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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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**ANSWER TO PETITION FOR REVIEW**

*(Proof of Service attached)*

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**Attorneys for Respondents**

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**I. INTRODUCTION/SUMMARY OF ANSWER TO THE PETITION FOR REVIEW**

Pursuant to RAP 13.4(b)(1), the Petitioner has not provided any cases from other Courts of Appeal or from our State Supreme Court that are in conflict with the unpublished Court of Appeals opinion in Jametsky v. Olsen. Slip Opinion, 2012 WL 5292830 (Wash. App. Div. 1)

Pursuant to RAP 13.4(b)(1), the Petitioner has not established that the Court of Appeals application of statutory interpretation in Jametsky, supra, was in conflict with this Court's principles of statutory interpretation, when it found that Petitioner did not qualify as a distressed property owner under Chapter 61.34 RCW.

The Court of Appeals decision in Jametsky, supra, is an unpublished decision under a unique set of facts. Neither party moved to publish the opinion. Therefore, it cannot be cited as authority in any court in this state. Pursuant to RAP 13.4(b)(4), there can be no substantial public interest, as this case has no legal binding authority beyond these parties.

**II. THERE ARE NO ISSUES FOR REVIEW THAT RISE TO THE LEVEL OF GRANTING THE PETITION**

1. The Court of Appeals decision is not in conflict with a decision of the Supreme Court under RAP 13.4(b)(1); and,

2. The Court of Appeals *unpublished* opinion cannot be cited as legal authority in this State and therefore, Petitioner's assertion that the opinion has "far-reaching implications for all persons who own and purchase residential property in Washington" is incorrect and does not rise to a level of substantial public interest under RAP 13.4(b)(4).

**III. STATEMENT OF THE CASE**

**A. Procedural**

Mr. Olsen, purchased real property from Petitioner in November 2008. Petitioner is attempting to revoke that sale by alleging that he was a distressed property owner under Chapter 61.34 RCW based upon nonpayment of his real property taxes.

On April 28, 2011, Judge Jay White ruled on summary judgment granting the Respondent's motion to dismiss Petitioner's case and denied the Petitioner's partial motion for summary judgment. (CP 302-305) Petitioner filed a notice of appeal. (CP 323-330)

The Court of Appeals, Division One, after a de novo review, in an *unpublished opinion*, affirmed the Trial Court in finding that Petitioner was not a distressed property owner under Chapter 61.34 RCW. Jametsky, supra, Slip Opinion, 2012 WL 5292830 (Wash App. Div. 1) <sup>1</sup>

**B. Substantive Facts<sup>2</sup>**

Real Property Taxes Undisputed Facts

Petitioner, on March 31 and May 2, 2008, made two real property tax payments totaling \$5,120.15.<sup>3</sup> He understood that by making those payments that he would not be three years behind in his property taxes; that he would only be two years in arrears. (CP 43, 59 and CP 62). These payments were made at least six months before Petitioner was introduced to Respondent Flynn. (CP 161)

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<sup>1</sup> The Trial Court did not need to address the remaining arguments under the Distressed Property Conveyance Act, as the Petitioner's property did not meet the criteria to be defined as a "distressed property" under the act.

<sup>2</sup> The Respondent relies primarily on the Petitioner's deposition testimony and not the declaration prepared for his signature which was created before the deposition. The majority of the Petitioner's statement of the case relies upon Petitioner's short declaration and ignores his detailed deposition testimony in which he contradicted that prepared statement.

<sup>3</sup> Petitioner asserts that the \$5,120.15 in payments made by Mr. Jametsky months before entering the agreement with the Respondents, was not a significant portion of the real estate taxes then due. (See Petition, page 2) However, it cannot be disputed that those payments prevented Mr. Jametsky from receiving a Certificate of Delinquency in 2008, and was approximately 33% of the amount then due.

