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STATE OF MICHIGAN

IN THE SUPREME COURT
* * * * *

LYNETTE HATHON and AMY JO DENKINS, et al

Plaintiffs-Appellees,

v.

STATE OF MICHIGAN,

Defendant-Appellant.

_____/

Supreme Court No. 165219

Court of Appeals No.: 356850

Court of Claims No.: 19-000023-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule of regulation, or other State governmental action is invalid.

APPENDIX TO
AMICI CURIAE BRIEF ON BEHALF OF
THE DONNA L. EMANOUIL TRUST AND EDWARD SATTLER

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
A	**Letter from Counsel for Edward Sattler to Kent County Treasurer** dated September 23, 2021 regarding 1614 Hamilton, NW, Grand Rapids, MI
B	**Letter from Delta County Treasurer to Counsel for Christopher Klinter** regarding surplus proceeds

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C	**Transcript of Motion Hearing on April 18, 2023**, *In Re Berrien County Treasurer v Estate of Jane Whetstone, et al*, (Case No. 2020-0105-CH)
D	**Deposition Transcript of Amanda Price of October 9, 2023**, *Linda Baker, et al v Ottawa County, et al*, Ottawa County Circuit Court (Case No. 2020-6360-CZ)
E	**Opinion and Order,** *In Re Schoolcraft County Treasurer v Blake Barclay,* dated July 1, 2022 (Case No. 20-5456-CZ)
F	**Order,** *In Re Berrien County Treasurer v Estate of Jane Whetstone, et al*, dated April 21, 2023 (Case No. 2020-0105-CH)
G	**Opinion and Order Denying Petitioner's Motion for Reconsideration,** *In Re Berrien County Treasurer v Estate of Jane Whetstone, et al*, dated April 21, 2023 (Case No. 2020-0105-CH)
H	**Pending Appeals List Regarding Constitutionality of Public Act 256**
I	**Letter from Counsel for Christopher Klinter to Delta County Treasurer** dated October 20, 2020 regarding 15771 20th Lane, Garden Township, MI
J	**Unpublished Opinion,** *Kakalia Management v Otsego County Treasurer*, Michigan Court of Appeals dated April 13, 2023 (Docket No. 361621)
K	**Transcript of Oral Argument of September 6, 2023**, *In Re Muskegon County Treasurer v Beeman, et al*, Michigan Court of Appeals (Docket 363764)

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT A

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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VISSER AND ASSOCIATES, PLLC
LEGAL AND MEDIATION SERVICES
2480 - 44TH STREET, S.E. -- SUITE 150
KENTWOOD, MICHIGAN 49512
Telephone: (616) 531-9860
Facsimile: (616) 531-9870

September 23, 2021

Mr. Peter MacGregor
Kent County Treasurer
300 Monroe Ave., NW
Grand Rapids, MI 49503

RE: PROPERTY ADDRESS: 1614 Hamilton, NW, Grand Rapids
2020 Tax Sale - Amount Owed $94,900
Our Client: Edward Sattler
Our File No. 21-100

Dear Mr. MacGregor:

Our office represents Edward Sattler in regard to the foreclosure of property at 1614 Hamilton, NW in **2020** for delinquent property taxes pursuant to the General Property Tax Act. Our investigation has indicated that $94,900 in surplus funds from the sale of that property is owed to our client. That money belongs to the property owner as determine by the Michigan Supreme Court in *Rafaeli v County of Oakland.*

Demand is hereby made for immediate payment of all amounts due to our client. The important part is to realize that my clients are legally entitled to these funds and it is improper to retain the funds. Since the issuance of the *Rafaeli* decision, there is no basis for retaining the funds. It will be our position that failure to promptly remit the funds constitutes conversion of funds belonging to my clients.

Thank you for your prompt attention to this matter.

Very truly yours,

Donald R. Visser

DRV/kae

cc: Edward Sattler

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Lynette Hathon, et al v State of Michigan

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EXHIBIT B

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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COUNTY OF DELTA
SHERRY GODFREY, CPA
DELTA COUNTY TREASURER
310 LUDINGTON ST.
ESCANABA, MICHIGAN 49829

PHONE: (906) 789-5152
FAX: (906) 789-5171

WEBSITE:
www.deltacountymi.org
sherrygodfrey@deltacountymi.org

Dear Sir,

Thank you for your correspondence of a demand letter requesting immediate payment of 'the amount due' your client, Christopher Klinter.

We acknowledge the July 17, 2020, decision of the Michigan Supreme Court in Rafaeli, LLC v Oakland County. Unfortunately, the Court's opinion offers no explanation regarding the appropriate procedures by which refunds of "surplus proceeds" are to be paid.

