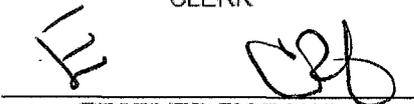


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**SUPREME COURT
OF THE STATE OF WASHINGTON**

TAMARA FRIZZELL,

Appellant,

v.

BARBARA MURRAY and GREGORY MURRAY,

Respondents.

RESPONSE TO PETITION FOR REVIEW

**Law Offices of Dan R. Young
Attorney for Appellant
1000 Second Avenue
Suite 3310
Seattle, WA 98104
(206) 292-8181**

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I. COUNTER-STATEMENT OF THE CASE

In 2008 Tamara Frizzell told a friend of hers, Doug Baer, that she wanted to get a small loan of about \$20,000 to pay some past-due bills, such as taxes and other things (CP 145).

Doug saw an advertisement in the Tacoma News Tribune to the effect that “we loan money on real estate” (CP 145). Tamara owned a house with a fish pond, front deck, fruit trees in the yard and a nice location (CP 145).¹ She had put a lot of work in the property (CP 145). Doug believed the property was worth about \$250,000 (CP 145). The assessed value was approximately \$225,000, and the market value according to Tamara was approximately \$300,000 (CP 159).² Tamara’s property was essentially owned free and clear (CP 159). Doug called the number in the ad and spoke with Gregory Murray (CP 145-46). They talked about a hard cash loan of \$20,000 (CP 146). They went back and forth about the interest rate, and the amount of the loan increased over time, because Gregory said he would give a better interest rate on a larger loan (CP 146).

Doug had a power of attorney signed by Tamara authorizing

¹The property consisted of a lot with a manufactured home on it (CP 215).

²Barbara Murray obtained a value of \$240,000 from Zillow (CP 210).

him to take action for her (CP 146; 155-57). Tamara and Doug agreed that Doug would have control over the money (CP 146; 250-51). Doug showed Gregory (and at the end his associate, Barbara) the power of attorney (CP 146). Doug told Gregory and Barbara that Tamara was not good in financial matters, did not understand them and was unable to handle money (CP 146). Doug realized this early on in relationship with Tamara (CP 146). Tamara is basically able to take care of her daily needs, but does not understand financial or legal matters (CP 146). She is like a child in that regard (*id.*). Doug does not believe that Tamara understood the nature or effect of the transaction she was entering into in the "loan" transaction (*id.*).

Doug thought Greg Murray was the one who would make the loan, as Greg told Doug that it was Greg's money, and in their negotiations Greg said Greg would be the lender (CP 146). But at the last minute Barbara was brought in the transaction, and she stated she would be the lender (*id.*). She refused to provide the money to Doug under the power of attorney, and made the loan to Tamara (*id.*). Tamara had no involvement in the loan negotiations or lending process (*id.*). She was handed certain documents, such as a declaration concerning purpose of loan, business real estate loan application and homestead questionnaire, by Doug at home (CP 255-

56). She filled them out and they were taken back to the office (CP 256). All she did was sign the final papers (CP 146). Doug did not sign any of the loan documents (CP 206).

Tamara signed a declaration concerning purpose of loan and use of loan funds (CP 286). This document recited that it was the "intent of the undersigned to use all the proceeds of the loan for investment, commercial or business purposes" (CP 286). A statement in the declaration recites that "[t]his loan will be used as follows: wheelchair + scooter business" (CP 286).

At the recording office where Tamara signed the papers, Barbara was concerned about the relationship of Tamara and Doug, and asked Tamara how long Tamara had been with Doug (CP 204). Tamara replied she had been with him a year (CP 204).

Tamara signed the documents that were put in front of her (CP 252, 253).

Doug wanted to use the money for a business and was in control of the process (CP 253).