At the time of the November 2008 sale of the property to Mr. Olsen, assuming Petitioner was not planning on making further tax payments in 2009, King County was approximately seven months away from issuing a *Certificate of Delinquency*. (CP 152)

No *Certificate of Delinquency* has ever been issued or a foreclosure action ever commenced that relates to any of the Petitioner's unpaid real property taxes. (CP 41-42).

#### Purchase of Property

Mr. Olsen purchased the Petitioner's real property for \$100,000. (CP 74-88)<sup>4</sup> At the closing of the purchase of the property, Mr. Olsen's \$100,000 was applied by a third party escrow to payoff Petitioner's judgments, liens, and taxes. (CP 84-85)

Contemporaneous with the purchase of the property, the parties entered into an Option to Purchase Agreement and a Lease Agreement. The option price was set at \$110,000 and executable within 18 months. (CP 90 and 171) Mr. Olsen later offered to extend the time to exercise the option. (CP 169) After paying rent

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<sup>4</sup> The opening of the escrow pre-dated the tragic death of Petitioner's son. (CP 134)

for fifteen months, and with the ability to pay rent, Petitioner refused to make any more payments. (CP 168 and CP 59)

Petitioner's counsel states that it was difficult, if not impossible, for Petitioner to understand legal documents. (Petition, page 2) Petitioner's sworn testimony is different. Petitioner understood that the transaction was going to be a sale of his property. He acknowledged in his deposition that he understood that he was selling his house and renting it for \$835 per month. (CP 46) He further testified that he knew the difference between a sale and renting of his house. (CP 35) Petitioner also understood what the option agreement meant; that he could purchase the house for \$110,000. He also understood that he would have until May 31, 2010 to pay the \$110,000. (CP 49-50)

Petitioner never exercised the option to purchase the property and he refused an extension of time to meet the option price. (CP 169)

Petitioner remained on the property without paying rent for over a year while Mr. Olsen continued to pay the real property taxes, Petitioner's sewer bill, insurance, and Olsen's debt service on a mortgage loan. (CP 169)

Facts Prior to Closing of the Property Sale.

Petitioner's close friend, a Mr. Hager, contacted the owner of Pine Mortgage, Michael Haber, to inquire if he could assist Petitioner with his financial situation. (CP 36-37 and 52-53)

During the first meeting between Petitioner, Haber and Hager they discussed that there was a \$56,000 House Hold Finance ("Beneficial ") debt, which Petitioner understood was a lien against the property.<sup>5</sup> Mr. Haber indicated he would try to obtain a loan for Petitioner. Petitioner provided Mr. Haber financial information and he ran his credit. Mr. Haber did all Petitioner's paperwork and his taxes. (CP 38-39) In reality, Petitioner started the process of trying to obtain money at least 6-12 months before October 2008. (CP 37, 51 and 52)

In October 2008, Mr. Haber contacted Respondent Flynn through an advertisement. Mr. Haber informed him that he represented Mr. Jametsky in financial matters. Mr. Flynn, having never solicited Mr. Jametsky, was introduced to Petitioner by Mr. Haber. (CP 161-162, CP 40 and 51) Mr. Haber provided the

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<sup>5</sup> Despite all of the undisputed evidence in the hands of Petitioner's counsel of the secured nature of the Beneficial loan, Petitioner represented to the Trial Court, the Court of Appeals, and now the State Supreme Court that the Beneficial loan was unsecured note. (See, Petition, page 3) Petitioner testified that he was aware that it was in fact a lien against the property. (CP 38, Jametsky deposition excerpt, page 15, lines 23-25). Again these are Petitioner's own words being ignored.