In particular, the Rafaeli opinion does not detail how the restrictions imposed by MCL 211.78m(8) upon the handling of sales proceeds are to be unraveled for the purpose of refunding "surplus proceeds," while retaining the non-excess. Procedures for proper proof of claims, and for the necessary accounting and record keeping in these regards, are not to be found in the General Property Tax Act as currently written, and the Supreme Court gave no guidance.

At present, we are carefully reviewing procedural options, lest negative legal consequences be compounded. Checks cannot simply be written ad hoc as demands are received. It is not even clear from what account the Supreme Court would expect refunds to be drawn. We are currently seeking guidance from State authorities, including the Legislature and the Attorney General, as well as our own legal counsel.

We respectfully request your forbearance, while appropriate procedures to take any action required by the Rafaeli decision are developed.

Sincerely,

Sherry Godfrey

Sherry Godfrey

Delta County Treasurer

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Lynette Hathon, et al v State of Michigan

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EXHIBIT C

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION

IN THE MATTER OF:

Case No. 2020-00105-CZ

PETITION OF BERRIEN COUNTY
TREASURER FOR FORECLOSURE OF
CERTAIN PARCELS OF PROPERTIES.
_____/

MOTION HEARING
BEFORE THE HONORABLE STERLING R. SCHROCK
St. Joseph, Michigan - Tuesday, April 18, 2023

APPEARANCES:

For the Plaintiff: CHARLES A. LAWLER, ESQ., (P65164)
Clark Hill, PLC
215 South Washington Square, Suite 200
Lansing, Michigan 48933
(517)318-3016

For the Defendant: DONALD R. VISSER, ESQ., (P27961)
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None.

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None.

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St. Joseph, Michigan

Tuesday, April 18, 2023 - At 2:05 p.m.

THE COURT: All right. This is 2020-0105 in the matter of the petition of the Berrien County Treasurer for the foreclosure of certain parcels of property, and the matter before the Court today is a Petition for Disbursements of Remaining Excess -- three different ways this has been described in various places in the law, right? -- remaining proceeds, exceeds proceeds, and the third one is escaping me.

MR. LAWLER: Surplus.

THE COURT: Surplus proceeds, right, and I think it's actually remaining in surplus proceeds that are most frequently referred to -- following tax foreclosure in this 2020 case and sale, with remaining or surplus proceeds. The claimants requesting disbursement are Ronald Arndt, II; the Eileen H. Globinski (ph) Children's Trust; the Marianne Heinzie (ph) Romano Children's Trust; the Mary Ellen Heinzie Trust; The Estate of Jackie Eldon Snow -- Jackie Eldon Snow; The Estate of Diane M. Woodford; The Estate of Jane Whetstone; Elizabeth Kell; The Sandra K. Nimmits (ph) Living Trust; The Benjamin E. Marshal Trust; and The Estate of William Kanalos. It's K-a-n-a-l-o-s, Kanalos.

These claimants, which is I think the appropriate way to refer to them, are represented by Mr. Visser, who is

present. The Treasurer is represented by Mr. Lawlor, who is present. So this is the matter of the request for the disbursement of surplus or excess proceeds for those named 11 claimants, correct? Are we getting off on the right foot here, Mr. Lawler?

MR. LAWLER: We're both headed in the same direction.

THE COURT: Okay. Mr. Visser says yes?

MR. VISSER: The only question I had, Your Honor, is we also had an Estate of Arthur Petroskey (ph) on our list of the ones we were going to hear today. That's with a separate attorney.

THE COURT: I did not notice that for hearing. Is that the matter with the most -- that was most recently filed?

MR. VISSER: Yeah. Well, I think that -- well, I don't know if it was the most recently filed. It was the most recently filed in this case. It was a Brasswell was the attorney on that one.

THE COURT: Ms. Brasswell. I haven't seen or heard from her. That was not set for hearing today.

MR. VISSER: Okay, good.

THE COURT: You filed an Answer under the Statute 78t very recently to that.

MR. VISSER: Yep.

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THE COURT: Within the last what, less than a month, probably.

MR. VISSER: Yeah.

THE COURT: And, yeah, so no. She has not contacted the Court and asked for a hearing on that matter, and there is also, just for housekeeping purposes, one other claimant that I'm aware of relative to this case, and counsel -- you know, just full disclosure here for the record, counsel, Mr. Lawler, Mr. Visser, and I have had at least one communication in the form of a phone conference to discuss issues and timing and things like that, and what was actually pending and what wasn't pending, and those sorts of things, and I got a recent letter from Mr. Lawler identifying that -- because, frankly, I didn't see it wading through this -- that one of the issue -- one of the cases that I been -- that I was aware of when I assumed this docket was a claimant whose case had been resolved, Modasonto (ph) or something of that nature, and so Mr. Lawler brought that to my attention.

