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Supreme Court No. 88215-1

**THE SUPREME COURT OF THE STATE OF WASHINGTON**

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Lawrence Jametsky, a single man,

Petitioner,

v.

Rodney A. Olsen and Jane Doe Olsen and  
Mathew Flynn and Jane Doe Flynn,

Respondents.

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**SUPPLEMENTAL BRIEF  
OF RESPONDENTS OLSEN AND FLYNN**

*(Proof of Service attached)*

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**SUPPLEMENTAL BRIEF OF  
RESPONDENTS OLSEN AND FLYNN**

The Respondents, Rodney Olsen and Matthew Flynn, submit this supplemental brief in opposition to the Petitioner. The Respondents also incorporate by reference their previously filed *Answer to the Petition for Review* and *Respondents' Answer in Opposition to the Amicus Brief* filed in Support of the Petition for Review. The Respondents also incorporate by this reference the *Respondents' Court of Appeals Brief*.

**INTRODUCTION**

The focus of this appeal is about the definition of a "*distressed property*" under the Distressed Property Conveyance Act (DPCA), Chapter 61.34 RCW. Specifically, whether, at the time of a sale of residential real property, was the property considered "*distressed*" or "*at risk of loss*" because of the nonpayment of any portion of the property taxes, when no Certificate of Delinquency for the nonpayment of those taxes was ever issued and when the earliest time any potential issuance of said certificate would have been almost seven months after the sale?

The only issue ruled upon by the trial court, and affirmed by the Court of Appeals, was whether the Petitioner's property qualified as a distressed property under the DPCA.

**I. The Legislature made a distinction between the two types of distressed property under the Act.**

The Petitioner and Amicus ask the Court to ignore the DPCA's differences in its description of what constitutes a distressed property as it relates to property taxes vs. a default or potential default in the payment under a mortgage. The Petitioner asks the Court to disregard the timeframes in RCW 84.64.050 and to hold that "*risk of loss*" is simply a "*chance*" or "*possibility*" of a loss. (Petition for Review, page 16) The Amicus asks the Court to add words and an element to the DPCA that would require a financial analysis of the homeowner to determine whether he/she is at risk of loss due to nonpayment of taxes. (Brief of Amicus, page 4)

The pertinent section of RCW 61.34.020(2) defines a "distressed property" as:

- (a) A dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes; ..

A. The Courts must respect the dissimilar language in the description of distressed property.

In Densley v. Department of Retirement Systems, 162

Wn.2d 210, 219, 173 P.3d 885 (2007), the Court stated:

When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings. *Koenig v. City of Des Moines*, 158 Wash.2d 173, 182, 142 P.3d 162 (2006) (citing *Roggenkamp*, 153 Wash.2d at 625, 106 P.3d 196); see also *State v. Beaver*, 148 Wash.2d 338, 343, 60 P.3d 586 (2002) ("When the legislature uses different words within the same statute, we recognize that a different meaning is intended."); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wash.2d 139, 160, 3 P.3d 741 (2000) (It is "well established that when `different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.'" (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wash.2d 626, 634, 555 P.2d 1368 (1976))).

The Amicus argues that although the *certificate of delinquency* may be relevant in considering whether a property is at risk of loss for failure to pay taxes, the Court should also consider the homeowner's financial situation and other evidence. (See Brief of Amicus, page 4) However, the definition under RCW 61.34.020(2)(a) for nonpayment of taxes does not have the same accompanying parallel section that the Legislature added to RCW 61.34.020(2)(b), that being RCW 61.34.020(11). The Legislature, when addressing a default under a *mortgage*, added

RCW 61.34.020(11)(c), which is a subjective financial element that the "*homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds.*" RCW 61.34.020(11)(c).

If the Legislature wanted to add or apply a parallel financial assessment into the definition of "*a dwelling that is in danger of foreclosure or risk of loss due to nonpayment of taxes,*" it would have drafted one.

In the present case, a financial analysis of the homeowners inability to pay property taxes almost 7 months into the future is not an element of whether the Petitioner's property was a dwelling that is at risk of loss due to nonpayment of taxes.<sup>1</sup>

B. The Petitioner and Amicus are asking the Court to Improperly Add Words to the Statute.

The Petitioner and Amicus want the Court to add words, criteria, and meanings to the definitions of a "*distressed home*" that were not drafted by the Legislature. As noted above, the Amicus is asking the Court to consider the homeowner's financial situation at

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<sup>1</sup> Based upon the Petitioner and Amicus' arguments, the Court would be required to speculate that the homeowner, 7 months into the future, could not make enough of a tax payment to forestall a certificate of delinquency. This Petitioner did make earlier tax payments to forestall the issuance of a certificate of delinquency.

the time of sale and other evidence.<sup>2</sup> (Brief of Amicus, page 4)

The Petitioner wants the Court to find that “risk of loss” means, “chance” or “possibility.” (Petition for Review, page 16)

We may not add words where the legislature has chosen to exclude them.