Tamara at the time of the loan made less than \$1,000 per month according to Doug (CP 146), although her application stated her income was \$1,600 per month as a caregiver (CP 159). The loan terms provided for payments of \$1,000 per month on a \$100,000 loan

(CP 146; 170). The only way she could make these payments would be to put the money in some kind of business (CP 146). She had no business to operate (CP 146). Doug had between 40 and 50 wheelchairs and scooters at Tamara's house, and he suggested a wheelchair business (*id.*). Doug had no business plans drawn up or projected income and expense statements or anything like that (*id.*). He just figured that Tamara and he could make money selling wheelchairs (*id.*). Greg and Barbara asked very few questions about the business (*id.*). Barbara testified at her deposition that it was "Doug's business" and that Tamara was going to get the loan to help Doug's business (CP 206). Barbara Murray saw between 20 and 30 scooters and wheelchairs "in the shed out back" and Doug reported that he was good at fixing things and had a connection in Bellevue or Redmond where the scooters and wheelchairs were going to be sold (CP 207). Barbara Murray did not know specifically what the loan proceeds were to go for and did not ask (CP 207-08). Barbara Murray never asked to see or saw any business plan for the business, never asked for or saw any business proformas (even claiming not to know what one was), and never made any determination of how likely funds from a scooter or wheelchair business would be to pay back the loan (CP 208). In spite of that, Barbara Murray "thought it was likely" the

loan could be paid off with the business solely on the basis of Doug's statement that "Doug said he was good at fixing things. She [Tamara] had an inventory of wheelchairs that they could fix and market" (CP 209).

Barbara Murray did not know where Tamara worked (CP 213). Barbara had no information on Doug's work history, did not ask him for any financial information, and did not know what his business experience was (CP 213).

The business real estate loan application signed by Tamara shows no assets and liabilities, other than the home Tamara owned (CP 159-161). Tamara signed a note calling for payment terms of \$1,000 per month, which was interest only, with repayment due in three years (CP 170). Some \$12,000 in fees was subtracted from the nominal \$100,000 loan, and Tamara received slightly less than \$88,000 (CP 290). The note was secured by a deed of trust on the property (CP 296-299).³

Tamara did not put the money in the wheelchair business (CP 146). According to Doug, she paid some bills, bought some stocks (which she knew nothing about) and spent the money on various

³The note and deed of trust were executed in favor of Barbara Roszyk, a single woman (CP 292, 296). She married Greg Murray after the note and deed of trust were executed.

things that she probably does not even know now (*id.*). In Doug's opinion, giving Tamara a loan of \$100,000 "was like giving the money to a small child who had no conception of how to spend the money, what would be required to pay it back, and what would happen if it were not paid back" (CP 146).

At her deposition Tamara was shown the closing statement showing the final closing charges (CP 258-59, CP 290). When asked what the words "business loan" on the statement (CP 290) referred to, Tamara replied, "I can't say, because I don't understand what went on" (CP 259). When asked if she did believe that she was "borrowing [the] funds from the Murrays[,] " Tamara replied, "I'm not sure" (CP 282).

Tamara further testified that the Murrays did not accept the general power of attorney that Tamara had signed in favor of Doug (CP 268). She would have preferred that Doug handle the transaction (*id.*).

Tamara testified that she put all of the money in the stock market (CP 269). She came up with the idea to invest in the stock market because her ex- husband's family had money in stocks (*id.*). She lost all the money she put in the stock market (CP 271). She has no idea what happened to the wheel chair business or whether any of the money was ever used to buy more wheelchairs, to fix the

wheelchairs, or anything similar (CP 271).

Tamara made only three payments on the loan (CP 91). When predictably Tamara did not repay the loan, Barbara initiated the process of foreclosing on Tamara's home through a non-judicial sale under the deed of trust (CP 296-99). The trustee sale was scheduled for February 19, 2010 (CP 143).

Shortly before the sale Tamara filed the present civil action against the lender and agent, Greg and Barbara Murray (CP 1-9). The complaint alleges a number of legal and equitable grounds that would provide a basis for restraining the trustee sale (*id.*).

Significantly, the complaint alleges that at the time Tamara signed the note and deed of trust, she did not understand the nature, terms and effect of the transaction, and did not have the mental capacity to contract (CP 3).

