

NO.42265-4-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TAMARA FRIZZELL,

Appellant,

v.

BARBARA MURRAY and GREGORY MURRAY,

Respondents.

11/17/11 10:53 AM  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This appeal concerns whether the trial court properly granted Respondent's Summary Judgment dismissing Appellant's Complaint, which includes various claims related to a loan and deed of trust, based on the Appellant's waiver of post-trustee's sale remedies when (i) the Appellant had actual knowledge of the pending non-judicial foreclosure, (ii) the subject loan was a commercial transaction for business purposes, and (iii) the Appellant failed to *actually* restrain the sale by failing to post the required security. Appellant also contends that her defense based on a lack of competency to contract grants her an exception to RCW 61.24.127(4) and the applicable case law regarding limitations on post-trustee's sale actions.

## II. STATEMENT OF THE ISSUES

1. Did the trial court properly determine that there were no material issues of disputed fact which would preclude the granting of summary judgment, to specifically include the determination that the subject loan was a commercial transaction?<sup>1</sup> Answer: Yes.

2. Did the trial court properly determine that the Appellant waived all claims regarding the subject Promissory Note and Deed of Trust where she failed to *actually* restrain the Trustee's Sale despite receiving notice of the sale?<sup>2</sup> Answer: Yes.

## III. STATEMENT OF THE CASE

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<sup>1</sup> Appellant's Brief, viii (Assignment of Error No. 1).

<sup>2</sup> Appellant's Brief, viii (Assignment of Error No. 2).

In mid August 2008, Douglas Baer contacted one of the Respondents, Gregory Murray, regarding obtaining a loan on behalf of the Appellant, Tamara Frizzell.<sup>3</sup> He claimed to be acting on behalf of Ms. Frizzell through a power of attorney.<sup>4</sup>

At no point did Mr. Baer indicate or even suggest that Ms. Frizzell was incompetent or lacked the capacity to understand or execute a contract.<sup>5</sup> To the contrary, he claimed her execution of the power of attorney, signed August 12, 2008, granted him full authority to handle her financial affairs, to include obtaining a loan for \$100,000.<sup>6</sup>

Although Mr. Baer initially asked to proceed solely based on the authority granted to him by the Power of Attorney, Mr. and Mrs. Murray were uncomfortable extending such a large loan without the direct involvement of the only borrower.<sup>7</sup> As such, they insisted that Ms. Frizzell sign the documents on her own behalf.<sup>8</sup>

Mr. Baer stated that Ms. Frizzell needed the funds to start a new business selling wheelchairs and scooters.<sup>9</sup> He claimed that they already possessed an inventory of wheelchairs and scooters, and they required the loan to start the business.<sup>10</sup>

Mr. Baer stated that Ms. Frizzell owned her home outright, and

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<sup>3</sup> CP: 88-89, ¶ 3; CP: 145-46, ¶ 3.

<sup>4</sup> CP: 88-89, ¶ 3; CP: 146, ¶ 4.

<sup>5</sup> CP: 88-89, ¶ 3.

<sup>6</sup> CP: 88-89, ¶ 3; CP: 95-98 (Exhibit A - General Power of Attorney); CP: 146, ¶ 4.

<sup>7</sup> CP: 89, ¶ 4; CP: 146, ¶ 5.

<sup>8</sup> CP: 89, ¶ 4; CP: 146, ¶ 5.

<sup>9</sup> CP: 89, ¶ 5; CP: 146, ¶ 6.

<sup>10</sup> CP: 89, ¶ 5; CP: 146, ¶ 6.

was willing to offer it as collateral for the loan.<sup>11</sup>

Mr. Murray clearly and emphatically explained that the Murrays only offered loans for business purposes, and that they did not offer loans for personal uses.<sup>12</sup> As part of that disclosure, which was about a week or so before the loan closed, Mr. Murray provided Mr. Baer a “Business Real Estate Loan Application”, and explained to him that it needed to be completed prior to issuing the loan.<sup>13</sup>

On or about August 26, 2008, Mr. Murray received the completed copy of the application by fax.<sup>14</sup> The “Business Real Estate Loan Application” was completed by Ms. Frizzell on August 26, 2008.<sup>15</sup> Ms. Frizzell initialed the first three pages, and signed both the second page and the fourth page.<sup>16</sup>

The application offered her home and land at 3116 – 128th Street E, Tacoma, Washington (“**128th St. Property**”) as collateral for the requested business loan, and estimates the value of the home and land as \$300,000.<sup>17</sup> It further states that there are no liens or encumbrances on the 128th St. Property.<sup>18</sup>

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<sup>11</sup> CP: 89, ¶ 6; CP: 146, ¶ 3.