Also, there was -- there's a claim, a motion that I found in the file that was filed by a law firm representing a claim -- claimant. That attorney is Mr. Shek, and after I got your letter and went back and started to look at these issues, Mr. Lawler, what I noted was that actually Mr. Shek had filed that motion, I think, on the

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Treasurer's previous attorney and not on you, but rather on the attorneys who had represented the Treasurer at the time of the 2020 foreclosure.

That would have been Attorney DeWayne (ph), I believe, or his firm.

MR. VISSER: That's right, Your Honor, and I do have a copy.

THE COURT: Okay. You did get a copy of it.

MR. VISSER: We're taking care of that with Mr. Shek.

THE COURT: Okay. All right.

MR. VISSER: The reason I brought up Petroskey is because I thought we talked about that when we had the discussion amongst the three of us.

THE COURT: Well, correct. We talked about it in the sense that hey, I just saw this motion, but -- but I haven't heard anything from counsel for that claimant asking to be a part of this hearing, or even setting the matter for a hearing, and we'll have to get to that at some point. So, all right. I think we're now off on the correct foot. So, as -- as is my practice, I have probably read both of your briefs with your -- motion and briefs with your exhibits on more than one occasion, so I've done the best I could to digest what the issues here -- what the issues are here before we got on the record today.

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So I don't know what your intentions are in the form of a presentation today, but given that I have now had the time to digest, I think as well as I can, given the complexity of the issues, I don't need to hear what's in your briefs, so if -- but certainly, if there's any information that you want me to have to amplify what you've otherwise argued in your briefs, I am happy to hear from you. So, I'll hear from Mr. Visser.

MR. VISSER: Your Honor, am I picked up if I speak from here?

THE COURT: Yes, I believe so. Okay, sure.

MR. VISSER: Let me know if for somehow I am not picked up. As Your Honor is quite aware, the central issue here is that the County has asserted that the claimants that are before you today did not timely file the notice of intention and that is the flaw. In response to that, we have asserted two things. One is that there's a settlement in this matter in which the County indicated it was not going to be asserting a defense based upon the notice of intention. It would make the payment. And secondly, that if that settlement is not enforced, that the statute at least as interpreted by the County would thus be unconstitutional, and that's contained in a principle in our briefs, I think fairly well covered.

Underlying that, however, is a real question as to

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why the County is even here, and that's based on a reading of the statute and just simply going through the statute. The County really does not have standing to be here for anything other than the five percent that's asserted in the statute.

I've broken it down. If I could approach the Bench, I've got a copy of the statute, which I'm sure you've read several times, consisting of four pages, but then I've also attached on it in the paperclips, kind of trying to break it down. The first couple of sections, one and two, talk about notice of intention. But then as you move down the statute, the next page is claims under Subsection 4, and that basically talks about when the claims may be filed after February 1 and prior to May 15.

Now, there's nothing in there that requires a notice of intention. Then we come to Subsection 6, which is really where we are in this particular situation. It's for a claimant seeking proceeds from the transfer of sale or foreclosed property transferred or sold under Section 78(M), pursuant to this subsection. Now what we have is we have a very defined envelope regarding what process we're looking at. We are looking under Subsection 6 only under the subsection.

Remember the previous subsections address notice of intention. This now says you're not looking at the

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section, you're only looking at the claims under the subsection, and what does it have to include? It says the motion must be certified and include all of the following: The name of the claimant, all the way down through a sworn -- being a sworn statement.

You will note there is nothing in there about a notice of intention. It does not have to be asserted and it's not -- this subsection is not predicated upon a notice of intention. Then we go to the next page, which I have. It's called the roll of the foreclosing governmental unit. That's described in Subsection 7 of the statute. That statute says that the end of the claim period, which was described in Subsection 4, this is what the County -- or the FGU, in this case the County Treasurer, has to provide.

As you will notice there, there's a whole bunch of information on there, again nothing having to do with a notice of intention. You have to give the parcel description. You have to give the amount that it was sold for, all of the information that you're going to be looking at today to make distribution, but that information has to be sent out. And the last thing is, the name and address provided by each claimant for their property, pursuant to either Subsection 2 or 6. Notable, however, is nothing regarding a notice of intention.

Then Subsection 8, which describes what has to be

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done. Again, this is what -- this is what needs to be asserted, and the claimant -- again, there's no mention in this section -- or in this subsection about a notice of intention. And then finally, we get to Subsection 9, which is the last page of my handout and I have highlighted a couple of things in color there. Again, there's nothing in this subsection about a notice of intention.

