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STATE OF MICHIGAN

IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

NICK YONO,

Plaintiff-Appellee,

vs.

INGHAM COUNTY;
INGHAM COUNTY TREASURER; and
INGHAM COUNTY LAND BANK FAST TRACK AUTHORITY,

Defendants-Appellants.

Supreme Court Case No.:
MCOA Case No. 362536
Lower Court Case No. 20-697-CZ

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APPLICATION OF DEFENDANTS-APPELLANTS INGHAM COUNTY, INGHAM COUNTY TREASURER AND INGHAM COUNTY FAST TRACK AUTHORITY SEEKING LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE JUDGMENT TO BE APPEALED

Plaintiff-Appellee Nick Yono lost property to foreclosure by the Ingham County Treasurer for tax delinquency. The property was offered for sale at public auction in accordance with MCL 211.78m(2) and (5). But the property did not sell. As a consequence, no "surplus proceeds" were generated.

Nevertheless, in an unpublished opinion issued December 28, 2023, the Court of Appeals held that the Defendants-Appellants must compensate Yono "by reference to the value of the property." ***Yono v County of Ingham, et al.***, *unpublished opinion per curiam of the Court of Appeals, issued December 28, 2023 (Docket No. 362536).* **(Appellants' Appx., p. 80, COA Majority Opinion, p. 6)**.

The Defendants-Appellants deem this result to be contrary to the principles of compensation described by this Court in ***Rafaeli, LLC v Oakland County***, 505 Mich 429; 952 NW2d 434 (2020). But a motion for reconsideration by the Court of Appeals was denied by order of February 7, 2024. **(Appellants' Appx., p. 85, COA Order Denying Reconsideration)**. The Defendants-Appellants now make application to this Court for review of the Court of Appeals decision.

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STATEMENT REGARDING JURISDICTION

The Court of Appeals issued its opinion on December 28, 2023. **(Appellants' Appx., pp. 75-84, COA Majority Opinion and Concurring Opinion)**. Defendants-Appellants Ingham County, Ingham County Treasurer and Ingham County Land Bank Fast Track Authority filed a timely motion for reconsideration under MCR 7.215(I) on January 17, 2024. **(Appellants' Appx., p. 74, COA Docket Entries, Entry No. 29)**. The Court of Appeals denied reconsideration by order of February 7, 2024. **(Appellants' Appx., p. 85, COA Order Denying Reconsideration)**.

Defendants-Appellants Ingham County, Ingham County Treasurer and Ingham County Land Bank Fast Track Authority hereby make timely application for appeal to this Court under MCR 7.305. This Court has jurisdiction over the application by authority of MCL 600.215(3) and MCR 7.303(B)(1).

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STATEMENT OF QUESTION PRESENTED

Plaintiff-Appellee Yono's tax-foreclosed former property was *offered* for sale at public auction but found no buyer. The Ingham County Treasurer then transferred the property for $1.00 to the Ingham County Land Bank - - which has continued the effort to sell the property without success.

> WHERE PLAINTIFF-APPELLEE YONO'S TAX-FORECLOSED FORMER PROPERTY WAS OFFERED FOR PUBLIC SALE BUT FOUND NO BUYER AND GENERATED NO "SURPLUS PROCEEDS," **DID THE COURT OF APPEALS ERR** BY HOLDING THAT THE DEFENDANTS-APPELLANTS MUST NEVERTHELESS PAY COMPENSATION TO YONO "BY REFERENCE TO THE VALUE OF THE PROPERTY?"
>
> Plaintiff-Appellee Yono will answer: "No."
>
> Defendants-Appellants Ingham County, Ingham County Treasurer and Ingham County Land Bank Fast Track Authority answer: "Yes."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Substantive Facts.

Plaintiff-Appellee Nick Yono claims to have been a land contract purchaser of property located at 1506 N. Grand River Avenue in Ingham County, Michigan. **(Appellants' Appx., pp. 8, 10, Verified Complaint, ¶¶ 2, 10)**. The property is the commercial site of a former soft drink bottling plant. **(Appellants' Appx., pp. 20, 25, 35-38, Ingham County Land Bank "Redevelopment Opportunity" Brochure, pp. 1, 4, 14-17)**.

Although Yono produced a "Memorandum of Land Contract," he never provided any evidence regarding the terms of the contract or his payments. **(Appellants' Appx., pp. 14-16, Memorandum of Land Contract)**. Yono has alleged that he "paid the balance of the land contract. **(Appellants' Appx., p. 10, Verified Complaint, ¶ 16)**. But Yono never produced any deed or other documentation to support this allegation.