<sup>12</sup> CP: 89, ¶ 7.

<sup>13</sup> CP: 89, ¶ 8.

<sup>14</sup> CP: 89, ¶ 9; CP: 99-103 (Exhibit B – Business Real Estate Loan Application).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; CP: 149-51 (Defendants’ Requests for Admissions Nos. 3-5); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 3-5).

<sup>17</sup> CP: 89, ¶ 10; CP: 100.

<sup>18</sup> CP: 89, ¶ 10; CP: 100.

The purpose for the loan, as stated in the “Business Real Estate Loan Application” is a “Wheelchair/Scooter Business”, and Ms. Frizzell requested a loan in the amount of \$100,000 for thirty-six months.<sup>19</sup>

In the liabilities section, Ms. Frizzell wrote in “Hard Cash Loan” and “This Info. Should Not Matter”.<sup>20</sup>

Along with the “Business Real Estate Loan Application”, Mr. Murray asked Ms. Frizzell to execute a “Declaration Concerning Purpose of Loan.”<sup>21</sup> This document states that the loan is solely to be used for investment, commercial, or business purposes, and is not to be used for personal, family, or household purposes.<sup>22</sup> It further states that the lender is only considering the loan based on that representation.<sup>23</sup>

On August 26, 2008 Mr. Murray received the completed “Declaration Concerning Purpose of Loan”,<sup>24</sup> which was executed by Ms. Frizzell.<sup>25</sup> The “Declaration Concerning Purpose of Loan” once again indicates that Ms. Frizzell requested the loan for a “Wheelchair + Scooter Business.”<sup>26</sup>

Another document requested by Mr. Murray as part of the loan

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<sup>19</sup> CP: 90, ¶ 11; CP: 100.

<sup>20</sup> CP: 90, ¶ 12; CP: 101.

<sup>21</sup> CP: 90, ¶ 13; CP: 105.

<sup>22</sup> CP: 90, ¶ 13; CP: 105.

<sup>23</sup> CP: 90, ¶ 13; CP: 105.

<sup>24</sup> CP: 90, ¶ 13; CP: 105.

<sup>25</sup> CP: 149-51 (Defendants’ Requests for Admissions Nos. 6 and 7); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 6 and 7).

<sup>26</sup> CP: 90, ¶ 13; CP: 105.

application was the “Automatic Homestead Questionnaire.”<sup>27</sup> This document contains various brief questions about the real property proposed as security for the loan. On August 26, 2008 Mr. Murray received the completed “Automatic Homestead Questionnaire”, which was executed by Ms. Frizzell on August 26, 2008.<sup>28</sup>

Mr. Murray provided Ms. Frizzell with a disclosure dated August 27, 2008, which explained the costs and fees associated with the loan (\$12,117.98), and that Ms. Frizzell would receive a net payment of \$87,882.02 from the \$100,000.00 loan.<sup>29</sup> Ms. Frizzell signed the disclosure form, and dated it August 28, 2008.<sup>30</sup>

The August 27, 2008 disclosure form states “the borrower is encouraged to seek there [sic] own legal advice in all matters with regard to this loan prior to signing.”<sup>31</sup> Ms. Frizzell signed immediately below that warning.<sup>32</sup>

The loan closed on August 28, 2008.<sup>33</sup> Ms. Frizzell appeared, and executed each of the documents.<sup>34</sup> Mr. Murray did not observe anything in her behavior or questions that indicated that she did not understand the

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<sup>27</sup> CP: 90, ¶ 14; CP: 107.

<sup>28</sup> CP: 90, ¶ 14; CP: 107; CP: 149-51 (Defendants’ Requests for Admissions Nos. 8 and 9); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 8 and 9).

<sup>29</sup> CP: 90, ¶ 15; CP: 109.

<sup>30</sup> CP: 149-52 (Defendants’ Requests for Admissions Nos. 10 and 11); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 10 and 11).

<sup>31</sup> CP: 90, ¶ 16; CP: 109.

<sup>32</sup> CP: 90, ¶ 16; CP: 109.

<sup>33</sup> CP: 90-91, ¶ 17.

