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Supreme Court No. 88215-1

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IN THE SUPREME COURT
STATE OF WASHINGTON

LAWRENCE JAMETSKY, a single man,

Petitioner

v.

RODNEY A. and JANE DOE OLSEN, MATHEW and JANE DOE
FLYNN, and MICHAEL and JANE DOE HABER,

Respondents

**SUPPLEMENTAL BRIEF OF PETITIONER LAWRENCE
JAMETSKY**

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ORIGINAL

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I. INTRODUCTION

The Distressed Property Conveyances Act, RCW 61.34.010 *et seq.* (the “DPCA”), is part of a larger statutory scheme designed to protect Washington consumers from unfair and deceptive practices. As expanded by the legislature in 2008, the DPCA was designed to protect consumers from “foreclosure rescue” scams. More broadly, the DPCA is designed to prevent homeowners from making hasty decisions to sell their property for much less than fair value while under duress of a pending loss of the home by foreclosure, either from not paying property taxes or the mortgage.

Along with many other Washington statutes that govern specific types of unfair or deceptive business practices, a violation of the DPCA is a *per se* unfair or deceptive trade practice for purposes of Washington’s Consumer Protection Act, RCW 19.86.010 *et seq.* (the “CPA”). As such, the DPCA, like its “umbrella” statute, the CPA, is a remedial statute and must be liberally construed to protect consumers.

The Superior Court, resolving cross-motions for summary judgment, and Court of Appeals’ decision below failed to serve the DPCA’s express purpose of protecting consumers vulnerable to “equity skimming” and other foreclosure rescue scams when they held Petitioner Lawrence Jametsky’s home failed to meet the DPCA’s threshold requirement that it be a “distressed home” as defined by RCW 61.34.020(2). Despite ample evidence in the record that Mr. Jametsky

was at risk of losing his home due to nonpayment of property taxes for over three years, that he was an unsophisticated homeowner, and that he was in dire financial straits, and unemployed, Division I upheld the Superior Court's narrow definition of "at risk of loss due to nonpayment of taxes" and concluded that because the county treasurer had not yet issued a certificate of delinquency to Mr. Jametsky, pursuant to RCW 84.64.050, he could not, as a matter of law, be at risk of losing his home. In Mr. Jametsky's case, failure to satisfy this narrow standard meant he was deprived of the protections of the DPCA, a statute expressly designed to help Washington residents who, like Mr. Jametsky, are preyed upon by persons who pretend to help homeowners in financial distress but instead, defraud them. The ruling also deprived him of his home and its substantial equity. Although the Court of Appeals "...accept[ed] that he may have truly feared that he would ultimately lose his house based upon a failure to pay his property taxes" (Slip opinion at p. 12), it unnecessarily narrowed the reach of the statute, when it should have liberally construed it to achieve the stated legislative purpose.

This Court now has the opportunity to correct the lower courts' narrow and incorrect interpretation of the DPCA, one which ignored the statute's plain language and its legislative purpose. For the reasons set forth below, Mr. Jametsky respectfully requests the Court reverse the Superior Court's order granting summary judgment for Respondents

Rodney Olsen and Mathew Flynn, and the subsequent judgment for attorney fees and costs, and direct entry of summary judgment in favor of Jametsky, since there was no dispute in the trial court by the defendants about his insolvency, his unemployment, his looming tax foreclosure, or his distressed state of mind. Alternatively, this court could remand with instructions to reinstate his case on the basis that genuine issues of material fact remain as to whether Mr. Jametsky's home was a "distressed home" for purposes of the DPCA.

II. ARGUMENT

A. Summary of Argument

This case presents an issue of first impression this Court reviews de novo: whether the DPCA's definition of a "distressed home" as a dwelling that is "at risk of loss due to nonpayment of taxes" only applies to a home that has been issued a certificate of delinquency and scheduled sale date, under RCW 84.64.050. See, *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 430, 275 P.3d 1119 (2012) (explaining that "[l]egal conclusions, including the proper interpretations of statutes, are reviewed de novo"). As detailed below, well-established principles of statutory interpretation compel the Court to conclude that the definition of "distressed home" is not so limited.

Since the DPCA does not define "at risk of loss due to nonpayment of taxes," the Court must first carefully review the DPCA's plain

language, and specifically, the definition of “distressed home” set forth in RCW 61.34.020(2)(a). Referring to a dictionary or dictionaries to assist in the plain language analysis is both necessary and appropriate. As discussed below, analysis of the plain meaning of “at risk of loss” makes clear that whether a dwelling is at such risk due to the owner’s failure to pay taxes is a factual determination to be made with reference to several factors, including the homeowner’s overall financial situation, his or her level of sophistication, and the specific acts and practices the “distressed home consultant” employs in the transaction.

