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Supreme Court No. 88215-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

Lawrence Jametsky, a single man,

Petitioner,

v.

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

Respondents.

RESPONDENTS' ANSWER TO THE AMICUS BRIEF

(Proof of Service attached)

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 ORIGINAL

TABLE OF CONTENTS

1.	The Court of Appeals Applied the Correct Statutory Construction and Interpretation Analysis.. . . .	1
2.	The Courts Do Not Rewrite Statutes; the Courts Rely Upon the Legislature	1
3.	The Amicus Fails to Define “At Risk” in Context with the Statute	3
4.	The Real Property Tax Foreclosure Statutes are Related Statutes	7
5.	The Amicus and Petitioner Fail to Provide the Court a Timeframe of when an owner is at risk of loss for nonpayment of taxes.	10
6.	The Petitioner Understood and Did Protect Himself Against Being At Risk Of Loss.	11
	Conclusion	11
	Proof of Service	12

TABLE OF AUTHORITIES

Table of Cases

<u>Applied Indus. Materials Corp. v. Melton</u> , 74 Wash. App. 73, 79, 872 P.2d 87 (1994)	2
<u>Haley v. Highland</u> , 142 Wash.2d 135, 147, 12 P.3d 119 (2000).	2
<u>Jametsky v. Olsen</u> , slip opinion.	1,2,3,10
<u>Klassen v. Skamania County</u> , 66 Wn. App. 127, 131-132, 831 P.2d 763 (1992).	9
<u>Millay v. Cam</u> , 135 Wash.2d 193, 202, 955 P.2d 791 (1998)	2
<u>Price v. Kitsap Transit</u> , 125 Wash.2d 456, 463, 886 P.2d 556 (1994)	1
<u>Salts v. Estes</u> , 133 Wash.2d 160, 170, 943 P.2d 275 (1997)..	2
<u>State v. Keller</u> , 98 Wn. App. 381, 387, 990 P.2d 423 (1999), <i>aff'd</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).	4
<u>State v. Kaiser</u> , 161 Wn. App. 705, 254 P.3d 850 (2011)	7
<u>Washington Utilities & Trans. Comm'n v. United Cartage, Inc.</u> , 28 Wn. App. 90, 97, 621 P.2d 217 review denied, 90 Wn. 2d 1017(1981)	9

Table of Statutes

RCW 61.34	9,10
RCW 61.34.020(2)(a) and (b).	3,9
RCW 61.34.020(11)	6
RCW 61.34.020(11)(c).	6
RCW 84.64.050.	4,9,10
RCW 84.64	7,8,9,10

RCW 84.64.060.	.	.	.	.	.	.	7
RCW 84.64.080	.	.	.	.	.	.	8

RESPONDENTS' ANSWER TO THE AMICUS BRIEF

The Respondents, Rodney Olsen and Matthew Flynn, submit this brief in answer to the Amicus Brief. The Respondents also incorporate by reference its previously filed Respondents' Answer to the Petition for Review and Respondents' Supplemental Brief.

1. The Court of Appeals Applied the Correct Statutory Construction and Interpretation Analysis.

The Amicus asserts that the Court of Appeals did not utilize proper statutory analysis and application. However, the Court of Appeals' Jametsky v. Olsen opinion negates that argument. The Court of Appeals stated in part:

When interpreting statutory language, we aim to carry out the legislature's intent. (footnote omitted) "We determine the plain meaning of a statutory provision based on the statutory language and, if necessary, in the context of related statutes that disclose legislative intent about the provision in question." (footnote omitted) If a statute's meaning is plain on its face, we give effect to that plain meaning. (footnote omitted) Only if statutory language is ambiguous do we resort to aids of construction, including legislative history. (footnote omitted)

Jametsky v. Olsen, slip opinion, page 5.