<sup>34</sup> *Id.*

documents being executed or the purposes of the loan closing.<sup>35</sup> She was given an opportunity to review each document before she signed, and executed all of the required documents without issue.<sup>36</sup>

As part of the loan closing, Ms. Frizzell executed a Promissory Note.<sup>37</sup> It clearly states that the document is for a loan of \$100,000, requires monthly payments of \$1,000, and is due and payable in full on October 1, 2011.<sup>38</sup> Ms. Frizzell initialed each page of the Promissory Note, and even made a correction to her mailing address on page 2.<sup>39</sup> The Note expressly states that it is secured by a Deed of Trust.<sup>40</sup>

On August 29, 2008 Ms. Frizzell also executed a Deed of Trust as security for the loan, which granted Mrs. Murray a security interest in the 128th St. Property.<sup>41</sup> The Deed of Trust clearly states that the document is for a loan of \$100,000, and the 128th St. Property is security for the loan.<sup>42</sup>

Ms. Frizzell received \$87,882.02 from Mrs. Murray on August 28,

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> CP: 91, ¶ 18; CP: 111-13; CP: 149-52 (Defendants' Requests for Admissions Nos. 12-14); CP: 180 (Plaintiff's Responses to Defendants' First Set of Requests for Admissions Nos. 12-14).

<sup>38</sup> CP: 91, ¶ 18; CP: 111-13.

<sup>39</sup> CP: 91, ¶ 19; CP: 111-13; CP: 149-52 (Defendants' Requests for Admissions Nos. 12-14); CP: 180 (Plaintiff's Responses to Defendants' First Set of Requests for Admissions Nos. 12-14).

<sup>40</sup> CP: 91, ¶ 18; CP: 111-13.

<sup>41</sup> CP: 91, ¶ 20; CP: 115-18; CP: 149-53 (Defendants' Requests for Admissions Nos. 15-16); CP: 180 (Plaintiff's Responses to Defendants' First Set of Requests for Admissions Nos. 15-16).

<sup>42</sup> CP: 91, ¶ 20; CP: 115-18.

2008 via wire transfer to an account of Ms. Frizzell's choosing.<sup>43</sup>

Ms. Frizzell made the first three regularly scheduled payments under the Note in the total amount of \$3,000, and the last payment was received on December 3, 2008.<sup>44</sup> Since that time she has failed to make any payments towards the Note.<sup>45</sup>

Following Ms. Frizzell's default, Mrs. Murray instituted the non-judicial foreclosure of the Deed of Trust.

Despite the assertion that the funds were going to be used for the wheelchair/scooter business, Ms. Frizzell used nearly \$60,000<sup>46</sup> of the \$87,882.02<sup>47</sup> she received from Mrs. Murray to invest in the stock market, and claims to have lost nearly all of the funds through those investments.

Ms. Frizzell testified at a deposition in this case on May 10, 2011. During her deposition, Ms. Frizzell admitted several times that the purpose of the loan was to start a wheelchair and scooter business.<sup>48</sup>

The original trustee's sale regarding Ms. Frizzell's property was scheduled to occur on October 23, 2009, but it was stayed by Ms. Frizzell filing a Chapter 13 bankruptcy petition *pro se* on October 13, 2009.<sup>49</sup> Ms. Tamara Frizzell, while proceeding *pro se*, filed nine separate pleadings

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<sup>43</sup> CP: 149-53 (Defendants' Requests for Admissions No. 17); CP: 180 (Plaintiff's Responses to Defendants' First Set of Requests for Admissions No. 17).

<sup>44</sup> CP: 91, ¶ 21.

<sup>45</sup> *Id.*

<sup>46</sup> CP: 268-71.

<sup>47</sup> CP: 267, ll. 3-10.

<sup>48</sup> CP: 241, ll. 2-8; CP: 243, ll. 12-23; CP: 252, ll. 20-23; CP: 260, ll. 18-22; CP: 274, ll. 12-14.