Jametsky financial paperwork and credit information to Mr. Flynn.  
(CP 162)<sup>6</sup>

Petitioner testified that he felt like Mr. Haber was assisting and representing him in this transaction. (CP 56-7)<sup>7</sup>

Based upon Mr. Flynn's analysis of the paperwork, he informed Mr. Haber that he would not be able to arrange a loan for Petitioner. (CP 162) Mr. Haber, as Petitioner's representative, suggested a buyer could be found to purchase the home with a lease and option to purchase. (CP 162)

Petitioner never met Mr. Olsen until after the transaction closed. (CP 53 and 54) Further, Mr. Olsen also has never met Mr. Haber. (CP 168)

#### **IV. ARGUMENT**

##### **A. The Court of Appeals Unpublished Decision is Not in Conflict with any Decision of the Supreme Court under RAP 13.4(b)(1).**

The Court of Appeals followed existing precedent in statutory interpretation and made no new law on the legal analysis

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<sup>6</sup> It is undisputed that prior to this sale transaction, Mr. Flynn had never met nor been affiliated with any transactions involving Mr. Haber. (CP 161-2).

<sup>7</sup> Petitioner's have never served Haber nor tried any forms of alternative service.

and interpretations of statutory language. (That is consistent with the opinion being unpublished.)

1. No Conflicting Decisions Under RAP 13.4(b)(1) Identified.

A petition for review under RAP 13.4(b)(1) will only be accepted "[If] the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

The Petitioner has not identified any existing Supreme Court or Court of Appeals cases that are in conflict with the holding in the unpublished Jametsky v. Olsen opinion. Rather, the Petitioner attempts to create a conflict by simply emphasizing the remedial aspects of the Distressed Property Conveyance Act (DPCA), by generally citing to rules of statutory construction, and by disagreeing with the Court of Appeals analysis and conclusions it made under those rules. Disagreeing with the conclusions of the Court of Appeals does not equate to qualifying for a review under RAP 13.4(b)(1).

2. The Court of Appeals used established principles of statutory construction.

The Court of Appeals decision in Jametsky, supra, did not conflict with well-established principles of statutory interpretation. It applied the proper principles and common sense. The Court's

opinion describes its legal analysis by first recognizing the tenants of statutory interpretation, providing a thorough description of the applicable portions of Chapter 61.34 RCW, and then applying its analysis and providing its conclusions. Jametsky, supra, Slip Opinion, at pages 2-7

The Petitioner asserts that the Court of Appeals only noted the criteria of the proper statutory interpretation and then ignored those principles. (See, Petition, page 14-15) However, that assertion is faulty. The Court's opinion identified relevant statutes and also assessed the application of "plain meaning" in its analysis.

The Court of Appeals, for example, noted, as part of its statutory analysis, when comparing the two alternative definitions of a distressed home regarding taxes or a mortgage, that:

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 lack of funds." FN 37 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, supra, Slip Opin., at page 6.

The Court of Appeals, consistent with the principles of

statutory interpretation established by this Court, did not add words to the statute that the legislature did not include when it accurately analyzed the comparison and context of the statute of which these provisions and definitions were found. See, Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (“Even though we look to the broader statutory context, we do not add words where the legislature has not included them, and we construe statutes “such that all of the language is given effect.”)

Further, the Court's reference to RCW 84.64.050 and its clearly defined time frames regarding real property tax payments and the consequences of nonpayment, is also consistent with proper analysis and not in conflict with prior Supreme Court opinions.<sup>8</sup>

This Court noted in 2001:

Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.

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<sup>8</sup> RCW 84.64.050 provides guidance with timeframes defined of when real property can be foreclosed upon due to nonpayment of taxes. It describes the process of when the County must issue a Certificate of Delinquency. In the present case, no Certificate of Delinquency was ever issued.

