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COURT OF APPEALS  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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**TAMARA FRIZZELL,**

**Appellant,**

**v.**

**BARBARA MURRAY and GREGORY MURRAY,**

**Respondents.**

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 OCT 13 AM 11:53

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**BRIEF OF APPELLANT**  
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## **I. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court erred in determining that there were no material issues of disputed fact which would preclude the granting of summary judgment in favor of the Murrays.

2. The trial court erred in determining that the borrower's inability to meet the bonding requirement of the order enjoining the trustee's sale precluded all relief against the lender.

### **B. Issues Pertaining to Assignments of Error**

1. Are there material issues of disputed fact regarding plaintiff's lack of capacity, which call into question the application of the waiver rule, the purpose of the loan, and the validity of the borrower's declaration regarding the business purpose of the loan? (Assignment 1.)

2. Is there a disputed issue of material fact regarding whether the purpose of the loan was business, or personal, family or household use? (Assignment 1.)

3. Is there a disputed issue of material fact concerning whether the transaction in question was not a commercial loan, so that the non-waiver statute embodied in RCW 61.24.127(1) applies so as to allow plaintiff to proceed with her common law fraud and misrepresentation and CPA claims? (Issue 1.)

4. Is the waiver doctrine set forth in *Plein* and *Brown* inapplicable, where plaintiff timely moved to restrain the trustee sale under a deed of trust and actually obtained an order restraining the sale, but which order expired upon her inability to pay cash and post a sufficient bond? (Assignment 2.)

5. Was plaintiff denied her constitutional right of access to the court by being precluded from maintaining various statutory and common law claims, including a CPA claim, against the Murrays following her inability to pay \$15,000 in cash and put up a \$10,000 bond in order to enjoin the foreclosure sale? (Assignment 2.)

## II. 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).<sup>1</sup> 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).<sup>2</sup> 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 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

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

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

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).<sup>3</sup>

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 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[.]"

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<sup>3</sup>The 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.

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).

### **III. SUMMARY OF 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. While 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 breadth of the language used in the opinions makes the waiver rule appear more rigid than it ought to be. But even applying the rigid form of the rule,

the test in these two cases 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.

In addition, *Brown* specifically stated it was not dealing with a case where a party unsuccessfully attempted to obtain a preliminary injunction. *Brown, supra*, 146 Wn. App. at 170. Thus *Brown* does not apply to such a case as the present one, where the trial court actually did enter an order restraining the sale.

Application of *Brown* in the present circumstances also impinges upon Tamara's constitutional right of access to the courts under *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). Simply because Tamara is impecunious and could not come up with \$15,000 in cash and a \$10,000 bond, she was denied the right to present claims other than ones challenging the foreclosure sale. 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 palliative 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).

On this record, 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, and whether the loan is commercial or residential is a disputed issue of material fact.

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. This Court should therefore reverse the trial court’s order granting summary judgment.

#### **IV. LEGAL ARGUMENT**

##### **A. This Court Reviews De Novo the Trial Court’s Order Granting Summary Judgment.**

The standard of review on summary judgment is well settled. Review is de novo; the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Association*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999); *Trimble v. Washington State University*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Clements*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Hash v. Children's Orthopedic Hospital*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Here, the Murrays have not sustained their burden.

**B. There Are Disputed Issues of Material Fact Precluding Summary Judgment.**

**1. There Are Disputed Issues of Fact Regarding Tamara**

**Frizzell's Capacity to Contract at the Time She Signed the Note and Deed of Trust.**

The test for mental competency is set forth in the case of *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942), as follows:

The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the contract in issue. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred . . .

12 Wn.2d at 109.

In *Harris v. Rivard*, 64 Wn.2d 173, 390 P.2d 1004 (1964) the supreme court affirmed a trial court's applying and interpreting the rule in *Page* as follows:

I feel that if we have a man . . . who does not know the value of his property, his mental condition is such that he doesn't know that; if he doesn't know whether he is getting a fair value for what he is selling, he doesn't know if he is getting his money's worth, he doesn't know that the consideration is fair, then that man does not have, under the rule in the *Page* case . . . , the mental capacity to contract. \* \* \* [W]hat is more important in entering into a contract for the sale of property than the consideration that is received? Now this isn't a matter of poor judgment; this is a matter of inability to understand, to comprehend; a lack of mental ability. How can we say that a person who doesn't know the value of his property, doesn't know whether he is getting a fair bargain, doesn't know whether the consideration is proper - has the mental ability, the mental competence to contract?