2. The Courts Do Not Rewrite Statutes; the Courts Rely Upon the Legislature.

The Courts presume that the legislature knows the existing state of the case law in the areas in which it legislates. Price v. Kitsap Transit, 125 Wash.2d 456, 463, 886 P.2d 556 (1994). The

When the Legislature uses different words in the same statute it is presumed that a different meaning is intended. Haley v. Highland, 142 Wash.2d 135, 147, 12 P.3d 119 (2000). Courts do not amend statutes by judicial construction, Salts v. Estes, 133 Wash.2d 160, 170, 943 P.2d 275 (1997), nor rewrite statutes "to avoid difficulties in construing and applying them." Applied Indus. Materials Corp. v. Melton, 74 Wash. App. 73, 79, 872 P.2d 87 (1994) (quoting Arkansas Oak Flooring Co. v. Louisiana & Arkansas Ry. Co., 166 F.2d 98, 101 (5th Cir.1948)).

It is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.

Millay v. Cam, 135 Wash.2d 193, 202, 955 P.2d 791 (1998) (citing United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wash.2d 355, 362, 687 P.2d 186 (1984)(*citation omitted.*)

The analysis of the Court of Appeals in the Jametsky v. Olsen, *supra*, opinion was consistent with the holdings in Price, *supra*, Haley, *supra*, Salts, *supra*, Applied Industrial, *supra*, and Millay, *supra*. The Court of Appeals stated:

For the purpose of reviewing the summary dismissal of Jametsky's claim, we accept that he may have truly feared that he would ultimately lose his house based on a failure to pay his property taxes. But this subjective, good faith belief that the property was at risk of loss for nonpayment of taxes does not meet the statute's requirements. The legislature adopted two alternative definitions for a "distressed home": (1) a dwelling in danger of

foreclosure or at risk of loss due to nonpayment of taxes or (2) a dwelling in danger of or being foreclosed due to a default under the terms of a mortgage. (footnote omitted) In the definition of "in danger of foreclosure," the legislature explicitly incorporated a good faith belief component: "[t]he 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."(footnote omitted) It did not include a parallel provision for when a party fears a risk of loss due to the nonpayment of taxes. Thus, the plain words of the DPCA do not make a good faith belief relevant to whether a dwelling is at risk for nonpayment of taxes.

Jametsky v. Olsen, slip opinion, page 12.

The Court of Appeals correctly identified the differences provided by the Legislature in the alternative definitions of a "distressed home." The statutory definition regarding a default on a mortgage included an explicit subjective standard of "good faith" belief of a likelihood of default on a mortgage along with some strict reporting requirements. The "risk of loss due to nonpayment of taxes" was drafted absent any parallel explicit, subjective, good faith belief or fear on the part of the homeowner. See and Compare RCW 61.34.020(2)(a) and (b).

3. The Amicus Fails to Define "At Risk" in Context with the Statute.

The Amicus repeats the Petitioner's assertion that since "risk of loss due to nonpayment of taxes" is undefined in the statute; we therefore, only need to look to the word "risk" or "at risk" as

defined in a dictionary. (Amicus Brief, Pages 6-7 and Petition page 15.)

Isolating the definition of a term by pulling out one word outside of the full context is arbitrary and dangerous. It is far more important to consider words in the context in which they are used rather than to consider their meanings in isolation. State v. Keller, 98 Wn. App. 381, 387, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 19 P.3d 1030 (2001).

The word “risk” must be read in context as “risk of loss due nonpayment of taxes.” In this case, we are not dealing with any mortgage default, but only failure to pay property taxes to the taxing authority. Who can take action if the property taxes are three years delinquent? Answer: King County. How does Mr. Jametsky become at risk to lose his property? Answer: If he does not pay his property taxes within the time frames in RCW 84.64.050. (See, Respondent’s *Answer to the Petition*, Page 14 regarding how King County defines “risk of loss.”) What happens if he does not pay at least the property taxes that are three years delinquent? Answer: The county will issue a certificate of delinquency. Next, if the taxes remain unpaid after the issuance of the certificate of delinquency, then a foreclosure action is

commenced with the tax foreclosure sale conducted in December.
(CP 148-152.)