The complaint alleges that Gregory Murray was required to be licensed as a mortgage broker under the Mortgage Brokers Practices Act, RCW 19.146.200, and that he employed a scheme, device or artifice to defraud or mislead Tamara in violation of RCW 19.146.020(1), (2) and (3) (CP 3-5). RCW 19.146.085 requires that all actions of a mortgage broker in this context be actuated by good faith and the mortgage broker must practice honesty and equity in all

matters related to his profession. The complaint alleges that Gregory failed to live up to those standards and did not explain to Tamara the nature and effect of the transaction she was entering into (CP 4).

The complaint further alleges that the defendants were involved in making a residential loan to Tamara within the meaning of the mortgage lending and home ownership law, RCW 19.144.010(10), and that they engaged in unfair or deceptive practices toward Tamara in violation of RCW 19.144.080 (CP 5-6).

In addition, the complaint alleges that Gregory Murray was really negotiating a purchase transaction, and not a loan, and therefore he should have been licensed as a realtor under RCW 18.85.010(1) and RCW 18.86.010(8), and his conduct violated the brokerage relationships law, RCW 18.86.030, by failing to deal honestly and in good faith with Tamara and failing to disclose all existing material facts known by him and not apparent to her in violation of RCW 18.86.030 (CP 6).

Other theories asserted in the complaint are violation of the Consumer Protection Act ("CPA") (RCW Ch. 19.86), civil conspiracy, unconscionability—the value of the house being some \$250,000, while the "loan" amount, really purchase price, was \$100,000--and common-law claims of misrepresentation and fraud (CP 6-8).

In addition, the complaint sought relief in the form of money damages for the statutory violations alleged above, invalidation of the note and deed of trust, and an injunction “barring enforcement of the deed of trust through foreclosure sale” (CP 8).

Tamara through counsel then filed a motion for an order enjoining the trustee sale (CP 12-13). The trial court entered an order on February 18, 2010 enjoining the trustee sale scheduled for the next day, “conditioned upon plaintiff’s payment into the registry of the court the sum of \$15,000 representing arrearages on the deed of trust and a bond in the sum of \$10,000 on or before February 19, 2010, at 9:45 a.m.” (CP 124-25). Plaintiff was unable to obtain the \$15,000 or post a bond by the next morning, so the injunction lapsed. The trustee foreclosed upon the home, Barbara Murray purchased the property at the sale, and evicted plaintiff, who is now homeless (CP 143).

Following discovery, the Murrays moved to dismiss all of plaintiff’s claims on summary judgment (CP 127-128). Their essential argument was that because Tamara did not obtain an order enjoining the sale, she was precluded from obtaining any relief under any cognizable legal theory against the Murrays (*id.*).

The trial court granted the Murrays’ motion as to all of Tamara’s claims, “based on the Plaintiff’s failure to obtain pre-sale

injunctive relief" (CP 305).

II. ARGUMENT

The trial court erred in granting summary judgment in favor of the Murrays, as there are disputed issues of material fact which preclude such relief. First and most basic of these disputed factual issues is Tamara's lack of capacity to contract. Her mental capacity is a fundamental aspect of (a) whether the note and deed of trust are enforceable; (b) whether she understood any foreclosure notice she received, a requirement for concluding that her lack of obtaining a pre-sale restraining order is a waiver of non-foreclosure related claims; and (c) whether the loan was in fact a residential loan, instead of a business or commercial loan, thus triggering the application of various consumer protection statutes, including the non-waiver provisions of RCW 61.24.127.

Doug Baer, a lay witness, opined that Tamara does not understand financial or legal matters (CP 146). She is like a child in that regard (*id.*). He does not believe that she understood the nature or effect of the transaction she was entering into in the "loan" transaction (*id.*). Dr. Whitehill, a clinical psychologist, examined Tamara and found that (1) her characterological disposition to conform to what others want and (2) her severe memory deficits,

suggestive of incipient dementia, are so significant that her ability to remember what she was told about the transaction and ability to make rational decisions would have been severely compromised (CP 197). A reasonable juror could conclude on the basis of this evidence that Tamara lacked the capacity to understand the nature, terms and effect of the transaction she was entering into.