<sup>49</sup> CP: 33-34, ¶ 3; CP: 36-87 (Exhibits A, B, C, and D).

with the court over a three week period, to include her Chapter 13 bankruptcy petition, her bankruptcy schedules, a first Chapter 13 plan, an amended Chapter 13 plan, and other pleadings.<sup>50</sup> Her bankruptcy petition was dismissed on February 4, 2010, and the sale was continued to February 19, 2010.<sup>51</sup> At no point during the bankruptcy did Ms. Frizzell dispute the validity of the Note or Deed of Trust<sup>52</sup>, nor did she allege a lack of capacity to contract.<sup>53</sup>

After the bankruptcy was dismissed, a Trustee's Sale was scheduled for February 19, 2010. Ms. Frizzell filed this action on February 12, 2010 along with a motion in this action seeking the restraint of the sale.<sup>54</sup>

Following a hearing held before Judge Lisa Worswick on February 18, 2010, the court entered an Order restraining the Trustee's Sale, conditioned on payment by Ms. Frizzell of \$15,000, representing the arrearages on the deed of trust, into the registry of the court and the filing of a bond with the court in the amount of \$10,000 on or before February 19, 2010 at 9:45 a.m.<sup>55</sup> Ms. Frizzell neither appealed the Order nor requested reconsideration.

Ms. Frizzell failed to comply with the imposed conditions, and the

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<sup>50</sup> CP: 33-34, ¶ 3.

<sup>51</sup> *Id.*

<sup>52</sup> CP: 34, ¶ 9.

<sup>53</sup> CP: 34, ¶ 8.

<sup>54</sup> CP: 1-9 (Complaint); CP: 12-16 (Motion to Enjoin Trustee's Sale); CP: 17-18 (Note for Judges' Motion Calendar).

<sup>55</sup> CP: 124-125.

Trustee's Sale proceeded on February 19, 2010.<sup>56</sup> Mrs. Murray was the successful bidder at the sale, and purchased the 128th St. Property.<sup>57</sup>

Appellant's Complaint does not dispute the procedural validity of the Trustee's Sale. All of the Appellant's allegations instead refer to the execution of the Note and Deed of Trust.<sup>58</sup>

Despite the pendency of this action, Mrs. Murray filed a separate action for unlawful detainer against Ms. Frizzell on April 19, 2010 under Pierce County Superior Court Cause No. 10-2-08455-5.<sup>59</sup> By the stipulation of the parties, a Writ of Restitution was issued on June 3, 2010, directing the Sheriff of Pierce County to restore possession of the 128th St. Property to Mrs. Murray.<sup>60</sup>

On April 22, 2011, the Respondents' filed their Motion for Summary Judgment, which requested dismissal of the Appellant's Complaint based on the commercial nature of the loan and the Appellant's failure to actually restrain the trustee's sale.<sup>61</sup>

The Motion was granted by Judge Elizabeth Martin on May 20, 2011.<sup>62</sup> Judge Martin held that Respondents' "Motion for Summary Judgment is granted based on the Plaintiff's failure to obtain pre-sale injunctive relief. Accordingly, all of Plaintiff's claims are denied."<sup>63</sup>

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<sup>56</sup> CP: 142, ¶ 5; CP: 181-184 (Trustee's Deed).

<sup>57</sup> CP: 142, ¶ 5; CP: 181-184 (Trustee's Deed).

<sup>58</sup> CP: 1-9.

<sup>59</sup> CP: 142, ¶ 6.

<sup>60</sup> *Id.*

<sup>61</sup> CP: 137-138.

<sup>62</sup> CP: 304-05.

<sup>63</sup> CP: 305 (emphasis added).

Although Judge Martin's Order did not specifically address the commercial nature of the transaction, it was implicitly acknowledged based on the denial of the post-sale actions permitted for non-commercial transactions under RCW 61.24.127, which was argued by the parties.<sup>64</sup>

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

The Appellant set forth the applicable standard of review for this appeal of an order granting summary judgment.<sup>65</sup>

##### B. **BASED ON THE TESTIMONY OF THE APPELLANT AND THE SUBJECT LOAN DOCUMENTS THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING THE COMMERCIAL PURPOSE OF THE LOAN**

There is no ambiguity regarding the purpose of the loan in either the loan documents or in the testimony of Ms. Frizzell during her deposition herein. It was clearly intended by Ms. Frizzell and the Respondents as a commercial transaction, and the Respondents would not have entered into the loan but for the assurance that it was a commercial transaction. Ms. Frizzell offers no material evidence to contradict this position, to include her actual use of the funds, and thus there is no genuine issue of material fact as to the commercial purpose of the loan.

The loan application completed by Ms. Frizzell is entitled "Business Real Estate Loan Application."<sup>66</sup> In her application, Ms. Frizzell stated the requested funds would be used for a

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<sup>64</sup> See CP: 138, ll. 12-15; CP: 191-192.