In the present case, the Petitioner was approximately 11 months away from any potential tax foreclosure sale at the time of the transaction. The Petitioner's argument also assumes Petitioner would have not done what he did the prior year, which was to pay enough of the tax bill to be no more than two years in arrears. (CP 43 and 62)

Had the Washington Legislature intended that the definition of "risk of loss due to the nonpayment of taxes" include the explicit subjective standard of the homeowner's fear of loss or good faith belief that he/she will not pay their taxes in the future, and that the current tax payment statutory time frames should be ignored, then it would have done so. It didn't.

Initially, the Amicus and Petitioner were not consistent in what they believed "risk" meant. The Amicus, in its Brief in Support of the Petition for Review, asserted that "at risk" meant "in jeopardy," or "in a dangerous situation or status." (Amicus Brief in Support of Review, page 7) In his brief, the Petitioner asserted "risk" defined as "chance" or "possibility." (Petition, pages 15-16) Both are very different in usage and application.

Apparently, the Amicus' view of the definition of "risk" has now dramatically changed to "possibility of loss," rather than "in jeopardy." (Amicus Brief, page 5) The Amicus' unexplained sudden change of what "risk" means exemplifies the problem with trying to add or re-write the statute to include a subjective element, which the Legislature excluded when addressing real property taxes.

The Legislature provided a statutory definition of "in danger of foreclosure" regarding a mortgage in RCW 61.34.020(11) which includes the homeowner having "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)(emphasis added). Even if we applied the Legislatively excluded, "good faith belief" rationale, the maximum time in the statute that the homeowner can prospectively apply that "good faith belief" is four months into the future.

Here, the Petitioner entered into the transaction with Respondent Olsen approximately seven months before a certificate of delinquency could have been issued. Respondents' *Answer to Petition for Review* noted that the 2010 King County tax sale

informational website indicated that, "the grace period is three years and the full year 2008 taxes will be three years past due on May 1, 2011." (CP 152) Petitioner's 2006 taxes, in King County, would not have been near a risk of loss until May 2009. In addition, the actual tax foreclosure action would not commence until the following June 2009 and the sale would not be for another 6 months, into December 2009, with the right to pay the taxes up to the day before the sale. (CP 148 and RCW 84.64.060.)(*Answer to Petition for Review*, pages 14-15)

In essence both the Petitioner and the Amicus would not only have this Court re-write the statute to include the "good faith belief" element, but it would also ask this Court to almost double the time the Petitioner could prospectively assert this "good faith belief" vs. a potential mortgage default.¹

4. The Real Property Tax Foreclosure Statutes are Related Statutes.

The Amicus asserts that the statutes of Chapter 84.64 RCW are unrelated to a homeowner being in danger of a tax foreclosure or at

¹ The Amicus also argues that the Respondents should have verified the Petitioner's financial situation before entering the transaction. (Amicus Brief, page 13) The Legislature did not create that requirement for a home that is not, by definition, *distressed*. The Amicus argument puts *the cart before the horse*.

risk of loss due to nonpayment of taxes. (Amicus Brief, page 11). However, the Amicus cites State v. Kaiser, 161 Wn. App. 705, 254 P.3d 850 (2011), which is a case, brought by the Attorney General, that used definitions in Chapter 84.64 RCW to determine whether there were consumer protection act (CPA) violations related to Kaiser contacting and entering agreements prior to a tax foreclosure with homeowners that had received certificates of delinquencies. (Amicus Brief, page 13) All of these homeowners had received certificate of delinquencies. Kaiser, supra, at 709.²

The Kaiser, supra, Court, cited RCW 84.64.080 when analyzing the Consumer Protection Act claim related to homeowners and deceptive acts related to tax foreclosures. Kaiser, supra, at 720-21. The Kaiser *Injunctive Relief Order* refers to a definition in RCW 84.64.080. Kaiser, supra, at 726. The CPA is a remedial statute and Chapter 84.64 RCW is the tax foreclosure statute, yet, the Kaiser Court applied the taxing statute definition as related to the remedial statute. They did not operate

² Here, the Respondents did not employ any deception and it was only a single transaction that occurred long before any certificate of delinquency could be issued. Petitioner acknowledged in writing he understood the transaction was a sale and it was closed through an escrow. Respondent Olsen paid the money, which then went to pay the Petitioner's debts. (CP 46, 84-85)

independently.