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 11, 43 P.3d 4 (2002) *citing* 2A Norman J. Singer, *Statutes and Statutory Construction* 48A:16, at 809-10 (6th ed. 2000) (*citations omitted.*)

This is consistent with the Respondent's position in the Courts below when they noted that the Legislature was aware of the real property tax foreclosure statute when amending RCW 61.34.020. RCW 61.34.020 and RCW 84.64.050, and their respective timeframes, must be read together. (See, Thurston County v. Gorton, 85 Wn.2d 133, 530 P.2d 309 (1975): *The legislature is presumed to enact laws with full knowledge of laws then in existence.*)

In addition, a significant part of the Petitioner's argument for review is an attempt to convince this Court that the interpretation and application of "risk," as applied to RCW 61.34.020(2)(a), is strictly defined as a standard based upon "chance or possibility" of an event occurring. (See, Petition, page 16) Petitioner's definition of "risk" is provided in a vacuum or in isolation and not in context of the entire phrase in the statute, not read in relation to existing statutes, and does not provide guidance to a common sense approach and application of the statute. See,

State v. Keller, 98 Wn. App. 381, 387, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 19 P.3d 1030 (2001)(*"It is far more important to consider words in the context in which they are used rather than to consider their meanings in isolation."*)

Based upon the Petition for Review's overly broad sweeping definition of "risk," every person in Washington, if they are one day late with a real property tax payment, are at risk of loss due to nonpayment of taxes.<sup>9</sup> Petitioner's isolated use of the word "risk" in this statute is unsound.

3. The Court of Appeals Properly Applied the Statutory Interpretation in Determining That Petitioner's Property was not a Distressed Home Under the Statute.

At the time of the sale in November 2008, Petitioner's property did not qualify under the RCW 61.34.020(2)(a)'s definition of a distressed property for the nonpayment of real property taxes, as his property, at the time of the transaction, was not in danger of foreclosure or at risk of loss due to nonpayment of those taxes.

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<sup>9</sup> It is not about strict or liberal construction of this statute; it is about common sense. Even under a liberal construction, the Courts are not required to provide an unlikely, absurd, or strained interpretation of the statutory language. See, State ex. re. Evergreen Freedom Nonprofit v. Washington Education Association, 140 Wn.2d 615, 637, 999 P.2d 602 (2000).

a. It is undisputed that earlier in 2008, many months before closing of the transaction and long before meeting Respondents, Petitioner made two real property tax payments on the property totaling \$5,120.15. (CP 43, 59 and CP 62);

b. It is undisputed that Petitioner made the 2008 tax payments so he "wasn't behind" (CP 43);

c. It is undisputed that King County has never issued a Certificate of Delinquency on the property and the County never commenced or threatened a foreclosure regarding the nonpayment of property taxes (CP 41-42); and,

d. It is undisputed that if Mr. Jametsky had not sold the property, nor made a tax payment in 2009 (similar to the one he made in 2008), based upon RCW 84.64.050, the earliest any potential of a risk of loss for nonpayment of property taxes would have been 7 months later in May 2009, when the County would have then issued a Certificate of Delinquency.

The real property tax foreclosure statute, RCW 84.64.050, in pertinent part states:

After 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, the county treasurer shall proceed to

issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs:

...

The treasurer shall file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer shall thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates.

RCW 84.64.050.

King County defines what constitutes a property at risk for tax foreclosure. On the King County Treasurer's website there is a document that in part states:

**KING COUNTY TREASURER TAX FORECLOSURES**

**Properties at Risk Due to Non-Payment of Property Taxes**<sup>10</sup>

In cases where a property owner fails to pay any particular year's property taxes to County for a total of three years, County seizes that property through rights granted by the State of Washington and attempts to sell it through a tax foreclosure auction.

(CP 148)

As noted in the 2010 King County tax sale information website, "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

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<sup>10</sup> Petitioner argues that RCW 84.64.050 does not apply because it does not use the term *risk of loss*. (Page 17) In reality, the entire statute is about what places a property at risk of loss for nonpayment of taxes and even King County, when applying it, uses the term "properties at risk due to nonpayment of taxes."

a risk of loss until May 2009, seven months after the transaction closed. In addition, the actual tax foreclosure action would not commence until the following June 2009 and the sale would not be for another 6 more months into December 2009. (CP 148.)