If the Court concludes that the meaning of “at risk of loss due to non-payment of taxes” remains ambiguous after reviewing the plain language of RCW 61.34.020(2)(a), it should interpret the phrase with reference to “what the Legislature has said in the [DPCA] and related statutes which disclose legislative intent about the provision in question.” *Estate of Bunch*, 174 Wn.2d at 432 (internal citations and marks omitted). As explained below, however, RCW 84.64.050 does not qualify as a “related statute” for purposes of this analysis. Rather, to ascertain the Legislature’s intent, the Court should focus on the language of the DPCA itself, the interpretation of the Washington State Attorney General, the state agency charged with enforcing consumer protection statutes, and the legislative mandate that consumer protection laws must be liberally construed so as to advance their remedial purpose. The Court should

reject the lower courts' conclusion that it was correct to rely on the standards governing issuance of certificates of delinquency set forth in a discrete statutory chapter, which does not disclose any legislative intent relevant to the DPCA.

B. The Court Should Apply the Correct Principles of Statutory Interpretation and Conclude That Whether a Dwelling Is “At Risk of Loss Due to Nonpayment of Taxes” Is a Factual Determination Dependent on Consideration of Several Non-Exclusive Factors

1. The Plain Language of RCW 61.34.020(2)(a) Confirms That Whether a Dwelling Is a “Distressed Home” Because It Is at Risk of Loss Due to Nonpayment of Taxes Is a Fact-Specific Determination

“Interpretation of a statute is guided by well-established principles.” *Estate of Bunch*, 174 Wn.2d at 432. An appellate court’s “fundamental objective when interpreting a statute is to discern and implement the intent of the legislature.” *Id.* (internal citations and marks omitted). When interpreting a statute, this Court “look[s] first to the statute’s plain meaning.” *Carlsen v. Global Client Solutions*, 171 Wn.2d 486, 494, 256 P.3d 321 (2011).

When a term in a statute is not defined, this Court “appl[ies] the plain meaning of the word and may consult a dictionary.” *Cregan v. Fourth Mem’l Church*, 175 Wn.2d 279, 285, 285 P.3d 860 (2012) (relying on Black’s Law Dictionary for definition of “public,” undefined in Washington’s recreational use immunity statute, RCW 4.24.210); *see also*, *Estate of Bunch*, 174 Wn.2d at 434 (referencing American Heritage

Dictionary to define “regularly” for purpose of interpreting RCW 4.24.010, which governs standing to sue for the injury or death of a child); *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 597, 278 P.3d 157 (2012) (relying on dictionary definitions to construe undefined terms in timber trespass statute).

It is undisputed that the DPCA does not define “at risk of loss due to nonpayment of taxes.” Indeed, aside from the use of this phrase in the definition of “distressed home,” *see*, RCW 61.34.020(2)(a), the word “risk,” much less the phrase “at risk of loss,” is not used in any provision of the DPCA. *See generally*, RCW 61.34.010–RCW 61.34.900. Nor does the DPCA refer to any other RCW title, chapter or section, including RCW 84.64.050, with respect to the meaning of “at risk of loss due to nonpayment of taxes.” *See generally, id.*

Accordingly, it is appropriate for the Court to consult dictionary definitions to shed light on the meaning of “at risk of loss.” *See, Cregan*, 175 Wn.2d at 285; *Estate of Bunch*, 174 Wn.2d at 434; *Jongeward*, 174 Wn.2d at 597. One meaning of “risk,” as defined by Black’s Law Dictionary, is “[t]he uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm[.]” Black’s Law Dictionary 1353 (8th ed. 2004) (emphasis added). A “possibility” is “[a]n event that may or may not happen.” *Id.* at 1203 (emphasis added). Applying this definition, the plain meaning of “at

risk of loss due to nonpayment of taxes” is the “chance” or “possibility” that the homeowner may lose his or her home due to nonpayment of taxes – “an event that may or may not happen.” Indeed, the magnitude of risk increases from the first missed tax payment right up to the actual sale of the property. At each point along that line there is measurable risk. To conclude, as the trial court did, that immediately prior to the issuance of the notice of tax foreclosure sale date, there would be *no* risk, but right afterward, maybe the next day, there would be adequate risk to trigger the protections of the DPCA, makes no sense.