Here's where I get to the question about what the County Treasurer's role is in this matter. As you come down about seven lines, it says the statute allows the foreclosing governmental unit may appear at the hearing. It may appear. This is -- it's interesting, because if you look at the entire scope of the statute, the County does not play a role in anything except for the next sentence: The Court shall require a payment to the foreclosing governmental unit of a sale commission equal to 5 percent of the amount for which the property was sold by the foreclosing governmental unit, end of the foreclosing governmental unit's relationship to this particular hearing.

There is nothing in this hearing that asks this Court to determine whether a notice of intention was sent. It's not part of this -- of the function. What's happened, the Plaintiff or the claimant has to prove or bear the burden of proof on that they had an interest in the property. The second part, then what happens is the Court,

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after allocating 5 percent, the Court shall -- this is mandatory language -- allocate any remaining proceeds, based upon its determination and order that the foreclosing governmental unit pay applicable remaining proceeds to one or more claimants consistent with this determination under the subsection.

So the Court's role at this stage, once a timely motion -- we're not talking about a timely notice of intent. The only thing that impacts this Court's hearing is the timely motion, that is it's by May 15, so we -- once that occurs, you can ignore the notice of intention. It has nothing. The count -- the FGU has nothing to say about whether a notice of intention was given timely or untimely. It simply is not relevant to the Court's hearing under this particular subsection.

So, other than -- to make sure that the Court gives the 5 percent, the foreclosing governmental unit then steps out of the way and it's up to the Court then to determine between one or more claimants as to the remaining proceeds. The fact that the FGU doesn't fit within that definition -- you can look down. I think it's Subsection 12 of the act, which says -- which defines what a claimant is, and the FGU cannot and does not fit that definition of being a claimant, so once the 5 percent is taken out, you have 95 percent to work with and you by statute are mandated to

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disburse that to the one or more claimants related to that property.

In this particular instance, we believe it does not allow for all of these other issues that have come up that obviates the necessity to -- to discuss whether we had a settlement or not. It obviates the necessity to declare the statute unconstitutional. If, however, the Court doesn't agree with me, obviously those issues come into play and I'm more than happy at this point to answer any questions that the Court may have relative to either of those -- well, actually or the things I just brought up regarding interpretation of the statute.

We just -- the statute is clear. It's not ambiguity. We know who a claimant is. We know who the FGU is, and so the rules of interpretation doesn't really allow us to go and say, well, the legislature meant or should have meant; we have to read a statute exactly as it is, and nothing more and nothing less, and so it's our interpretation that we don't get to even allowing, in this instance, the FGU to take a position on who the money gets distributed to after the 5 percent is out.

That, of course, makes sense. It's not their money. I mean, Rafaeli made that very, very, clear is that it belonged to somebody else. They're really just holding somebody else's money, and so in this particular sense, that

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interpretation makes -- is entirely consistent with Rafaeli.

THE COURT: All right. Thank you. Mr. Lawler?

MR. LAWLER: Your Honor, that's the first I've heard that novel argument and --

THE COURT: Well, yeah. I wish it would have been flushed out a little bit in a brief to give me an opportunity to think about that, because it's the first, of course, that I've heard it as well, but it is what it is.

MR. LAWLER: But I would point you to the statute. I mean, 78t(2) says, you know, that any property -- foreclosed property transferred or sold after July 17th, 2020, by the July 1st immediately following the effective day of the foreclosure, a claimant seeking proceeds for the property must -- I think that's a pretty simple term, must, notify the foreclosing governmental unit using the forms prescribed by the Treasury.

THE COURT: So you're arguing that contrary to what Mr. Visser is saying, that Section 2 incorporates the balance of the statutory scheme --

MR. LAWLER: Yep.

THE COURT: -- such as it must be followed, including submission of a notice of intention.

MR. LAWLER: That's part of it.

THE COURT: Okay.

MR. LAWLER: The other thing, Your Honor, is

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78t(9), and you can see my book is a little more weathered than Mr. Visser's there, and I really wasn't prepared for this, so I don't have it highlighted or anything, but I know it's there. Oh, I guess I do have it highlighted.

At the hearing, the Court shall determine the relative priority and value of the interest of each claimant in the foreclosed property immediately before the foreclosure was effective. The reason the Treasurer is here, Your Honor, regardless of whatever Mr. Visser says, is she doesn't want to pay more than once, so there's a -- the litigation that spawned out of this Rafaeli and out of the statute is -- I couldn't even describe it. I mean, some people would say it's a gift to attorneys like me, and some people would say it's a bane.

We've litigated this thing. In fact, I just got another class action from Mr. Visser, a federal one, I don't know a few days ago for another year, but the Treasurer is not -- you know, they're not against paying. They just want to make sure they pay the right people, and what really happened here is in the first one that we did the stip and order with Mr. Visser, we made a mistake. We didn't -- the reason we didn't -- the reason we stipped to that is we were concerned that there wasn't enough notice provided to these people of their opportunity to get their remaining proceeds and the process.