There is broad language in the case of *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003) and *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 167, 189 P.3d 233 (2008), *review denied*, 165 Wn.2d 1023, 202 P.3d 308 (2009) to the effect that unless a borrower obtains an order restraining the trustee sale, the borrower waives all claims relating to the note and deed of trust, including CPA and common law claims. Technically, these cases do not apply to the present facts, because in both *Plein* and *Brown* the borrowers made no effort to restrain the sale before it took place. The language is therefore dictum and not binding on lower courts. *State v. Christensen*, 153 Wn.2d 186, 196, 102 P.3d 789 (2004); *Williamson, Inc. v. Calibre Homes*, 147 Wn.2d 394, 403-04, 54 P.3d 1186 (2002). *See Kucera v. Department of Transportation*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (noting courts do not rely on cases that fail to specifically raise or decide an issue).

The breadth of the language used in the opinions also makes the waiver rule appear more rigid than it ought to be, especially in light of *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012), which presents a much more flexible application of the waiver rule in accordance with equitable principles. But even applying the rigid form of the rule, the test in *Plein* and *Brown* is not met, as one of the requirements of waiver is that the borrower must receive notice of the right to enjoin the sale and knowledge of a defense. *Plein, supra*, 149 Wn.2d at 227. If the borrower lacks the capacity to understand the nature and terms of the transaction, the notice should not constitute the basis for the conclusion that the borrower voluntarily relinquished a known right.

Brown is also distinguishable, as in that case the borrower did not seek to enjoin the trustee sale, but filed suit two years after the foreclosure. *Brown, supra*, 146 Wn. App. at 162. The court of appeals in *Brown* held that a borrower waives claims against a lender/beneficiary by failing to timely request a preliminary injunction or restraining order enjoining a nonjudicial foreclosure sale at least five days before the sale date. *Brown*, 146 Wn. App. at 160. But the court in *Brown* specifically did not address the issue present in the case at bar, i.e., what happens when the borrower does timely seek to

restrain the sale, but is unable to restrain the sale, stating:

[The borrowers] also argue that the requirement that a party obtain a preliminary injunction is overly burdensome because to obtain a preliminary injunction a party must show that he is likely to prevail on the merits. Thus, a party who files a lawsuit after the initiation of the foreclosure process and unsuccessfully attempts to obtain a preliminary injunction restraining the sale could prevail at trial yet be barred from obtaining relief. However, that issue is not before us. Here [the borrowers] failed to pursue presale remedies under the Act and then filed this lawsuit two years after the trustee's sale. To allow a challenge to the underlying obligation after a sale in these circumstances would "defeat the spirit and intent of the trust deed act [footnotes omitted]."

Brown, supra, 146 Wn. App. at 170.

In the case at bar Tamara did pursue pre-sale remedies, and the court in fact did enjoin the trustee sale provided that Tamara post a bond. She was unable to post the required bond in the few days before the sale, so the sale took place. Accordingly, she cannot be held to have waived any of her rights.

Application of *Brown* in the present circumstances also impinges upon Tamara's constitutional right of access to the courts. "Access to courts is a fundamental constitutional right." *Hough v. Stockbridge*, 113 Wn.App. 532, 539, 54 P.3d 192 (2002). As stated in *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009):

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991).

In *Putman*, the supreme court invalidated a state statute requiring medical malpractice plaintiffs to obtain and file with the complaint a certificate of merit from a medical expert, as such a requirement hindered their right of access to courts.⁴

"As with the relinquishment of any constitutional right, waiver of access to courts must be a voluntary, knowing, and intelligent act." *Hough, supra*, 113 Wn. App. at 640. *Hough* invalidated a pre-printed waiver of a petitioner's right to be served with a petition for an anti-harassment order as a condition to being able to file an anti-harassment petition. Similarly, here the trial court's determination of a waiver of all of Tamara's claims based on her failure to obtain \$15,000 in cash and post a \$10,000 bond interferes with Tamara's right of access to the courts on her other claims, including her CPA claim.

⁴The court also invalidated the statute on grounds that it violated the separation of powers doctrine.

The Murrays, in addressing the fact that Tamara did not post cash and a bond, conflate and confuse the role security plays in connection with enjoining the trustee sale, and its lack of any role in connection with Tamara's other post-sale claims. Parties who file CPA claims are not normally required to post a bond or security. The Murrays fail to explain why a CPA plaintiff, who also happens to be objecting to a foreclosure sale, should be required to post security before the court will hear her CPA claim.