The Washington State Attorney General, in its amicus curiae brief in support of Mr. Jametsky’s Petition for Review, suggests an alternate definition, noting that “[a]t risk” means “in a dangerous situation or status; in jeopardy.” Br. of Amicus Curiae Attorney General of Washington in Supp. of Pet. for Review (“AG Amicus”) at 7 (citing Random House Webster’s Unabridged Dictionary 1660 (2nd ed. 2004)).

Regardless of which definition is applied, however, these dictionary definitions of “risk” and “at risk,” with their reference to concepts not subject to bright-line decision making (“chance,” “possibility,” “jeopardy”) make clear that the determination of whether a particular situation is “at risk” is not subject to a bright-line rule. Rather, a finder of fact should consider a number of factors to determine whether a homeowner is at risk of losing his or her home due to nonpayment of

taxes. Whether a county has issued a certificate of delinquency pursuant to RCW 84.64.050 may be one relevant factor. Other factors could, and should, include the homeowner's overall financial situation; his or her level of sophistication; and the specific acts and practices used by the "distressed home consultant" with respect to the transaction, including the type and form of documents used to convey the property.

2. The Court Should Reject the Lower Courts' Reliance on RCW 84.64.050 to Determine Whether a Dwelling Is "at Risk of Loss Due to Nonpayment of Taxes" so as to Qualify as a "Distressed Home" Under the DPCA

When possible, "[this Court] derive[s] legislative intent solely from the plain language enacted by the legislature[.]" *State v. Evans*, -- Wn.2d --, 298 P.3d 724, 727 (2013). If the Court does not find a plain language analysis sufficient, the meaning of a statute "may be gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Estate of Bunch*, 174 Wn.2d at 432 (emphasis added; internal citations and marks omitted); *see also, Jongeward*, 174 Wn.2d at 594. In other words, not all "related statutes" are relevant to the Court's interpretation of a particular statutory provision, only those "which disclose legislative intent" about the statutory provision at issue. *Id.* (emphasis added).

Mr. Jametsky does not dispute that to an extremely attenuated degree, RCW 84.64.050, which governs the tax lien foreclosure process, is related to the DPCA. Both statutes involve real property and the financial

duties and responsibilities associated with property ownership. But whether RCW 84.64.050 is “related” to the DPCA such that it “disclose[s] legislative intent” about that statute is a different matter. There is nothing in RCW 84.64.050 that discloses any “legislative intent” relevant to the DPCA, a statute whose purpose is to provide a remedy for victims of “real estate fraud and abuse.” RCW 61.34.010. Rather, RCW 84.64.050 merely governs the procedure counties must follow when issuing certificates of delinquency regarding property taxes. It does not shed any light on criteria for determining when a person falls into the category of “innocent homeowners” to be protected from “equity skimmers,” the stated legislative purpose of the DPCA. The fact that RCW 84.64.050 sets a time period for when certificates of delinquency are issued – “[a]fter the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued” – does not bear on when a home “is at risk of loss due to nonpayment of taxes.” “Risk” is a continuum and always determined with respect to the specific circumstances of a homeowner’s situation. *See* Section II., B., 1. *supra*.

Respondents have suggested it is significant that when RCW 61.34.020 was amended, “the Legislature was aware of the real property tax foreclosure statute[,]” RCW 84.64.050. *See* Answer to Pet. for Review at 11 (citing *Thurston Cnty. v. Gorton*, 85 Wn.2d 133, 530 P.2d 309

(1975)). Mr. Jametsky agrees with the principle that “[t]he legislature is presumed to enact laws with full knowledge of existing laws.” *Thurston Cnty.*, 85 Wn.2d at 138. The Legislature’s “awareness” of RCW 84.64.050 when it amended the DPCA is not dispositive here, however, given the fact that the tax lien foreclosure statute is only very generally “related” to the DPCA, nor does it define what “risk of loss” might be.

Moreover, this Court “presume[s] that the Legislature is aware of the fact that two statutes address” the same general issue and “further presume[s] that if the Legislature had intended to restrict the application of [one statutory provision] by a limited definition” of the same term as used in another statutory chapter, “the Legislature would have expressly done so.” *Bennett v. Hardy*, 113 Wn.2d 912, 926, 784 P.2d 1258 (1990) (considering, in an age discrimination case, whether the definition of “employer” in RCW 49.60.040, the Washington Law Against Discrimination “should apply outside chapter 49.60 and operate to bar an implied cause of action under RCW 49.44.090[,]” the statutory provision declaring age discrimination an “unfair practice”; concluding that “if the Legislature had intended to restrict the application of RCW 49.44.090 by a limited definition of employer as it did in RCW 49.60, the Legislature would have expressly done so”).