64 Wn.2d at 175.

In the present case there is strong evidence that Tamara Frizzell did not understand the nature or effect of the transaction (CP 146). It is difficult to understand how the average person could pay back \$1,000 per month, when his or her income was some \$1,600. The lender here certainly did not bother to inquire about that or even care (CP 146). It is apparent that the “lender” really only wanted to acquire Tamara’s property for the amount of the loan. And Tamara’s lack of capacity to understand the transaction facilitated the lender’s attempt to profit at Tamara’s expense.

Dr. Whitehill, a clinical psychologist, examined Frizzell and is of the opinion that

a. Though of adequate intelligence and absent gross functional psychopathology, Ms. Frizzell is characterologically disposed to conform to what she believes others want, and to keep her own feelings suppressed. Had she believed that the Murrays wanted her to sign the loan agreement, in all likelihood she would have felt compelled to do so.

b. More concerning are the severe memory deficits seen in Ms. Frizzell, and which are strongly suggestive of an incipient dementia. These deficits are so significant that her ability to remember what she would have been told about the “nature, effect, and terms” of the loan, as well as the ability to have made rational decisions based on that memory, would have been severely compromised.

c. In light of these characterological and cognitive findings, the undersigned has significant concerns about Ms. Frizzell’s capacity to contract.

(CP 197).

The declarations of Doug Baer and Dr. Whitehill raise factual issues about Frizzell's "contractual capacity" that cannot be resolved on a motion for summary judgment. *Page, supra*, 12 Wn.2d at 109.

Moreover, the "clear, cogent and convincing" evidence standard which may be applicable at trial is not applicable for purposes of summary judgment. *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 181, 29 P.3d 1258 (2001). Rather, the nonmoving party "is entitled to all favorable inferences that may be deduced from the varying affidavits." *Id.*, quoting *Henderson v. Tagg*, 68 Wn.2d 188, 192, 412 P.2d 112 (1966).

**2. There Is a Disputed Factual Issue Regarding Whether Tamara Waived Her Claims for Monetary Damages.**

RCW 61.24.130(1) provides in relevant part as follows:

Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. 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 . . .

RCW 61.24.130(1). The Murrays' claimed that Tamara waived all claims, not only claims regarding the validity of the trustee sale, but also claims for money damages, by failing to restrain the sale (CP 137, fn 71 and 72, citing

*Plein* and *Brown*). This argument overlooks the factual underpinning of the waiver doctrine. Waiver occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Plein* at 227, 229; *Brown* at 163.

Receipt of notice regarding the right to enjoin the sale and actual or constructive knowledge of a defense to foreclosure involve a borrower's mental capacity. If the borrower cannot understand the notice or retain the knowledge of a defense, it cannot be said that the borrower waived a post-sale action against the lender. Thus the factual issue regarding Tamara's lack of capacity precludes the application of the waiver doctrine, as articulated in *Plein* and *Brown*.

But even if that were not the case, this Court should on its *de novo* review not apply *Plein* and *Brown* to the facts of this case for a number of reasons.

First, 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).

Washington's deed of trust act provides for nonjudicial foreclosure proceedings for deeds of trust. RCW Ch. 61.24. The act expressly provides that "[n]othing contained in this chapter shall prejudice the right of the . . . grantor . . . to restrain, on any proper legal or equitable ground, a trustee's sale." RCW 61.24.130(1); *Olsen v. Pesarik*, 118 Wn. App. 688, 692, 77 P.3d 385 (2003).

RCW 61.24.040 sets forth the procedural requirements for a nonjudicial foreclosure of a trust deed, including the contents for a notice of trustee's sale. A paragraph of the statutory notice reads:

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.

RCW 61.24.040(1)(f)(IX). The sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130. *In re Marriage of Kaseburg*, 126 Wash.App. 546, 558, 108 P.3d 1278 (2005); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415, 417-8 (2007).

The legislature enacted the nonjudicial foreclosure statutes to further three objectives: (1) to keep the nonjudicial foreclosure process

efficient and inexpensive; (2) to provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) to promote the stability of land titles. *Plein, supra*, 149 Wn.2d at 225; *Koegel, supra*, 51 Wn. App. at 113.