The Amicus asserts that RCW 61.34 and 84.60 address wholly different subject matters and RCW 84.60. (Amicus Brief, pages 8 and 10).³ However, RCW 84.60 addresses real property tax foreclosures and RCW 61.34.020(2)(a) specifically relates to the danger of foreclosure and the risk of loss due to nonpayment of taxes. These are not statutes with wholly different subject matters. As previous noted, only the County taxing authority can conduct a real property tax foreclosure. Further, RCW 61.34 does not provide that the timelines in RCW 84.60 are suspended or superseded by a different set of timelines specific to RCW 61.34.

The Amicus does, however, admit that the issuance of a certificate of delinquency (RCW 84.64.050) may be relevant in considering whether a homeowner is at risk of loss for failure to pay taxes, but that it believes it is only a factor that demonstrates a homeowner is at risk. (Amicus Brief pages 12-13.)

³ Citing Washington Utilities & Trans. Comm'n v. United Cartage, Inc., 28 Wn. App. 90, 97, 621 P.2d 217 review denied, 90 Wn. 2d 1017(1981) which is also cited in Klassen v. Skamania County, 66 Wn. App. 127, 131-132, 831 P.2d 763 (1992).

RCW 61.34 and RCW 84.64 are related statutes in analyzing a real property tax issue regarding the definition of a distressed home to determine whether the home is in danger of foreclosure or risk of loss due to nonpayment to taxes.

5. The Amicus and Petitioner Fail to Provide the Court a Timeframe of when an owner is at risk of loss for nonpayment of taxes.

The Amicus and the Petitioner never indicate what a reasonable time is before a homeowner is at risk of loss for nonpayment of taxes. Is the standard one day, one month, one year or more, late in paying taxes?

The Petitioner and Amicus seem to be relying upon the "*we will know it when we see it*" approach to statutory construction. The only related timing statute we have for the nonpayment of taxes and risk of loss that accompanies that nonpayment is RCW 84.64.050, and in the instant case, applying RCW 84.64.050, the Petitioner was not at risk of loss due to nonpayment of taxes. As the Court of Appeals correctly noted:

Therefore, the end of RCW 84.64.050's three-year grace period was still several months away when Jametsky sold his house to Olsen. Under these circumstances, Jametsky fails to raise a genuine issue of material fact regarding whether his property was a "distressed home."

Jametsky v. Olsen, slip opinion, page 12. (In fact, the issuance of any certificate of delinquency was approximately 7 months away.)

6. The Petitioner Understood and Did Protect Himself Against Being At Risk Of Loss.

The Amicus asserts that the homeowner may not know they could lose their home from not paying taxes and that they do not know the specific process the county must follow to foreclose on a tax lien. (Amicus Brief, page 3-4.) The undisputed record evidences Petitioner's knowledge of how to pay just enough of the property taxes to be only two years delinquent so he could avoid being at a risk to lose his property over taxes. (CP 43 and 62.)

CONCLUSION

The Washington State Supreme Court should affirm the Court of Appeals decision in Jametsky v. Olsen.

Dated this 26th day of September 2013.

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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 September 26, 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 September 26, 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 5th Avenue, Suite 2000, Seattle, WA 98109.

Dated September 26, 2013 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138

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Dear Clerk of the Court,

We attach for filing in pdf format the *Respondents' Answer to the Amicus Brief*. We will email a copy to all counsel this afternoon and have already mailed out hard copies to them in today's mail.

Very truly yours,

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