The Court here should apply the same principle of statutory interpretation here as it did in *Bennett*, presuming that the Legislature is

aware of the fact that the DPCA provides that a “distressed home” may be a home that is “at risk of loss due to nonpayment of taxes[.]” *see*, RCW 61.34.020(2)(a), and also presuming that the Legislature is aware of the tax lien foreclosure process set forth in RCW 84.64.050 *et seq.*

Accordingly, the Court should conclude that “if the legislature had intended to restrict” the definition of “distressed home” under RCW 61.34.020(2)(a) by reference to RCW 84.64.050, “the Legislature would have expressly done so.” *See Bennett*, 113 Wn.2d at 926.

For this reason, in addition to the DPCA’s plain language, which makes no reference to the tax lien foreclosure process, much less the tax lien foreclosure statute, the Court should conclude that “at risk of loss due to nonpayment of taxes,” for purposes of the DPCA, should not be defined subject to the limitations in RCW 84.64.050.

3. The Court Must Interpret the DPCA Broadly to Best Advance Its Legislative Purpose of Protecting Vulnerable Washington Homeowners from Foreclosure Rescue Scams

“[I]f an act is subject to two interpretations, that which best advances the legislative purpose should be adopted.” *In re Detention of R.*, 97 Wn.2d 182, 187, 641, P.2d 704 (1982) (citing *Hart v. Peoples Nat’l. Bank*, 91 Wn.2d 197, 588 P.2d 204 (1978)) (noting the statute’s “expressed purpose” is important to interpretation of statute); *see also*, *Bennett*, 113 Wn.2d at 928 (explaining that “[u]ltimately, in resolving a

question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose”).

The DPCA’s legislative purpose is explicit and set forth in the statute itself. *See* RCW 61.34.010. The Legislature expressly found that

persons are engaging in patterns of conduct which defraud innocent homeowners of their equity interest or other value in residential dwellings under the guise of a purchase of the owner's residence but which is in fact a device to convert the owner's equity interest or other value in the residence to an equity skimmer, who fails to make payments, diverts the equity or other value to the skimmer's benefit, and leaves the innocent homeowner with a resulting financial loss or debt.

Id. The Legislature “further [found] this activity of equity skimming to be contrary to the public policy of this state and therefore establishe[d] the crime of equity skimming to address this form of real estate fraud and abuse.” *Id.*

Accordingly, as is appropriate for a statute designed to protect consumers from “fraud and abuse” and other unfair or deceptive business practices, the DPCA provides significant relief for consumers who bring suit. A violation of the DPCA is a *per se* “unfair method of competition for the purpose of applying [the CPA]” and “the practices covered by the [DPCA] are matters vitally affecting the public interest for the purpose of applying [the CPA].” RCW 61.34.040(1). Accordingly, a plaintiff who prevails on a DPCA claim may receive double or treble exemplary

damages. RCW 61.34.040(2). In contrast to most CPA actions, where the exemplary damages are subject to a statutory limit of \$25,000, the DPCA increases the ceiling for exemplary damages to \$100,000. *Compare*, RCW 19.86.090 (imposing limit on exemplary damages for CPA violations) *with* RCW 64.34.040(2) (providing that the CPA limit on exemplary damages may be increased up to \$100,000 “[i]f...the court determines that the defendant acted in bad faith”). By providing for greater exemplary damages than those allowed under the CPA, the Legislature sent a clear signal that the DPCA was a remedial statute, like the CPA itself, which “shall be liberally construed that its beneficial purposes may be served.” *See* RCW 19.86.920; *cf.*, *Carlsen*, 171 Wn.2d at 498 (holding that Washington’s debt adjusting statute, RCW 18.28 *et seq.*, a violation of which is a *per se* violation of the CPA, “should be construed liberally in favor of the consumers it aims to protect” and that “[a] narrow interpretation of [the debt adjusting statute]...would directly contravene the debt adjusting statute’s remedial purpose.”).

Ignoring the DPCA’s remedial purpose and interpreting it narrowly by concluding that a dwelling is only “at risk of loss due to nonpayment of taxes” under RCW 61.34.020(2)(a) when a certificate of delinquency initiating the tax lien foreclosure process has been issued defeats the Legislature’s purpose of protecting homeowners from “foreclosure rescue” consultants.

To the extent the Court determines the phrase “at risk of loss due to nonpayment of taxes” remains ambiguous, it should defer to the Washington State Attorney General’s interpretation of the statute. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007), *cert. denied*, 552 U.S. 1040, 128 S. Ct. 661, 169 L. Ed. 2d 512 (2007) (explaining that while the Court “has the ultimate authority to interpret a statute,” deference is accorded to an agency’s interpretation of the statute if “(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise”).