State v. Delgado, 148 Wash.2d 723, 727, 63 P.3d 792 (2003).

[H] owever much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority. This is true even if the results appear unduly harsh.

Helenius v. Chelius, 131 Wn. App. 421, 434, 120 P. 3d 954 (2005)

*(citation omitted)*.

Further, the Petitioner argues that the Court of Appeals failed to liberally construe the remedial statute. (Petition for Review, page 17). As noted, the Petitioner's view of liberal construction would have the Court exchanging the term "*risk of loss for nonpayment of taxes*" to "*chance*" or "*possibility of loss for nonpayment of taxes*." The only way a person can lose their home for nonpayment of real property taxes is by government action. Therefore, logic dictates that the determination of when there is a

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<sup>2</sup> The Legislature only referred to the homeowner's belief of his/her ability to pay the mortgage in the future (only 4 months), not in the payment of taxes seven months away. (RCW 61.34.020(11)(c)).

risk of loss is derived from RCW 84.64.050. The Legislature, being aware of RCW 84.64.050, did not carve out an exception to it in Chapter 61.34 RCW during its 2008 and 2009 revisions.

As this Court noted in Chadwick Farms Owners Ass'n v. FHC LLC, 166 Wn.2d 178, 207 P. 3d 1251 (2009):

We recognize, however, that these arguments reflect the homeowners' view that the statute is unfair when it is applied according to its express terms. However, if the result here is not what the legislature envisioned it is, nonetheless, what the statute plainly provides. We understand from the house and senate bill reports that a comprehensive review of the Act is underway. If the result here is not what the legislature wants, it will be positioned to make additional changes deemed necessary. It is not, however, the province of this court to rewrite RCW 25.15.303 or any other provision of the Act.

Chadwick Farms, *supra*, at 198.

The Court should not presume the Legislature accidentally omitted a parallel definition for the nonpayment of taxes as it inserted for a default or potential default under a mortgage. The Court should not presume that the Legislature was not contemplating the property tax foreclosure timeframes from RCW 84.64.050 when assessing a risk of loss due to nonpayment of taxes. The Court should not re-write and change the meaning of the statute.

C. Petitioner and Amicus do not Agree as to the Meaning of the Words of the Statute.

The difficulties in following the Petitioner's and Amicus' analysis and approach to the definition of the meaning of the phrase, "[A] dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes," is exemplified in two areas.

First, the Petitioner and Amicus have argued that the Court should ignore RCW 84.64.050 and to define the phrase "at risk of loss" in isolation by only defining the word "risk and the term "at risk." (See Brief of Amicus, page 7 and Petition to Review, page 15.) As noted in the prior briefing, the Petitioner and the Amicus do not agree as to what these terms mean.

The Petitioner asserts "risk" means "chance" or "possibility." (Petition, pages 15-16) The Amicus believes "at risk" means "in jeopardy," or "in a dangerous situation or status." (Amicus Brief, page 7) These are both very different in usage and application.

If we were to ignore the time frames in RCW 84.64.050 and attempt to follow the isolated term dictionary approach of the Petitioner and Amicus, the property is still not distressed. The Amicus uses the word jeopardy. "Jeopardy" is defined as "great

*danger*" by Webster's New World Dictionary, 2nd College Addition 1970. "Great danger" and "in a dangerous situation" implies a more imminent loss. In the present case, there was no certificate of delinquency and it certainly was not imminent, as it was almost 7 months away from the potential issuance of a certificate of delinquency.

Second, neither the Petitioner nor Amicus' provided an answer to what timeframe encompasses the "risk of loss" due to nonpayment of taxes. The most generous timeframe allowed in the statute itself is described in the inapplicable RCW 61.34.020(11)(c), (homeowner's good faith belief that he or she was likely to default under the mortgage) as "*the upcoming four months.*" Here, Petitioner was almost 7 months away from the issuance of a certificate of delinquency.

Petitioner's counsel, in oral argument, was asked where would he draw the bright line where you're, as a matter of law, not in risk of losing your property due to taxes being unpaid. He replied:

*I don't know. That's a good question. I think that you take, I just think that you have to draw the line at maybe a year, I am not sure.*

(July 17, 2012, Court of Appeals recording minute marker 6:48-7:15).