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The reason that was, was because I didn't represent the Treasurer at that time. They had prior counsel, and what us treasurers who represent -- or us attorneys who represent a number of treasurers did is we got together and provided a judgment of foreclosure that included the whole process so everybody got notice, but after the first stip and order that we did with Mr. Visser, then we got into the Treasurer's records and we found out that they had taken extra steps, as you saw it in our briefs and everything else. I don't need to into that, but I gave Mr. Visser a copy of the judgment of foreclosure that we use in other areas, and if you would allow me, I would approach and give you one too because I'm not sure it's in the file.

THE COURT: Well, I don't think it was attached as an exhibit to your brief --

MR. LAWLER: Yep.

THE COURT: -- but I have no reason to dispute what you're saying.

MR. LAWLER: Okay.

THE COURT: The question is whether or not -- I think the question in my mind is whether or not under some -- the way the law is at this point in time, particularly in light of Rafaeli, that cures any of the issues that are concerning to me. I guess that's what the question is. Is there anything more you wanted to say, Mr. Visser?

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MR. VISSER: Your Honor, I would just simply reference a couple of the comments that were just made. Obviously, the order that's entered by this Court follow -- will follow the statute. That really pretty well protects the FGU from paying twice. I mean, there's no issue with paying twice. That's cured or uncured by analysis of whether notice of intention was timely filed or not. I mean, the options --

THE COURT: Unless the entire statute is unconstitutional -- unconstitutional and invalid, the foreclosure process eliminates all other claims.

MR. VISSER: That's correct, so I don't see that issue as rearing its head at all in this. What the FGU is currently telling you is, well, we're worried about paying twice, so why don't you just let us keep the money, and that seems totally antithetical to what -- what Rafaeli has said, so it's not -- it's not their money and, well, we would like to keep it because you -- you didn't file a notice of intention.

I will address the comment about the -- about notice, that the FGU is saying, well, after the fact we found out that we think that we gave enough notice to satisfy. Obviously, we have -- we have a significant problem here. Unlike many other counties, this County did not include any language in its foreclosure judgment about

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preserving any rights for remaining or -- remaining proceeds.

THE COURT: Under the statute, remaining proceeds.

MR. VISSER: Yes. They did not. Most of the other statutes -- counties across the state did include language advising of the remaining proceeds and keeping the case open. This case is absolute done, over with. There is no remaining proceeds, despite what the statute says, nothing preserved in the order, so we have some real notice issue there coming out of the foreclosure judgment itself.

But more particular to the whole constitutional analysis that PA 256 puts itself into, and that is the juxtaposition of the claim that 256 is the exclusive measure to get the remaining proceeds or surplus proceeds, versus jumping through the hoops. If it's -- if it's not the exclusive remedy, which some of the judges have found, that PA 256 simply did not effectively codify Rafaeli, so it's an alternative measure.

Surplus proceeds still remains a viable method, but by separate lawsuit. I understand that, but if you look at it otherwise, Rafaeli tells us that the surplus proceeds -- there's no claim to surplus proceeds until there's a sale. We're getting a little bit in the weeds here, but I'll just give the Court a little idea of what I think has happened since we've briefed this.

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The Sixth Circuit came down with a decision called Hall versus Meisner. It came out of Oakland County, which is fertile ground, I think, for a lot of these, but it was a piece of property that did not sell, so it never got to the position of generating surplus proceeds. The Sixth Circuit said that nonetheless, the Fifth Amendment under the federal law protects -- it protects that former property owner, and that they -- there was a violation of the Fifth Amendment there and they sent it back down.

Now, add one additional layer to that. I think it was in early January -- like January -- early part of January, the United States Supreme Court granted cert to an Eighth Circuit decision out of Minnesota in which the Circuit -- they have a similar statute to what Michigan had. The district court and the circuit court denied relief to the property owner, and the United States Supreme Court has granted cert now on that issue for violation of the Fifth Amendment and the Eighth Amendment, and in the application cited the conflict between the Eighth Circuit and the Hall versus Meisner Decision out of the Sixth Circuit, roughly the very same issues, but coming to different -- different ends.

The interesting part to us was that the United States Supreme Court deemed it prudent to address also six -- I mean, Eighth Amendment, taking fines and penalties --

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excessive fines and penalties out of that, so it suggests that -- we never know where they're going, but it suggests that there's probably a significant adjustment in all of our thinkings as to what the federal remedy is, in addition to what's happening under Rafaeli.

But for Rafaeli, it's real clear under state law the claim doesn't exist until the sale, so if we look at that, so now if you can identify what the property is at the date of sale, not before, you look at this sequence, you have the effective date of foreclosure, March 31, this supposed notice of intention of July 1, and your sale a couple months later. You can't file a claim. You can't do anything as far as anyone is concerned because that property does not exist. Under Michigan law you cannot file a claim.