<sup>65</sup> Appellant's Brief, 14.

<sup>66</sup> CP: 100.

“Wheelchair/Scooter Business.”<sup>67</sup> Ms. Frizzell completed a “Declaration Concerning Purpose of Loan and Use of Funds,” which also stated that the funds would be used for “Wheelchair + Scooter Business.”<sup>68</sup> That Declaration includes the statement

The Lender requires that the entire loan proceeds must be intended to be, and be employed solely for investment, commercial, or business purposes and not for personal, family, or household purposes. The Lender has further advised that they would not consider this loan application without this being the case.<sup>69</sup>

The summary of closing charges even referred to the loan as a “business loan.”<sup>70</sup>

Douglas Baer, who initially requested the loan on behalf of Ms. Frizzell, and whose Declaration was filed and relied upon by Ms. Frizzell, even states that they intended to start a wheelchair business.<sup>71</sup> Mr. Baer states that, at the time of the loan, he possessed 40-50 wheelchairs, which he used to start a wheelchair and scooter business based in Ms. Frizzell’s house.<sup>72</sup>

Appellant’s Brief repeats this claim.<sup>73</sup> Appellant states:

The only way [Ms. Frizzell] could make these payments would be to put the money in some kind of business.... Doug [Baer] had between 40 and 50 wheelchairs and scooters at Tamara [Frizzell]’s house, and he suggested a wheelchair business.... Doug [Baer]

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<sup>67</sup> *Id.*

<sup>68</sup> CP: 105.

<sup>69</sup> *Id.*

<sup>70</sup> CP: 109.

<sup>71</sup> CP: 146, ¶ 6.

<sup>72</sup> *Id.*

<sup>73</sup> Appellant’s Brief, 3-4.

just figured that Tamara [Frizzell] and he could make money selling wheelchairs.<sup>74</sup>

Ms. Frizzell appears to be arguing that prior to the loan she never intended on starting a business with Mr. Baer. Instead, she thought of starting a business only after accepting the loan in order to repay it. This is totally inconsistent with the “Business Real Estate Loan Application” referenced above, which she signed prior to receiving the loan. The application expressly states the commercial purpose of the loan, and that Ms. Frizzell intended on starting a wheelchair business. In addition to the application, all of the other loan documentation, to include the “Declaration Concerning Purpose of Loan and Use of Funds”, reference the intended wheelchair business. The only documentation before the court completely and utterly contradicts Ms. Frizzell’s argument. By providing this documentation to the Respondents in order to obtain the loan, Ms. Frizzell should be estopped from asserting that the purpose of the loan was non-commercial.

Most importantly, the Appellant’s current position is entirely inconsistent with her previous statements regarding intent. Ms. Frizzell was deposed in this case on May 10, 2011.<sup>75</sup> During her deposition she repeated stated that the purpose of the loan was to start a wheelchair business.<sup>76</sup>

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<sup>74</sup> *Id.* (citations omitted).

<sup>75</sup> CP: 235-299.

<sup>76</sup> CP: 241, ll. 2-8; CP: 243, ll. 12-23; CP: 252, ll. 20-23; CP: 260, ll. 18-22; CP: 274, ll. 12-14.

Irrespective of the Appellant's intent, it is also clear that the funds were actually used for commercial purposes. Ms. Frizzell admitted during her deposition that she invested approximately \$60,000.00<sup>77</sup> of the loaned funds in the stock market.<sup>78</sup> Ms. Frizzell maintained an E-Trade investment account, and used the funds to invest in oil company stocks.<sup>79</sup>

Based on the representations of the Appellant and her actual use of the loan proceeds, there is no genuine issue of material fact regarding the commercial purpose of the loan. As such, the exceptions to the waiver rule contained in RCW 61.24.127 are inapplicable.<sup>80</sup>

**C. THE TRIAL COURT PROPERLY RULED THAT THE APPELLANT WAIVED ALL CLAIMS REGARDING THE SUBJECT PROMISSORY NOTE AND DEED OF TRUST.**

1. THE KNOWING FAILURE OF THE APPELLANT TO ACTUALLY RESTRAIN THE TRUSTEE'S SALE CONSTITUTES A WAIVER OF ALL HER POST-SALE CLAIMS ARISING OUT OF THE OBLIGATIONS UNDERLYING THE SUBJECT DEED OF TRUST.