D. The Petitioner and Amicus' Interpretation Leads to Strange Results.

The court avoids reading the statute in ways that will lead to absurd or strange results. *Lane v. Harborview Med. Ctr.*, 154 Wash. App. 279, 289, 227 P.3d 297 (2010). Under the Petitioner's definition of "risk or loss," which is "chance" or "possibility," all homeowners that are at least one day late paying property taxes have the chance or possibility that they are at risk of loss for nonpayment of taxes.

E. The Legislature is aware of RCW 84.64.050.

The Legislature is presumed to know the law when it passes or revises the laws. *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1978).

The Legislature was aware of our real property tax laws and the related tax foreclosure laws, specifically, RCW 84.64.050, when it twice revised Chapter 61.34 RCW in 2008 and in 2009. As noted in prior briefing, the Amicus indicates it was part of developing the revisions to Chapter 61.34 RCW, however, it fails to provide any further legislative history regarding the section on the nonpayment of taxes that would lead the court to believe that RCW 84.64.050 was to be ignored in favor of the Amicus'

aforementioned proposed definition of risk of loss which is to include the homeowner financial analysis, which remains absent from the statute defining a distressed property as it relates to the nonpayment of taxes.

F. The Timeframes of RCW 84.64.050 are Applicable.

Unlike a mortgage payment default, which can be foreclosed by the lender at a time of its choosing, real property tax foreclosure and risk of loss for nonpayment of taxes is not a procedure that is commenced at an arbitrary time or when it is convenient for the government; the time to issue a certificate of delinquency and proceed to a tax foreclosure is statutory. RCW 84.64.050. The timeframes are required to be followed by the county government unless there is a statutory exemption to the issuance of the certificate of delinquency. These are fixed times.

Since, as noted, the only entity that can foreclose on your real property for failure to pay taxes is the government, why would its statutory timeframes not apply when determining whether there was a danger of foreclosure or risk of loss due to nonpayment to taxes?

G. This Petitioner Knew how to Avoid being at Risk of loss.

The Amicus, on page 3, asserts that homeowners may know they could lose their home for nonpayment of taxes but they may not know the process for a tax lien foreclosure. However, even if that assertion is correct, it does not apply to the facts as testified to by this Petitioner. He testified that on March 31 and May 2, 2008, he made two real property tax payments totaling \$5,120.15, because he knew it would only place him two years in arrears. (CP 43, 59 and CP 62). Therefore, based upon Petitioners own actions, the potential occurrence of the issuance of the certificate was speculative at best.<sup>3</sup>

Further, in the present case, the Petitioner was approximately 11 months away from any tax foreclosure sale at the time of the transaction.

The Amicus' minimizes RCW 84.64 because it is not a consumer protection statute. (Amicus Brief, page 8.) The Attorney General's position is that the foreclosure procedure statutes,

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<sup>3</sup> The Amicus repeatedly uses the word scammer in its brief. Perhaps it is used in a generic sense, but the Court should note that Mr. Olsen and Mr. Flynn were not scammers. Mr. Olsen paid \$100,000 for the property and provided 18 months for the Petitioner to buy it back for \$110,000. Even at the end of the term, Mr. Olsen offered an extension. A "scammer" would have set a much higher option price and tried to take the property back immediately. The opposite occurred here.

(which would also have to include Chapter 61.24 RCW) cannot be and are unrelated to the DPCA. The Amicus would have the Court hold that 11 months away from a potential tax foreclosure equates to being at a risk of loss due to nonpayment of taxes, dramatically extending any noted time frames already in Chapter 61.34 RCW and in opposite to the timeframes in RCW 84.64.050.

**Conclusion**

The Supreme Court should affirm the decision of the Court of Appeals, Division One.

Dated this 30th day of May 2013.

STERNBERG THOMSON OKRENT & SCHER,  
PLLC



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CERTIFICATE OF SERVICE

I, Aaron S. Okrent, do hereby declare under penalty of perjury that I have arranged for the service of the Respondents' Answer to Amicus Brief to be delivered by pdf attachment via email on May 30, 2013 to Mr. David Leen, Esq., at david@leenandosullivan.com, to Attorney Ms. Kimberlee L. Gunning at kgunning@tmdwlaw.com, and to Attorney Ms. Shannon E. Smith at shannons@atg.wa.gov. I also mailed, postage prepaid, on May 30, 2013, the Respondents' Answer to Amicus Brief to Mr. Leen at 520 East Denny Way, Seattle, WA 98122 to, Ms. Gunning at 936 North 34th Street, Suite 400, Seattle, WA 98103, and to Ms. Smith at 800 5<sup>th</sup> Avenue, Suite 2000, Seattle, WA 98109.

Dated May 30, 2013 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138

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