Rafaeli says no more and no less under the State Constitution than the surplus proceeds. You don't have -- it also says you don't have a claim until it sells. It seems to me that in the real world, due process really has to issue -- once you identify, give notice, once you identify the property and say I'm going to take it. Otherwise, we could all give notices at the time of your birth and say we're going to take your property whenever we want to down the road, and you've got notice.

You can't do that without having some relationship between the property that you're taking and the notice that

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you're trying to give by it -- or give in relationship to it. And, of course, it's our position that even if you get there, you still -- you still have problems with the Article 10, Section 2 of the Michigan Constitution.

If you take it, you still have to pay for it. That's just compensation, so let's say you get all the way there and, yeah, we took your property. I'm not sure it happens, because if you look at PA 256, it never addresses ownership -- transferee, and I have tried and eventually I will get this I think in some of the appellate decisions. I have tried to get the FGUs to define when is it that ownership transfers from the claimant to the FGU. I had one treasurer tell me it doesn't happen.

It was a clever argument to avoid the taking issue, we just keep it in escrow, and then eventually --

THE COURT: I think Rafaeli said that interest doesn't transfer, did it not?

MR. VISSER: Rafaeli says it does not transfer, so now PA 256 is apparently, although it never addresses it, at the end of the process, you look at this -- we know Rafaeli at the beginning of the process says it belongs to the claimant. We would suspect, anyway, we're not sure, but up at least until July 1, I would probably suspect it still belongs to the claimant.

Now, if we get -- if we walk out of this courtroom

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and Your Honor does not order the funds turned over, effectively it's become -- because we can't get it, effectively it's become the County's property. That's really what -- it just by osmosis gets over there, but the Constitution doesn't allow osmosis.

So we try to define when did it occur so we can -- if we can do a freezeframe analysis, what happened on that date; was due process good for that -- for that day of taking? What about the constitutional analysis for compensation? If we can define what it is, but the whole statutory sequence here is it really never addresses it, and that's real -- that's a real problem. So if we're taking something, defining when we take it helps with the analysis of due process because, okay, if you're going to take it, now ought to have due process.

It also helps with the setting okay, when does Article 10, Section 2 kick in for compensation, so I identify a whole lot of problems that I see. I don't know that -- in fact, there's more than one. I don't know that I can say this is the particular issue with the statute, but I do know that when you say this is an exclusive remedy and if you buy into the County's position that you have to give notice of intention by July 1, now I can identify some real issues that are inconsistent with due process and inconsistent with just compensation.

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THE COURT: And I think not as completely as you just argued your point there, you covered most of that in your brief. Did you have anything further, Mr. Lawler?

MR. LAWLER: I've got a couple comments, Your Honor, and I guess the first thing I'd say, Mr. Visser, I'm a little disappointed that I didn't do a better job when I participated in drafting the statute, but a couple things. The Hall case is an interesting case. The thing to point out is there was actually eight properties in that case when they started, and a bunch of them were dumped.

Judge Kethledge actually said that the Hall case was a classic example of why these shouldn't be class actions, because each property is individual, each one has individual things but that's not before us today. I don't personally think the fact that the Supreme Court took it gives us any indication of what they're going to do one way or the other. There's obviously a circuit split and they want to clean up some of these issues, so whether they side with Mr. Visser's side of the V or my side of the V, we're going to find out here pretty quick because the argument is the 26th.

The one thing I would point out, Your Honor, and Mr. Visser and I have debated this continually, the July 1st deadline was put in there for a specific purpose, and there is a rational basis for them having that. The reason it was

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put in there is so the local units of government who had an opportunity -- you understand the process, and through the process the locals have an opportunity to pay the minimum bid in the old days.

But now -- now what they have to do is if there is a notice of intention of claim form, they've got to pay the fair market value or the minimum bid, whichever is greater. The reason they put that July 1st deadline in there is to keep the process moving. So there's nothing -- you know, anybody who thinks they may have a claim or their property is foreclosed, they should all file a 5743. I mean, that's why the Treasurer sent out those two written notices after -- after the fact. You know, it wasn't in their judgment, that's true, but she did send two written notices to every parcel -- every individual who had a parcel foreclosed, telling them that, hey, you've got to file a claim by July 1st.

I guess that's pretty much all I have to say, unless you have any specific questions about our -- our briefs. I mean, the one thing I would say is that most of these parcels that Mr. Visser has here are fraught with issues. You know, there's no notice of intention filed on some of them. They're all late. There are some of them that have a number of other mortgages, other parties of interest that aren't here. Now -- now, the Plaintiffs

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always argue that, well, they didn't file their notice, so.