Even if the stability of land titles, providing an adequate opportunity to prevent wrongful foreclosures, and the establishment of an efficient and inexpensive process for lenders to realize on their security are important goals of the Deed of Trust Act, denying impecunious litigants the right to pursue distinct claims serving different purposes does not further those goals, and in fact impedes the achievement of other equally or more important social goals.

For example, the Washington Consumer Protection Act, RCW ch. 19.86, prohibits unfair and deceptive acts in the conduct of a trade or business. *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 785-793, 719 P.2d 531 (1986). Private litigants are encouraged to act as attorneys general in the public interest to reduce the incidence of such unfair conduct. *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94

Wn.App. 602, 610, 971 P.2d 953, *review denied*, 138 Wn.2d 1009, 989 P.2d 1136 (1999). Yet requiring a litigant in the context of a foreclosure to put up cash and a bond in order to pursue a CPA claim will deny in most cases, as it did here, the litigant's ability to bring the CPA claim at all. This undermines the ameliorative impact of the CPA.

The legislature recognized this issue in the enactment of RCW 61.24.127, which provides that the "failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale" is not deemed to be a waiver of a claim for damages asserting common law fraud or misrepresentation, or a violation of Title 19 RCW. RCW 61.24.127(1)(a) and (b). This statute was enacted in 2009, and applies only to foreclosures of owner-occupied residential real property. RCW 61.24.127(3). The statute specifically does not apply "to the foreclosure of a deed of trust used to secure a commercial loan." RCW 61.24.127(4).

Moreover, courts must "strictly construe" the deed of trust statutes codified in chapter 61.24 RCW in the borrower's favor. *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 536-37, 119 P.3d 884 (2005). The rationale is that these statutes, permitting a trustee to sell property without a judicial process, remove many of the protections borrowers have under a

mortgage, and the removal of these protections should not be expanded. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111, 752 P.2d 358 (1988).

On this record, the Murrays have not established as a matter of law that the loan to Tamara was a commercial loan. Whether or not the transaction was a commercial loan is a disputed issue of material fact. Certainly, the loan had none of the indicia of a commercial loan, and the Murrays' casual disregard of Tamara's income, financial acumen, business experience or practical plans is remarkable. But again, since Tamara's lack of capacity is a disputed issue of material fact, her signing a declaration concerning the purpose of the loan (CP 164) cannot be considered conclusive as to the contents of the declaration.

Similarly, other consumer protection statutes are triggered in the context of a residential mortgage loan (RCW 19.146.010(19)) or a residential loan (RCW 19.144.010(1)). For similar reasons, the applicability of these statutes depends upon the character of the loan—residential or not—and cannot be decided on this record.

If the trial court had not adopted the blanket rule that failing to obtain a pre-sale restraining order waives all claims, the trial court surely would have denied the Murrays' motion for summary judgment.

It was therefore proper for the Court of Appeals to reverse the trial court's order granting summary judgment.

III. CONCLUSION

For the reasons set forth above, this Court should deny the petition for review filed by Respondents.

RESPECTFULLY SUBMITTED this 29th day of October,
2012.

Law Offices of Dan R. Young

By Dan R. Young
Dan R. Young, WSBA # 12020
Attorney for Appellant
Tamara Frizzel

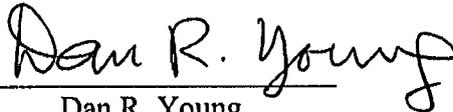
DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellant Tamara Frizzell in this action.
2. On October 29, 2012, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Response to Petition for Review to the following:

Darren Krattli, Esq.
Eisenhower and Carlson PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402-4395

Dated: October 29, 2012, at Seattle, Washington.



Dan R. Young

OFFICE RECEPTIONIST, CLERK

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Attached for filing is a Response to Petition for Review in *Frizzell v. Murray*, Supreme Court case #87927-3. The person filing the document is
Dan R. Young, WSBA #12020
Law Offices of Dan R. Young
1000 Second Avenue, Suite 3310
Seattle, WA 98104
206-292-8181 (office)
206-962-0676 (cell)
danryoung@netzero.net