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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 IN OPPOSITION TO THE AMICUS
BREIF FILED IN SUPPORT OF THE PETITION FOR REVIEW**

(Proof of Service attached)

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 ORIGINAL

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**RESPONDENTS' ANSWER IN OPPOSITION TO THE
AMICUS BRIEF FILED IN SUPPORT OF THE PETITION
FOR REVIEW**

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

1. This is an Unpublished Opinion and it Does Not Affect the Public Interest.

The Court of Appeals decision is *unpublished* and has no precedential impact in the Washington Courts. (GR 14.1(a)) RCW 2.06.040, the statute that created our three courts of appeals, states in part:

Decisions determined not to have precedential value shall not be published.

Yet, the Amicus argues that RAP 13.4(b)(4) applies because the Court of Appeals decision involves a substantial public interest in the proper analysis and application of the Distressed Property Conveyance Act (DPCA). (Page 3 of the Motion)

If the issue is the proper analysis and application of the DPCA, then it would be addressed in RAP 13.4(b)(1) and (2), and not RAP

13.4(b)(4). (Those arguments under RAP 13.4(b)(1) and (2) are addressed below.)

Neither the Amicus nor the Petitioner requested the Court of Appeals decision to be published, eliminating the practicalities of the Court of Appeals decision creating an issue of substantial public interest.

In State v. Watson, 155 Wash.2d 574, 122 P.3d 903, (2005), the Court granted a petition for review from a published opinion because of the affect the *published* opinion could have on every sentencing proceeding in Pierce County.

On appeal, the Court of Appeals affirmed the sentence in a published opinion. See *State v. Watson*, 120 Wn. App. at 536.

.....

This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.

Watson, *supra*, at 576-77.

Unlike Watson, *supra*, this is an *unpublished* opinion with no precedential value and the potential to affect other DPCA cases is minimal at best. The only parties affected in the unpublished Jametsky opinion are the Appellant and the Respondents. The opinion does not affect the public interest.

The Amicus asserts that because the Federal Courts allow citation to unpublished opinions that this opinion has a possible substantial public interest impact. Aside from being highly speculative and tenuous of when this case would be cited, as counsel is not aware of any DPCA diversity of citizenship related cases currently in our Federal Courts, accepting a "substantial public interest" argument because an unpublished case may be cited in the Federal Court would open this Court up to many more Petitions.

Pursuant to RAP 13.4(b)(4), as this case has no legal binding authority beyond these parties, there is no issue affecting substantial public interest.

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

The Amicus asserts that the Petition should be accepted because 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.

The Court of Appeals continued:

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 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. While the "risk of loss due to nonpayment

of taxes" was drafted with an objective standard absent any parallel explicit good faith belief or fear on the part of the homeowner. See and Compare RCW 61.34.020(2)(a) and (b).

The Court of Appeals applied proper statutory construction. The Petitioner and Amicus do not like the conclusion, but they cannot argue that the Court of Appeals did not follow the proper law on statutory construction and interpretation.

3. 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 Courts decisions are required to recognize that the differences in statutory language are intended by the legislature and must be given meaning. 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 above quotes from the Court of Appeals in the Jametsky v. Olsen opinion describing its analysis and application is consistent with Price, supra, Haley, supra, Salts, supra, Applied Industrial, supra, and Millay, supra. Division One did not vary from proper statutory analysis and interpretation and the Petition for Review should be denied.

4. The Amicus Defines "At Risk" Not 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.¹

As was noted in the Respondent's Answer to the Petition, in State v. Keller, 98 Wn. App. 381, 387, 990 P.2d 423 (1999), *aff'd*,

¹ The Amicus and Petitioner are not consistent in what they believe it means. The Amicus believes "at risk" means "in jeopardy," or "in a dangerous situation or status." (Amicus Brief, page 7) The Petitioner asserts "risk" means "chance" or "possibility." (Petition, pages 15-16) Both very different in usage and application.

143 Wn.2d 267, 19 P.3d 1030 (2001) the Court noted that it is far more important to consider words in the context in which they are used rather than to consider their meanings in isolation.

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. In this case, who can take action if the property taxes are three years delinquent? 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? The county will issue a certificate of delinquency. Next, if the taxes remain unpaid after the issuance of the certificate of delinquency, then in October 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 tax foreclosure sale at the time of the transaction. The Petitioner's argument also assumes he 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)

Yet, if one extrapolates the Amicus' argument we cannot look to RCW 84.64.050 because it is unrelated only because it is not a consumer protection statute. (Amicus Brief, page 8.) The Attorney General's position is that the foreclosure procedure statutes, (which would also have to include Chapter 61.24 RCW) cannot be and are unrelated to the DPCA. That makes no sense.

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. As noted above, the Legislature is presumed to know the law. Price, supra, at 463.²

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 indicates that it proposed the DPCA legislation in 2008, which was amended a second time in 2009. Nowhere in the proposal or in the 2008 and 2009 amendments is an additional

² There is a difference between liberally construing a remedial statute and simply carrying the construction too far.

definition of at "risk of loss due to nonpayment of taxes." In addition, neither in the Court of Appeals briefing and in both the Petitioner's Petition or the Amicus Brief do they indicate what a reasonable time is before a homeowner is at risk of loss for nonpayment of taxes. They do not suggest a standard. If you are one day, one month, one year, late in paying taxes, are you at risk of loss for nonpayment of taxes?

In the oral arguments in the Court of Appeals when Mr. Jametsky's counsel was asked where would you draw the bright line where you're, as a matter of law, not in risk of losing of your property due to taxes being unpaid, answered:

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).

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, using 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.

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

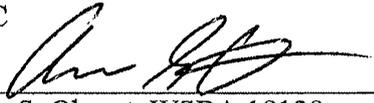
The Amicus asserts that the homeowner may not know they could lose their home from not paying taxes and that they do not know the specific process the county must follow to foreclose on a tax lien. (Amicus Brief, page 3-4.) In Petitioner's unpublished case, that argument fails. The undisputed record evidences Mr. Jametsky'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 Petition for Review should be denied as both the Petition and the Amicus Brief do not fulfill RAP 13.4 prerequisites for acceptance of review.

Dated this 6th day of March 2013.

STERNBERG THOMSON OKRENT & SCHER,
PLLC

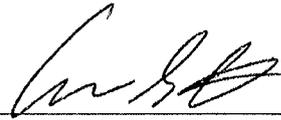


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CERTIFICATE OF SERVICE

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 March 6, 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 March 6, 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 March 6, 2013 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138

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From: Aaron S. Okrent [<mailto:okrentlaw@msn.com>]
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To: OFFICE RECEPTIONIST, CLERK
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Dear Clerk of the Court,

We attach in pdf format the Respondents' Answer in Opposition to the Amicus Brief in Support of the Petition for Review under **Case Number 88215-1**. Please confirm receipt. We have emailed and mailed the Answer to all opposing counsel today. Proof of service is on the last page of the pleading.

Very truly yours

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