Okay, well, if they didn't file their notice and they shouldn't be here, then why -- why does that let them off the hook of filing notice? But I've got a whole list of these that we did, which I'm happy to share with the Court that outlines all of the issues with every single one of them. And contrary to what Mr. Visser said, you know, the Treasurer is not here to hold the money or keep the money, or ant else. You know, they're a fiduciary of all these funds. Their duty is to make sure it gets to the right person. If nobody makes a claim, sure, it goes back to the County, and then the County uses it to serve all of the citizens.

But the statute specifically says, again in 78t(9), that nobody should be unjustly enriched, so what some of the Plaintiffs' lawyers have suggested is that I own a house and, you know, I happen to own a house in Okemos, Michigan, right now. Let's say it's $200,000 house, and I've got $150,000 mortgage. If I don't pay my taxes, I've got to go through the process and my mortgage company doesn't show up, I should get whatever it's sold for, so if it's sold for 200,000, that's what I should get. That's just not equitable and there's no way the statute or anything was ever intended to do that.

So the biggest thing we have done is trying to

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make --

THE COURT: Doesn't -- I understand what that issue is and the concern there, but has -- I mean would that other interest in the property, if the remaining proceeds, surplus proceeds, whatever you want to call them, goes to the original owner of the property, doesn't that other entity then have a cause of action against them? Isn't the Court available to resolve those issues for them?

MR. LAWLER: They could be. Yes, Your Honor.

THE COURT: Yeah, so I don't see how that is any kind of a compelling argument for the application of the statute here, I guess. I'm not tracking.

MR. LAWLER: Well, what we found isn't --

THE COURT: It's complicated. It's a mess.

MR. LAWLER: Well, what really happened is -- no offense to the -- as Mr. Visser said, the circuit courts are kind of -- they're not all on the same page on this yet.

THE COURT: Well, you're darned right they're not.

MR. LAWLER: So we've had some --

THE COURT: You both demonstrated that with the -- with the variety of opinions from other jurisdictions that you attached to your briefs, and I wish I could say that's helpful, but it certainly is not. It just shows the confusion over the application of the statute.

MR. LAWLER: Right.

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THE COURT: Right.

MR. LAWLER: Yeah. Yeah, because we've had other circuit courts order us to provide notice to some -- truthfully, they were all governmental entities that they were probably trying to protect, but we did have to provide notice on numerous occasions to other parties who had an interest prior to the foreclosure. So, I don't really have anything else, Your Honor, unless you have something specifically you'd like to ask or you'd like further clarification. I'm happy to brief any issues if we have to brief something else for you too.

THE COURT: I'm not convinced that I -- the way things lie, that I need anything else from either of you. I mean, I don't think any of us can -- I mean, Mr. Lawler said it, Mr. Visser certainly shook his head and agreed on the record; it's created quite an issue, the application of the statute since the issuance of the Rafaeli Decision. You know, counsel, if you wouldn't mind giving me about five minutes, I'm -- there's -- I want to discuss a couple things with my law clerk, all right? So we'll go off the record for just a few minutes.

THE BAILIFF: All rise. Berrien County Trial Court stands in recess.

(At 2:43 p.m., court recesses)

(At 2:46 p.m., court reconvenes)

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THE BAILIFF: Trial Court is now in session, the Honorable Sterling R. Schrock presiding. You may be seated.

THE COURT: All right. We're back on the record on 2020-105. So, counselors, I've spent enough time with this that I'm prepared to rule, and I think I should start by saying that just as we discussed at the end of our previous session before I took that brief recess, there's not a lot of clarity coming from the courts that need to weigh in on this, the higher courts, to give the circuit courts some guidance in the interpretation of the statute.

Where that is the case, this Court is left with reaching a conclusion based upon the way it understands the application of the law, and in this particular situation, of course, that's 78t of MCL 211. So this matter involves 11 named claimants who present a joint Motion for Distribution of Remaining Proceeds, as defined by MCL 28 -- I'm sorry, 211.78t of the Michigan General Property Tax Act. That act defines remaining proceeds, quote, which for purposes of this decision may also be referred to as surplus proceeds.

The Court is referring to the surplus remaining from the foreclosure sale of the parcels after deduction of taxes owed, interest, penalties and fees reasonably associated with the foreclosure sales of the parcels. All of these 11 claimants owned -- owed -- I'm sorry, owned taxed parcels that were the subject of a Judgment of

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Foreclosure, which was entered March 8, 2021 and became effective March 31, 2021.