When Ms. Frizzell failed to restrain the Trustee's Sale associated with the Deed of Trust, she waived all claims based on the Promissory Note and Deed of Trust. The three goals of the Washington Deed of Trust Act<sup>81</sup> are to: (i) provide an efficient and inexpensive nonjudicial

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<sup>77</sup> This amount is approximately 68% of the net funds received by Ms. Frizzell through the loan. CP: 267, ll. 3-10 (Ms. Frizzell received \$87,882.02 at closing).

<sup>78</sup> CP: 268-71.

<sup>79</sup> *Id.*

<sup>80</sup> RCW 61.24.127(5).

<sup>81</sup> Chapter 61.24 RCW.

foreclosure process; (ii) provide adequate opportunities for interested parties to prevent wrongful foreclosure; and (iii) promote stability of land titles.<sup>82</sup> As part of those goals, the Deed of Trust Act provides the only means by which a grantor may preclude a sale once foreclosure has begun.<sup>83</sup> The statutory Notice of Trustee's Sale states:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. *Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.*<sup>84</sup>

A party who (i) receives notice of the right to enjoin a sale, and (ii) has actual or constructive knowledge of a defense to foreclosure prior to the sale, waives the right to postsale remedies where the party fails to bring an action to obtain a court order enjoining the sale.<sup>85</sup> This waiver applies to *all claims* arising out of the obligations underlying the subject deed of trust, to include claims based on fraud and consumer protection statutes.<sup>86</sup> Even if a suit is brought prior to the sale and requests injunctive relief, the failure to *actually* obtain a preliminary injunction restraining the

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<sup>82</sup> *Plein v. Lackey*, 149 Wash.2d 214, 225 (2003) (citing *Cox v. Helenius*, 103 Wash.2d 383, 387 (1985)).

<sup>83</sup> *Cox*, 103 Wash.2d at 388; *Brown v. Household Realty Corp.*, 146 Wash.App. 157, 163 (Div. 1, 2008); see also RCW 61.24.130.

<sup>84</sup> RCW 61.24.040(1)(f) (emphasis added).

<sup>85</sup> *Plein v. Lackey*, 149 Wash.2d 214, 227-29 (2003) (citing *Cox*, 103 Wash.2d at 388).

<sup>86</sup> *Brown*, 146 Wash.App. at 171 (holding that the trustee's sale terminated the financial relationship between the lender and borrower, leaving each from any further claim by the other arising out of their loan transactions).

trustee's sale constitutes a waiver of presale remedies.<sup>87</sup> This waiver of claims is seen as serving all three goals of the Deed of Trust Act.<sup>88</sup>

There is no doubt that Ms. Frizzell had notice of the pending nonjudicial foreclosure, as Ms. Frizzell filed a Motion to Enjoin the Trustee's Sale.<sup>89</sup> However, she failed to comply with the conditions imposed by the Court, and thus did not avail herself of her statutory presale remedy. The Court required Ms. Frizzell to deposit \$15,000 into the registry of the court and to file a bond in the amount of \$10,000 on or before February 19, 2010, which was the day of the Trustee's Sale.<sup>90</sup> Despite receiving a loan of \$87,882.02 from Mrs. Murray, and only repaying Mrs. Murray \$3,000 of those funds, Ms. Frizzell was unable to produce the required funds. As such, the sale proceeded, and Ms. Frizzell consequently waived any claims related to the Deed of Trust or the underlying obligation.

Conditions such as those imposed by the trial court are required by

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<sup>87</sup> *Plein*, 149 Wash.2d at 229 (2003) (despite filing an action for injunctive relief, "by failing to obtain a preliminary injunction or other restraining order regarding the trustee's sale, as contemplated by RCW 61.24.130, [the grantor] waived any objections to the foreclosure proceedings.").

<sup>88</sup> *Plein*, 149 Wash.2d at 227-28 ("The waiver doctrine applied in this context serves all three goals of the deed of trust act. Adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver in these circumstances furthers the goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles."); *Peoples Nat. Bank of Wash. V. Ostrander*, 6 Wash.App. 28, 32 (Div. 3, 1971) ("To allow one to delay asserting a defense [until after the sale] would be to defeat the spirit and intent of the trust deed act").

<sup>89</sup> CP: 1-8 (Complaint); CP: 12-16 (Motion for Order Enjoining Trustee's Sale).