Whether or not Yono fulfilled the land contract so as to become the owner of the property, he acknowledges that he did *not* pay the required property taxes and became "delinquent" for tax years 2014 and 2015. **(Appellants' Appx., Yono's COA Brief, pp. 5, 7, 10, 19)**. This resulted in foreclosure judgments. **(Appellants' Appx., pp. 17-18, Recorded Certificates of Forfeiture of Real Property)**.

Pursuant to the then-current version of MCL 211.78m, the property was offered for sale but found no buyer. Therefore, the Ingham County Treasurer conveyed the forfeited property by quit claim deed to the Ingham County Land Bank Fast Track Authority for $1.00. **(Appellants' Appx., p. 19, Quit Claim Deed)**. The property remains on offer for purchase. **(Appellants' Appx., pp. 20-44, Ingham County Land Bank**

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"Redevelopment Opportunity" Brochure). After enduring years of expense to maintain the property, the Land Bank has still not found a buyer willing to complete a purchase.

Procedural Facts.

On December 8, 2020, Yono filed a two count Complaint asserting claims for "unconstitutional taking" and "bailment." **(Appellants' Appx., pp. 7-13, Verified Complaint).** The bailment claim was rejected by both the circuit court and Court of Appeals. The present application concerns the resolution of the "unconstitutional taking" claim.

Yono claims to have lost "a vested property interest" in the "Fair Market Value (FMV)" of his former property. **(Appellants' Appx., pp. 11-12, Verified Complaint, pp. 25, 27-31).** In his brief to the Court of Appeals, Yono contended that the Fair Market Value was $378,400.00 (i.e., the state equalized value times two), and referenced Const 1963, Art 10, §2, for the proposition that compensation should be 125% of that amount. **(Appellants' Appx., pp. 87-89 , Yono Court of Appeals Brief, pp. 10-11, 22, including n. 1 and n. 2).**

Referencing this Court's decision in ***Rafaeli, LLC v Oakland County***, 505 Mich 429; 952 NW2d 434 (2020), the circuit court held that there had been no taking and no compensation was owed, because no surplus proceeds resulted from the foreclosure. **(Appellants' Appx., p. 67, Circuit Court Order Granting Summary Disposition, p. 5).** But the Court of Appeals reversed this aspect of the circuit court decision.

The Court of Appeals predicated its opinion upon its earlier decision in ***Jackson v Southfield Neighborhood Revitalization Initiative***, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 361397). In that case, the Oakland County Treasurer had sold the

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tax-foreclosed property to the City of Southfield as part of a pre-arranged plan, whereby the city would then transfer the property to a private company for redevelopment. Guided by a decision of the United States Court of Appeals for the Sixth Circuit addressing a case involving the same transaction, ***Hall v Meisner***, 51 F4th 185 (CA 6, 2022), the Court of Appeals held in ***Jackson*** that the county must pay fair market value compensation under both the Fifth Amendment and the Michigan Constitution. ***Jackson***, slip op at 18, 22.

In deciding the present case, the Court of Appeals failed to see the distinction between the deliberate plan of the county and city in ***Jackson*** (and ***Hall***) to *avoid* public sale (*in order to assure a "minimum bid" transfer*) and the very different circumstance of the Yono property being offered for public sale and failing to find a buyer.

As this Court emphasized in ***Rafaeli***, the burden of tax delinquency should fall upon the delinquent, without "taking money away from the public as a whole." In the present case, the public lost the tax revenue by virtue of the property not finding a buyer - - and has continued to lose money through the cost of maintaining a 2.639 acre commercial site for over six years, unable to relieve themselves of an apparent "white elephant" property. The holding by the Court of Appeals that the County, Treasurer and Land Bank must now pay compensation to Yono subverts the emphatic holding of ***Rafaeli*** that a tax delinquent should not benefit at the expense of the general public.

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ARGUMENT

I. THE ISSUE PRESENTED BY THE DEFENDANTS-APPELLANTS JUSTIFIES REVIEW BY THIS COURT.

Under MCR 7.303(B)(1), appellate review by this Court is "discretionary." To gain such review, the applicant "must show" that the issue presented falls within one of the grounds enumerated by MCR 7.305(B)(1)-(6). Three of these grounds are directly implicated in the present case.