The Office of the Attorney General is the Washington state agency charged with enforcing the CPA, and statutes giving rise to *per se* unfair or deceptive acts under the CPA, on behalf of the public. *See* RCW 19.86.080 (providing that “[t]he attorney general may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act” prohibited by the CPA and that in a CPA action brought by the attorney general, “[t]he court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful”). The Attorney General also “has an interest in the development of CPA case law.” AG Amicus at

1; *see also* RCW 19.86.095 (requiring private parties bringing suit requesting injunctive relief under the CPA to serve the attorney general with “a copy of the initial pleading alleging a violation of [the CPA] and imposing the same requirement in appellate proceedings “in which an issue is presented concerning a provision of [the CPA]).

Here, as explained in its amicus brief in support of Mr. Jametsky’s Petition for Review, the Washington State Attorney General’s position is that “[w]hether the county has issued a certificate of delinquency may be relevant in considering whether the homeowner is at risk of losing the home for failure to pay taxes, but it is not the only factor that may demonstrate the homeowner is at risk.” AG Amicus at 4. Among other factors, “the homeowner’s financial situation” should be taken into account. *See, id.* The Attorney General concluded that if this Court were to adopt the Court of Appeals’ conclusion that whether a certificate of delinquency has been issued is the only relevant consideration, “an important protection for financially strapped homeowners [will be turned into] an exculpatory clause for scammers.” AG Amicus at 5.

Using RCW 84.64.050 to determine when a homeowner is at risk of losing his or her home due to nonpayment of taxes permits a “foreclosure rescue scammer [to] simply disregard an important provision [of] the DPCA with impunity for up to 36 months, so long as the county

has not issued a certificate of delinquency.” *Id.* That is exactly what happened to Mr. Jametsky.

Furthermore, the Attorney General explained that “[h]omeowners who are under financial duress or who are not sophisticated in property transactions and who are significantly behind on their property taxes may know that they could lose their home for nonpayment of taxes[.]” AG Amicus at 3-4. What such homeowners may not know, however, is “the specific process the county must follow to foreclose on the tax lien.” *Id.* Such homeowners “could be at risk of losing their homes due to nonpayment of taxes and could fall prey to scams offering to save their homes before the county treasurer issues a certificate of delinquency under RCW 84.64.050.” *Id.* Indeed, using the day of issuance of a certificate of delinquency as the bright line to determine whether a home is “at risk of loss due to nonpayment of taxes” will only encourage those who prey on homeowners in dire financial straits to come up with more inventive schemes to defraud their victims. *Cf., Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) (internal citations and marks omitted) (noting that, with respect to the CPA, it is important to define terms broadly because “[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again”).

As the agency charged with enforcement of Washington's consumer protection statutes, the Attorney General concludes that "[g]iven the broad protections set forth in the DPCA, it is plain that the Legislature did not intend this result." AG Amicus at 5. Any ambiguity as to when and whether a home is "at risk of loss due to nonpayment of taxes" can be resolved by deferring to the Attorney General's interpretation of RCW 61.34.020(2)(a), which is in accord with the statute's stated purpose of protecting "innocent homeowners" from being defrauded of their equity interest or other value" in their homes. *See* RCW 61.34.010.

III. CONCLUSION

Mr. Jametsky respectfully requests that the Court hold that the DPCA's definition of a "distressed home" as a dwelling that is "at risk of loss due to nonpayment of taxes" is not limited to a home that has been issued a certificate of delinquency initiating the tax lien foreclosure process under RCW 84.64.050, reverse the Superior Court's order granting summary judgment for Mr. Olsen and Mr. Flynn, and the subsequent judgment for attorney fees and costs, and direct judgment in Mr. Jametsky's favor. Alternatively, this court should remand this case to the Superior Court with instructions consistent with its ruling.

RESPECTFULLY SUBMITTED AND DATED this 29th day of
May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of May, 2013, caused to be served a true and correct copy of the following upon the persons indicated below:

Petitioner's Supplemental Brief

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

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Subject: RE: Jametsky v. Olsen, No. 88215-1

Rec'd 5-29-13

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Subject: Jametsky v. Olsen, No. 88215-1

Dear Supreme Court Clerk:

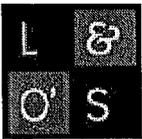
Attached for filing in Jametsky v. Olsen et al., Supreme Court No. 88215-1, is the Supplemental Brief of Petitioner Lawrence Jametsky and declaration of service.

Please confirm receipt of the above document.

Copies have been mailed today for service to the parties and they are copied as a courtesy on this email.

Respectfully,

David A. Leen

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