The Court of Appeals' decision should be allowed to stand and review should not be accepted based upon RAP 13.4(b)(1)

**B. The Court of Appeals Unanimous Unpublished Decision Does Not Involve an Issue of Substantial Public Interest.**

The Jametsky, supra, opinion, as noted, is *unpublished*.

General Rule 14.1(a) states, in part, that:

**(a) Washington Court of Appeals.** A party may not cite as an authority an unpublished opinion of the Court of Appeals.

GR 14.1(a).

The opinion sought for review is not legal precedent or law as applied to other purchasers of real property. Absent precedential value, the Petitioner's overbroad assertion that the Court of Appeals' decision will have "far-reaching implications for all persons who own and purchase residential property in Washington, is inapplicable.<sup>11</sup>

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<sup>11</sup> The Petitioner relies heavily on a law review comment from 2008, which pre-dates the change in the law and does not address distressed properties in relation to delinquent taxes, certificates of delinquency, and real estate tax foreclosures. (Page 18 of Petition)

Further, the Petitioner states that the issue here is the requirements for the sale of distressed homes and the contracts and forms to be used between such parties. (Petition, page 10-13) These issues were never ruled upon in summary judgment and, therefore, there is no issue of public interest on those issues in the Court of Appeals' opinion.

The Petitioner also misguides the Court through the use of embellishment and inaccuracies in asserting a public interest component by inaccurately describing himself as "struggling to avoid tax foreclosure." (Petition, page 19) Again, the facts as stated by Petitioner in his deposition, are opposite to that assertion.

The Petitioner's broad speculative assertion cannot serve as a basis for review under RAP 13.4(b)(4). This matter relates to a routine ruling by the Court of Appeals for this set of circumstances. There is nothing in this unpublished opinion that is likely to have any affect beyond the parties in this case, and, therefore, no "substantial public interest" is at issue.

**C. Respondents are Entitled to Their Attorneys' Fees and costs.**

Respondents are entitled to their attorneys' fees and costs in this matter under the provisions of paragraph q. of the Residential

Real Estate Purchase and Sale Agreement and under paragraph 11 of the Lease/Rental Agreement as the prevailing party is entitled to an award of reasonable attorneys' fees and expenses. (CP 55 and 172) A party on appeal is entitled to attorney fees where applicable law authorizes the award. RAP 18.1(a). The Respondent requests an award of his attorneys' fees and costs.

## **VI. CONCLUSION**

Petitioner has failed to meet the prerequisites of RAP 13.4(b) for review. The Court should deny the Petition for Review and provide an award to Respondents of their reasonable attorneys' fees and costs in filing this Answer.

Dated this 27th day of December 2012.

STERNBERG THOMSON OKRENT & SCHER,  
PLLC



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Aaron S. Okrent, WSBA 18138  
Scott R. Scher, WSBA# 18168  
Attorneys for Respondents Olsen and Flynn

CERTIFICATE OF SERVICE

I, Aaron S. Okrent, do hereby declare under penalty of perjury that I have arranged for the service of the Respondent's Brief to be delivered by pdf attachment via email on December 27, 2012 to Mr. David Leen, Esq., at david@leenandosullivan.com and to Ms. Kimberlee L. Gunning at kgunning@tmdwlaw.com. I also mailed, postage prepaid, on December 27, 2012, the Answer to Mr. Leen at 520 East Denny Way, Seattle, WA 98122 and to, Ms. Gunning at 936 North 34th Street, Suite 400, Seattle, WA 98103.

Dated December 27, 2012 at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Aaron S. Okrent', written over a horizontal line.

Aaron S. Okrent, WSBA#18138

## OFFICE RECEPTIONIST, CLERK

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**To:** Aaron S. Okrent  
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Dear Clerk of the Court,

We attach in pdf format the Respondents' *Answer to Petition for Review* under **Case Number 88215-1**. Please confirm receipt. We are emailing the same to opposing counsel.

Very truly yours,

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