This Court must surely have anticipated that its decision in ***Rafaeli, LLC v Oakland County***, 505 Mich 429; 952 NW2d 434 (2020), would ignite a firestorm of litigation. And that has certainly been the result - - with multiple cases (many brought as putative "class actions") in both the Michigan and federal courts.

There remain a host of unresolved questions regarding how ***Rafaeli*** applies in various circumstances that may surround a tax-foreclosure. For example, in ***In re Emmet County Treasurer for Foreclosure***, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 359447), the former owner of tax-foreclosed property died during the foreclosure process, and the Court of Appeals had to determine at what point the former owner's devisee had an enforceable interest in surplus proceeds for purposes of defending against the State's assertion of a Medicaid lien.

This case presents yet another factual scenario to which the principles of the ***Rafaeli*** decision must be applied. But the resolution by the Court of Appeals runs contrary to those principles.

This Court was emphatic in ***Rafaeli*** that the compensation owed to the former owners of tax-foreclosed property should be "no more" than surplus proceeds, lest tax

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delinquents "be taking money away from the public as a whole." ***Rafaeli***, 505 Mich at 483-4; 952 NW2d at 465-6. Yet this is precisely the result countenanced by the Court of Appeals decision. The County has received nothing but $1.00, while its land Bank has been losing money to maintain a property for which it still cannot find a buyer. The public has *only* lost money in this exchange. And the Court of Appeals decision now directs that the County, the Treasurer and the Land Bank lose even more by paying compensation to Yono (*atop the ever-growing legal expense of litigating against Yono's claim*).

Although unpublished, the Court of Appeals decision will certainly become the basis for more claimants to follow in Yono's legal footsteps. Therefore, the Appellant County, Treasurer and Land Bank can surely show the grounds for appeal enumerated in MCR 7.305(B)(2), (3) and (5). The issue they present has "significant public interest" to the counties as subdivisions of the state. MCR 7.305(B)(2). The issue presented "involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3). And the decision of the Court of Appeals conflicts with this Court's decision in ***Rafaeli***, such that the Court of Appeals decision is "clearly erroneous and will cause material injustice." MCR 7.305(B)(5). Indeed, the taxpaying public in every county throughout the state will face the injustice of lost funding for governmental services upon which the public depends, while tax delinquents reap a windfall.

II. THE COURT OF APPEALS DECISION SUBVERTS *RAFAELI* AND SHOULD BE REVERSED.

In ***Rafaeli***, this Court held that the former owners of tax-foreclosed property have a common law right (protected by the Michigan Constitution) to recover the "surplus proceeds," if any, that result from a tax-foreclosure sale. ***Rafaeli***, 505 Mich at 470-3, 477; 952 NW2d at 459-50, 462. This Court's analysis in ***Rafaeli*** has found confirmation from

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the federal Supreme Court. Through historical analysis parallel to the review by this Court, the federal Supreme Court has held that the Fifth Amendment likewise protects the same interest in the "overplus," "surplus" or "excess" proceeds from a tax-foreclosure sale. ***Tyler v Hennepin County, Minnesota***, 598 US 631, 639-643 (2023).

In ***Hall v Meisner***, 51 F4th 185 (CA 6, 2022), the United States Court of Appeals for the Sixth Circuit also agreed (again, by historical analysis) that Anglo-American common law protects a compensatory interest of the former owner of tax-foreclosed property in the "surplus" of proceeds generated by the sale. As stated by the Sixth Circuit, a "public sale" was deemed "the truest text of value of the landowner's equitable interest in the land," and the "surplus proceeds . . . represented the value of the equitable title thus extinguished." ***Hall***, 51 F4th at 193, 195. Thus the ***Hall*** decision, like the federal Supreme Court decision in ***Tyler***, confirms this Court's ***Rafaeli*** conclusion.

But in ***Hall***, the tax-foreclosed property was not offered for sale. Instead, the City of Southfield took advantage of the statutory allowance for a local government to purchase tax-foreclosed properties, i.e., the former version of MCL 211.78m(1), in order to avoid any public sale and ensure the transfer of the property to a pre-selected private developer for no more than "minimum bid."[1]

By avoiding public sale, the county and city deprived the former owners of the "opportunity" for surplus proceeds. ***Hall***, 51 F4th at 196. The Sixth Circuit deemed this defiance of the centuries old common law mandate for a "public sale" to be a violation of

[1] The Sixth Circuit opinion provides few facts. ***Hall***, 51 F4th at 188-9. Opinions by the federal district court provided a few extra details. See ***Hall v Meisner***, 565 F Supp 928, 935-6 (ED Mich, 2021). A much fuller description is found in the Court of Appeals ***Jackson*** decision; slip op at 2-5.