<sup>90</sup> CP: 124-25.

the Deed of Trust Act. RCW 61.24.130 states that:

The court *shall* require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed....<sup>91</sup>

As such, the trial court's restrictions were reasonable and appropriate, and do not excuse Ms. Frizzell's failure to restrain the Trustee's Sale. If she disputed the ruling, Ms. Frizzell could have either appealed the Order Enjoining Trustee Sale or sought reconsideration. She did neither. As such, she remained bound to the security requirements imposed by the court pursuant to RCW 61.24.130.

Ms. Frizzell attempts to distinguish the controlling case on the issue of waiver, *Plein v. Lackey*,<sup>92</sup> by suggesting that the Court's ruling in *Plein* was non-binding dicta and that the facts are sufficiently distinguishable to render *Plein* merely persuasive.<sup>93</sup> In *Plein* the foreclosed party, prior to the trustee's sale, filed an action for a permanent injunction against the trustee and beneficiary.<sup>94</sup> The action alleged a lack of default and a declaration that the foreclosure was void. The foreclosed party even filed a motion for summary judgment three days prior to the scheduled sale. The Supreme Court of Washington ruled that merely filing an action contesting a foreclosure does not have the effect of restraining a trustee's sale.<sup>95</sup>

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<sup>91</sup> RCW 61.24.130(1) (emphasis added).

<sup>92</sup> 149 Wash.2d 214 (2003).

<sup>93</sup> Appellant's Brief, 20.

<sup>94</sup> *Plein*, 149 Wash. At 220.

<sup>95</sup> *Id.* at 227.

We hold that by failing to *obtain* a preliminary injunction or other restraining order restraining the trustee's sale, as contemplated by RCW 61.24.130, [the foreclosed party] waived any objections to the foreclosure proceedings.<sup>96</sup>

Under *Plein*, the failure to *obtain* a preliminary injunction or other order restraining the sale under the provisions of RCW 61.24.130 results in waiver of the foreclosed party's objections to the foreclosure proceedings.

In Appellant's Brief she asserts that she "enjoined the sale".<sup>97</sup> That is simply not the case. The trial court entered an order restraining the sale *conditioned* on Ms. Frizzell posting adequate security,<sup>98</sup> as required by RCW 61.24.130(1) and CR 65(c).<sup>99</sup> By failing to post the required security (or seeking appropriate relief from the order via appeal or reconsideration), Ms. Frizzell failed to restrain the sale.

Appellant further argues that a secondary source (the "Hoffman Comment"),<sup>100</sup> which was favorably cited by *Plein*<sup>101</sup> and *Brown*<sup>102</sup> suggests that the failure of a borrower to successfully enjoin a sale should not be held as a waiver of the borrower's right to contest the completed

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<sup>96</sup> *Id.* at 229 (emphasis added).

<sup>97</sup> CP: 21.

<sup>98</sup> CP: 124-125.

<sup>99</sup> RCW 61.24.130(1) states that "the court may condition granting the restraining order or injunction upon the giving of security by the applicant." CR 65(c) further states that "no restraining order or preliminary injunction shall issue except upon the giving of security." Both these make the provision of security a mandatory requirement for a restraining order to become effective.

<sup>100</sup> Joseph L. Hoffmann, Comment, *Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 336 (1984).

<sup>101</sup> 149 Wash.2d at 225.

<sup>102</sup> 146 Wn.App. at 170 fn 45.

sale. The Hoffman Comment offers no citations in support of this position. More importantly, though, it does not apply to the facts of this case.

Ms. Frizzell was not unsuccessful in her request for relief. The trial court granted the request conditioned upon her providing security as required by RCW 61.24.130(1) and CR 65(c). Ms. Frizzell simply failed to comply with the trial court's reasonable security requirements. Despite receiving \$87,882.02 in funds from the Respondents nineteen months earlier, Ms. Frizzell claims she had no funds available to comply with the trial court's Order Enjoining Trustee Sale. By failing to appeal the Order Enjoining Trustee Sale or seek reconsideration, Ms. Frizzell was bound by its terms. Instead, she and her attorney seemly elected to disregard the Order Enjoining Trustee Sale altogether.

Based on the above authority, Ms. Frizzell should not be able to avoid the waiver rule stated in *Plein* by electing to ignore the ruling of the trial court on the issue of security. RCW 61.24.130 and CR 65(c) require the trial court to address the issue of security prior to granting a restraining order. Ms. Frizzell offers no authority for the position that such an order can simply be disregarded. As such, she should be bound by the waiver rule stated in *Plein* for failing to actually restrain the trustee's sale.