Second, *Plein* and *Brown* are distinguishable and do not address the issue presented in the case at bar. In *Plein*, the borrower did not seek a pre-sale order restraining the trustee sale. *Plein, supra*, 149 Wn.2d at 220. Accordingly, the holding in *Plein* that “by failing to obtain a preliminary injunction or other restraining order restraining the trustee sale, as contemplated by RCW 61.24.130, [the borrower] waived any objections to the foreclosure proceedings”<sup>4</sup> is dictum to the extent it applies to a situation, as in the case at bar, where the borrower brought an action to enjoin the sale and actually obtained a restraining order, but was unable to meet the financial conditions of the bond required.

Third, this issue is more clearly seen in *Brown*, where the borrower again 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

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<sup>4</sup>*Plein, supra*, 149 Wn.2d at 229.

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.

"A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from

circumstances indicating an intent to waive." *Lande v. South Kitsap School District*, 2 Wn.App. 468, 473-4, 469 P.2d 982 (1970); *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1964); *Estate of Lindsay*, 91 Wn.App. 944, 950-51, 957 P.2d 818 (1998). "It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage." *Estate of Lindsay, supra*, quoting *Peste v. Peste*, 1 Wn.App. 19, 24, 459 P.2d 70 (1969). Courts have uniformly held that where a borrower does not seek to enjoin the sale, the borrower has waived the ability to challenge the sale. But where the borrower does seek to enjoin the sale, and cannot obtain an injunction or restraining order, it makes no sense to apply the waiver doctrine, as the borrower has taken action, albeit unsuccessfully. In that situation the borrower cannot be said to have made an "intentional and voluntary relinquishment of a known right," as the borrower did everything he or she could do. Waiver occurs when the borrower fails to take action, i.e., fails to file a motion to restrain or enjoin the sale. So no waiver occurred in the present case.

Fourth, the courts in *Plein* and *Brown* relied upon and referred to with approval a certain law review article, Joseph L. Hoffmann, Comment, *Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323 (1984). *Plein*, 149 Wn.2d at 225, 227, 228; *Brown*, 146 Wn. App. at 170 fn 45 (stating that "[a]t least one

commentator has suggested an injured party who has unsuccessfully attempted to enjoin the trustee's sale may still have an action for damages for wrongful foreclosure"). In his Comment, Hoffman states that "a party who unsuccessfully attempted to enjoin the sale, should not be held to have waived the right to contest the completed sale." Hoffman, *supra*, 59 Wash L. Rev. at 337. Obviously, taking action, albeit unsuccessfully, is not a voluntary relinquishment of a party's rights.

Fifth, public policy also compels the result that Tamara here waived nothing. She was unable to come up with the money to post the bond, but if she had done so, the sale would have been enjoined. Thus the only reason the sale was not enjoined was because of Tamara's impecunious financial condition. While her financial condition may affect relief she might obtain with respect to enjoining the trustee sale, it should not affect the monetary relief she might otherwise be entitled to. Concluding otherwise denies her access to the courts on the basis of her indigency and denies her equal protection of the laws.

"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.<sup>5</sup>

"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 finding of a waiver of all of Tamara's claims based on the failure to obtain an order restraining the trustee sale interferes with Tamara's right of access to the courts on her other claims, including her CPA claim.

### **3. There is a Disputed Issue of Material Fact Regarding the Purpose of the Loan.**

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<sup>5</sup>The court also invalidated the statute on grounds that it violated the separation of powers doctrine.

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).

If Tamara was unable to understand the nature of the transaction she was entering into, then this declaration cannot be accepted a face value, as it may merely reflect her lack of understanding, rather than the truth of the facts recited. Accordingly, a reasonable juror could also evaluate other factors.

Tamara, for example, 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).<sup>6</sup>

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). Based on the minimal questions and investigation the Murrays conducted on the “business,” it is clear that they did not care about the business, which actually was no more than some scooters and wheelchairs in a shed and

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<sup>6</sup>This statement contradicts the witness’s earlier statement that it was Doug’s business. There is no evidence that the wheelchairs and scooters belonged to Tamara.

concomitant optimistic statements. A reasonable juror could conclude that the Murrays knew the loan was not going to be used for the scooter and wheelchair business, or any other business.

**4. There Are Disputed Factual Issues Regarding the Violation of Other Statutes.**

The complaint alleges that Gregory Murray was required to be licensed as a mortgage broker under 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). 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.

