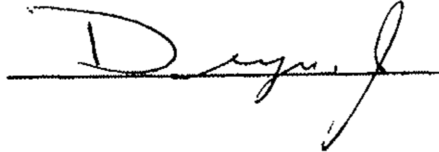
As he does not substantially prevail on appeal, Nordlund's request for an award of attorney fees is denied.[12]

The trial court's orders on summary judgment in favor of Aldente and Nordlund and against the Trust are reversed, as is the judgment entered in favor

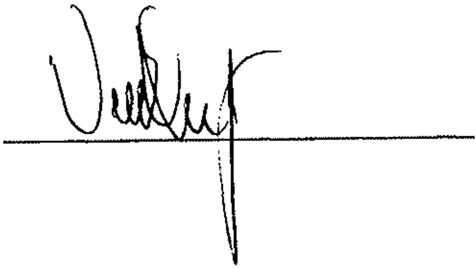
[12] The parties have not briefed the effect of Nordlund prevailing on appeal against only Arneson. The trial court's award of attorney fees in favor of Nordlund cannot survive today's decision. On remand, the parties may litigate whether Nordlund has any claim for an award of attorney fees as against Arneson individually.

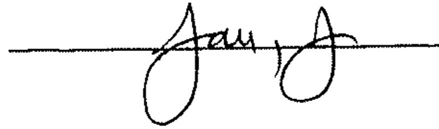
of Nordlund, and the cause is remanded to the trial court for further proceedings consistent with this opinion. The trial court's orders dismissing Arneson's individual claims are affirmed.

Affirmed in part, reversed in part, and remanded.



We concur:





FILED
Court of Appeals
Division I
State of Washington
10/3/2019 3:11 PM

No. 78053-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

GARY NORDLUND,

Respondent,

And

Defendants,

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

PROOF OF SERVICE

DAVIES PEARSON, P.C.

By: Brian M. King, WSBA No. 29197
Ingrid McLeod, WSBA No. 44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondent Nordlund

I, Jody M. Waterman, employed by Davies Pearson, P.C. as a Legal Assistant to Ingrid L.D. McLeod and being duly sworn on oath, state and allege as follows:

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

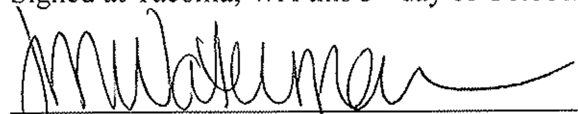
On October 3, 2019, I caused to be served the following document

1. **RESPONDENT GARY NORDLUND'S PETITION FOR REVIEW BY SUPREME COURT**

on the following persons in the manner listed below:

KOVAK & JONES, PLLC Richard Llewelyn Jones P.O. Box 1548 Snohomish, WA 98291 rlj@kovacandjones.com	( ) U.S. First Class Mail ( ) U.S. Certified Mail **(X)** Electronically via email See attached Email
GOODSTEIN LAW GROUP, PLLC Richard B. Sanders Carolyn A. Lake 501 South G Street Tacoma, WA 98405-4715 rsanders@goodsteinlaw.com; clake@goodsteinlaw.com; dpinckney@goodsteinlaw.com	( ) U.S. First Class Mail ( ) U.S. Certified Mail **(X)** Electronically via email See attached Email

Signed at Tacoma, WA this 3rd day of October, 2019.



JODY M. WATERMAN, Legal Assistant

jw / s:\2xxxx\20xxx\200xx\20078\2\appeal no. 2--pleadings\proof of service jmw 10-03-19.docx

Jody Waterman

From: Jody Waterman
Sent: Thursday, October 03, 2019 2:59 PM
To: 'clake@goodsteinlaw.com'; 'dpinckney@goodsteinlaw.com'; 'rsanders@goodsteinlaw.com'; 'rlj@kovacandjones.com'
Cc: Brian M. King; Ingrid McLeod
Subject: Arneson, Appellant v. Nordlund, Respondent - Respondent's Petition for Review
Attachments: PETITION-FOR-REVIEW-100319.PDF

Case No. 78053-1-I

Counsel,

On behalf of attorney Ingrid L.D. McLeod, attached please find Respondent Gary Nordlund's Petition for Review.

Kind regards,

Jody M. Waterman

Legal Assistant to Peter T. Petrich, Brian M. King,
Rebecca M. Larson, and Ingrid L.D. McLeod

Direct (253) 238-5103

Davies Pearson, P.C.
ATTORNEYS AT LAW
920 Fawcett Avenue / PO Box 1657, Tacoma, WA 98401
253-620-1500 | Fax 253-572-3052 | www.dpearson.com

DAVIES PEARSON, P.C.

October 03, 2019 - 3:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78053-1
Appellate Court Case Title:	Penny Arneson, Appellant v. Gary Nordlund, Respondent

The following documents have been uploaded:

- 780531_Affidavit_Declaration_20191003150831D1664701_2786.pdf
  This File Contains:
  Affidavit/Declaration - Service
  The Original File Name was PROOF OF SERVICE 100319.PDF
- 780531_Petition_for_Review_20191003150831D1664701_4900.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PETITION FOR REVIEW 100319.PDF

A copy of the uploaded files will be sent to:

- bking@dpearson.com
- clake@goodsteinlaw.com
- dpinckney@goodsteinlaw.com
- jwaterman@dpearson.com
- rlj@kovacandjones.com
- rsanders@goodsteinlaw.com

Comments:

Petition for Review with Proof of Service. Filing fee paid directly to Supreme Court Clerk's Office.

Sender Name: Jody Waterman - Email: jwaterman@dpearson.com
Filing on Behalf of: Ingrid Linnea Daun Mcleod - Email: imcleod@dpearson.com (Alternate Email:)

Address:
920 Fawcett Ave
Tacoma, WA, 98402
Phone: (253) 620-1500

Note: The Filing Id is 20191003150831D1664701