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the Takings Clause of the Fifth Amendment, thus requiring the county to pay compensation. ***Id***. But the Sixth Circuit never explained how the amount of compensation was then to be determined as distinct from the historical surplus proceeds measure of compensation.

In ***Jackson v Southfield Neighborhood Revitalization Initiative***, the Michigan Court of Appeals confronted similar claimants whose properties were transferred from the county to the city for minimum bid as part of the same Southfield program. Holding that the claimants had been deprived of property without just compensation in violation of both the Fifth Amendment and the Michigan Constitution, the Court of Appeals held that in "*situations when there is not a public tax-foreclosure sale*, ***Rafaeli*** *requires the 'surplus' to be calculated on the bases of the property retained, less what was legally owed*." ***Jackson***; slip op at 18, 22.

Critically, the Court of Appeals recognized in ***Jackson*** that it was dealing with a situation where the foreclosed property was not offered for sale to the public. The opinion mentions this three times in just two pages. ***Jackson***; slip op at 21-22. And, of course, this was the same situation in ***Hall***, where the same scheme between Oakland County, the City of Southfield and the Southfield Neighborhood Revitalization Initiative was involved.

Notably, the Court of Appeals panel deciding the present case actually quoted directly from ***Jackson*** the statement that "[w]hen no such auction occurs . . . the lack of surplus proceeds can hardly be described as not a taking." ***Yono***, *unpub op at 4,* quoting ***Jackson***; slip op at 21. But the present case does <u>not</u> involve such circumstance.

Yono's former property was offered for auction. It has found no buyer, despite

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remaining on the market for over six years - - on offer from a county land bank eager to be rid of the property maintenance costs.

This Court was adamant in ***Rafaeli*** that the only property potentially "taken" in a tax-foreclosure "is the surplus proceeds," not the real property. ***Rafaeli***, 505 Mich at 482-3; 952 NW2d at 465. Therefore, "a former property owner has a compensable takings claim if and only if the tax-foreclosure sale produces a surplus." ***Rafaeli***, 505 Mich at 477; 952 NW2 at 462.

Rather remarkably, the ***Hall*** opinion deemed this emphatic statement to be "dictum." ***Hall***, 51 F4th at 189. But it is completely consistent with ***Hall's*** ultimate analysis that a public sale is "the truest test of value of the landowner's equitable interest in the land," and that the surplus proceeds "represent[] the value of the equitable title thus extinguished." ***Id.***, at 193, 195.

The necessary conclusion - - consistent with ***Rafaeli***, ***Tyler*** and ***Hall*** - - is that when a property is offered for public sale but finds no buyer, the "value" of the property is thus *demonstrated to be less* than the tax debt, interest and fees that determine the "minimum bid" that can be accepted by the Treasurer, County or Land Bank in exchange for the property. No "surplus proceeds" have been generated. Any payment of compensation to the former owner would represent a benefit to the former owner from their tax delinquency, while taking money from the public as a whole. This is precisely the result that ***Rafaeli*** condemned and prohibits. ***Rafaeli***, 505 Mich at 483; 952 NW2d at 465-6.

The decision by the Court of Appeals conflicts with ***Rafaeli*** and is clearly erroneous on a matter of significance both through the state's jurisprudence and to the public - -

whereby the latter will suffer a material injustice. Therefore, this Court should reverse the decision of the Court of Appeals.

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CONCLUSION AND RELIEF REQUESTED

For the reasons described above, review by this Court is justified under the grounds enumerated in MCR 7.305(B)(2), (3) and (5). This Court should grant the present application and reverse the decision of the Court of Appeals.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this Application Seeking Leave to Appeal complies with the applicable formatting and word count described in MCR 7.212(B)(1).

1. Exclusive of the portions exempted by MCR 7.212(B)(1), the application contains:

   A. 2,323 words.

2. The brief has been prepared:

   B. in proportionally spaced typeface using "Arial" in font size 12.

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Dated: March 7, 2024

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2024, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: All Attorneys of Record; and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: N/A.

/s/Marie E. Jones
Legal Assistant
Cummings, McClorey, Davis & Acho, P.L.C.