The only defense raised by the Murrays is that the loan in question was for commercial purposes, so does not come within RCW 19.146.010(19) (CP 138-39). However, as noted above, there are disputed issues of material fact as to whether this was a business loan.

In addition, RCW 19.146.010(19) defines a residential mortgage loan as follows:

"Residential mortgage loan" means any loan primarily *for personal, family, or household use* secured by a mortgage or deed of trust on residential real estate upon which is constructed or intended to be constructed a single family dwelling or multiple family dwelling of four or less units.

RCW 19.146.010(19) (italics added). The definition indicates that the loan is "for personal, family or household use," not what the intent of the borrower or lender is. The loan here was not used for any business or commercial purpose.

The complaint further alleges that the Murrays were involved in making a residential loan to Tamara within the meaning of RCW 19.144.010(10), and that they engaged in unfair or deceptive practices toward her in violation of RCW 19.144.080. The Murrays claim that this statute does not apply to loans made solely for investment purposes, citing RCW 19.144.010(10). That statute reads in relevant part as follows:

"Residential mortgage loan" means an extension of credit secured by residential real property located in this state upon which is constructed or intended to be constructed, a single-family dwelling or multiple-family dwelling of four or less units. . . . *It does not include loans to individuals making or acquiring a residential mortgage loan solely with his or her own funds for his or her own investment. . . .*

RCW 19.144.010(10) (italics added).

The syntax of the italicized language precludes the conclusion the Murrays wish to draw. The Murrays interpret the italicized language as

thought it read *loans by individuals making or acquiring a residential mortgage loan solely with his or her own funds for his or her own investment* (emphasis added). The statute is talking about loans made to individuals acquiring a residential mortgage loan solely with their own funds for their own investment. That is not the situation here. The exception to the definition of a residential mortgage loan therefore does not take the present action out of the scope of RCW chapter 19.144.

Nevertheless, if, as it was urged above, there is a material issue of disputed fact about Tamara's capacity to contract, then there is equally a disputed factual issue about whether this was a business or commercial loan, or a loan for personal, family or household purposes. The Murrays obviously cannot rely on a plethora of documents signed by Tamara to the effect that this was a business loan, if she lacked the capacity to contract. The statements in the documents mean nothing, a contract never arose, and the trier of fact must look at what was really happening in this transaction.

Other theories asserted in the complaint are violation of the CPA, 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. The Murrays did not address these claims on summary judgment. These claims are specifically not waived by RCW 61.24.127 if the loan is not a commercial loan. RCW 61.24.127(3). As noted

above, there are disputed issues of material fact about whether this was in reality a commercial loan. The application of RCW 61.24.127 therefore depends upon a disputed issue of material fact.

**5. There Are Disputed Factual Issues Regarding Whether the Note and Deed of Trust Were a De Facto Sale.**

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 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. Loaning money to someone who clearly does not have the ability to repay is essentially relying on the security for repayment. The net result is that the “loan” becomes the purchase price of the property, and the “lender” ends up with the property. The result is functionally equivalent to Tamara’s selling her property to the Murrays. Barbara Murray has acquired other properties in this fashion (CP 218-225). She admitted that three of “six or eight” other business loans she made are in default (CP 218-19). She foreclosed, for example, upon a lot in Federal Way, which lot she now owns (CP 220).

There is thus a material issue of disputed fact regarding whether under

the circumstances of this case the Murrays intended to acquire the property for the loan amount, making this a defacto sale. See, *Rainier Nat. Bank v. Inland Machinery Co.*, 29 Wn.App. 725, 730, 631 P.2d 389 (1981).

## V. CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's judgment entered in this case and remand the case for trial.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of October, 2011.

**Law Offices of Dan R. Young**

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

DECLARATION OF SERVICE

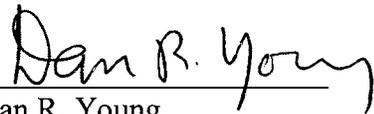
FILED IN PROCEEDING NO. 11-00113-1  
BY: [Signature]

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 13, 2011, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Brief of Appellant to the following:

Darren R. Krattli, Esq.  
Eisenhower & Carlson, PLLC  
1200 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402

Dated: October 13, 2011, at Seattle, Washington.

  
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Dan R. Young