2. THE FAILURE OF THE APPELLANT TO RESTRAIN THE TRUSTEE'S SALE CONSTITUTES A WAIVER OF ALL HER POST-SALE CLAIMS ARISING OUT OF THE OBLIGATIONS UNDERLYING THE SUBJECT DEED OF TRUST, TO INCLUDE CLAIMS BASED ON A LACK OF CAPACITY TO CONTRACT.

Appellant asserts, without any supporting authority, that claims

based on a lack of capacity to contract survive a trustee's sale irrespective of the waiver rule stated in *Plein*. The Supreme Court stated in *Plein* that “any objection to the trustee's sale is waived where presale remedies are not pursued.”<sup>103</sup> As noted in *Brown*, the legislature has reviewed Chapter 61.24 RCW since the *Plein* decision, but has yet to modify the application of the waiver doctrine in the context of commercial loans.<sup>104</sup> There is simply no legal basis for the assertion that any claims survive a trustee's sale where the borrower knowingly failed to obtain presale relief.

It is important to remember that Ms. Frizzell was represented by counsel prior to the sale and throughout this case. She filed a Complaint and a Motion for Order Enjoining Trustee Sale asserting her claimed lack of capacity to contract. Even assuming the validity of the competency argument (which the Respondents vehemently dispute and which is unsupported by her actual deposition testimony<sup>105</sup>) there is no dispute that Ms. Frizzell was properly represented in this matter. As such, her competency is irrelevant to her failure to comply with the Order Enjoining the Trustee Sale.

**D. THE REMAINDER OF THE ALLEGATIONS  
CONTAINED IN THE APPELLANT'S BRIEF ARE**

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<sup>103</sup> 149 Wash.2d at 229 (emphasis added).

<sup>104</sup> 146 Wash.App. at 170-71. RCW 61.24.127 does include certain exceptions to the waiver rule, but it only applies to non-commercial transactions. RCW 61.24.127(4) (“This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.”).

<sup>105</sup> See CP: 139-40; CP: 229-30. However, given that this is an appeal of a motion for summary judgment, Respondents acknowledge that competency was not expressly ruled on the trial court in the subject order. As such, Ms. Frizzell's competency is not explicitly addressed herein.

**IRRELEVANT TO THE ORDER BEING APPEALED.**

The Appellant's Brief contains additional arguments on a number of issues<sup>106</sup> that were not addressed in the Order subject to this appeal.<sup>107</sup> As such, they are not addressed herein.

**V. CONCLUSION**

There is no genuine dispute of material fact with regards to (i) the Appellant's actual knowledge of the pending foreclosure, (ii) the commercial purpose of the loan, or (iii) the Appellant's failure to actually restrain the sale. As such, based on the waiver rule stated by the Supreme Court in *Plein*, the Appellant waived all her claims regarding the underlying obligations secured by the subject deed of trust, to include her claims based on an alleged lack of capacity to contract. The trial court properly dismissed her claims, and the Order granting Respondent's Motion for Summary Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of November, 2011.

EISENHOWER & CARLSON, PLLC

By:   
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Darren R. Krattli, WSBA # 39128

Attorneys for Plaintiff

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<sup>106</sup> Appellant's Brief, 27-31 (the claims based on RCW 19.146, RCW 19.144, RCW 18.85, RCW 18.86, and the theory of a "de facto sale" were not addressed by the trial court).

<sup>107</sup> CP: 304-05.

CERTIFICATE OF SERVICE

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I hereby certify that on the 23rd day of November, 2011, I caused all parties hereto to be served with the *Brief of Respondents* and this *Certificate of Service* by directing delivery to the following persons by the means stated:

**By U.S. first-class mail and by e-mail on November 23, 2011, to Attorney for Appellant:**

Dan Robert Young  
Attorney at Law  
1000 2nd Ave. Ste. 3310  
Seattle WA 98104  
and  
[danryoung@netzero.net](mailto:danryoung@netzero.net)

**By ABC Legal Messenger for delivery on or before November 23, 2011, to:**

Clerk of the Court  
Washington State Court of Appeals, Division II  
950 Broadway, #300  
Tacoma, WA 98402

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

DATED this 23rd day of November, 2011, at Tacoma, Washington.

  
\_\_\_\_\_  
Nicole Frey, Legal Assistant