The parcels were then sold at a foreclosure sale on August 6th, 2021. In each of these instances, the parcels sold for in excess of the tax owed and the Berrien County Treasurer is the foreclosing governmental unit in these case. The principal question for the Court raised in the claimant's motion is whether the amendments to MCL 211.78t enacted and made effective December 22, 2022, in response to the Michigan Supreme Court Decision in Rafaeli versus Oakland County, decided July 17, 2020, precludes the claimants from recovering surplus or remaining proceeds generated by the tax foreclosure and sale of their properties.

On the facts presented in this case, I find that the statutory scheme created by the amendment to MCL 211.78t does not preclude the claims for surplus or remaining proceeds of these 11 claimants for the following reasons: The Rafaeli Decision clearly establishes the following: Holders of forfeited properties do not forfeit all rights, titles, and interests that they had in their properties by failing to pay their property taxes. The Michigan and United States Constitutions require protections of due process. Failure to do so and the statutory retention of surplus proceeds following a tax foreclosure and sale under

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the General Property Tax Act is an unconstitutional taking.

The property owner has a common law property right to the surplus proceeds from a tax foreclosure sale. That property right is vested in the property owner and survives the tax foreclosure process. This common law property right is constitutionally protected by the Takings Claus of the 1963 Michigan Constitution. The legislature is powerless to override a right protected by the Constitution. The takings claim for surplus proceeds is not compensable until the property is sold for an amount in excess of the tax debt. A property owner has a takings claim if, and only if, the tax foreclosure sale produces a surplus.

Once the sale produces a surplus, the former owner has a claim to make, even though that former owner no longer holds title to the property. Those are the essential principles from Rafaeli on which this Court relies. There are, of course, others. In my words, there is no basis, nor is there a vested property right that is subject to the protections of the Takings Claus of the Constitution until the sale occurs and the claim accrues. On the facts applicable to these claimants, that did not occur until the sale took place on August 8, 2021. There was no vested property right for which a claim could be made until that date.

This is where the legislature's effort to fix the

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General Property Tax Act with its amendments to Section 78t fails to correct the issues with the General Property Tax Act addressed by Rafaeli -- or by the Rafaeli Decision, and again, that's my understanding and interpretation of the law as it currently exists, which is the law I have to rely on in reaching this conclusion and rendering this opinion.

As amended and now applied to these claimants, 78t continues to deny these claimants their vested property right to the surplus or remaining proceeds because they failed to file a notice -- file a notice of intention by July 1, 2021, a date well before their claims accrued and before their vested property right even existed. I find, therefore, that retention of surplus proceeds or remaining proceeds for failure of claimants to provide the notice of intention before their vested common law property right even existed amounts to an unconstitutional taking of that property.

MCL 211.78t and its notice requirement is unconstitutional as applied to these claimants because it results in the taking of their property without due process by requiring notice to retain their vested property before such vested interest in the property even existed. To be clear, I am not ruling that the General Property Tax Act or, in particular, 78t, is unconstitutional as a general matter. Rather, I am only ruling that the application of 78t to

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these claimants results on an unconstitutional taking of their vested property rights.

The Court is not persuaded that a constructive trust theory is applicable under an equitable theory, nor to prevent unjust enrichment, as it is not evident on this record that the foreclosing governmental unit, the Treasurer in this case, acquired the property under such circumstances warranting a construct -- warranting a constructive trust. Further, the Court does not find that the claimants' attorney's affidavit nor the e-mails submitted as exhibits to their brief are sufficient to establish an enforceable agreement to disburse the surplus proceeds of the tax sales.

Finally, given the Court's ruling on the principal issues, the Court does not find it necessary to address the other theories raised in claimant's motion and brief. Now, as a result of this order, this ruling, I order the Petitioner, Berrien County Treasurer, to submit an affidavit as to each individual claimant, setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of their parcels. Because I find the provision of 78t as applied to these claimants is an unconstitutional taking, the 5 percent commission afforded the foreclosing governmental unit by 78t is also inapplicable to these claimants.

The claimants, through their attorneys, shall

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submit proposed orders for each individual claimant for the disbursal of the related surplus proceeds for each parcel. If either party has an objection to the amount to be disbursed, they may raise -- they may request a hearing with the Court upon filing of a written objection and motion. That's the Court's ruling. Any clarification either party needs?

MR. LAWLER: I do, Your Honor. What do we do about the ones where there's not an estate opened or, you know, there's not proof that somebody is actually deceased? I mean, some of these, there's -- some of these other --

THE COURT: That involves some of these 11 claimants?

MR. LAWLER: Yeah, and we can't pay -- we can't --

THE COURT: Yeah. I mean, this -- I don't know how to address that at this point. That's a good point. Your motion makes no mention -- I'm trying, to the extent possible, to follow what the existent scheme is that can be applied here, and that requires that an individual order be issued in each case. I mean, the Court, under the GPTA, is supposed to issue a ruling as to each. You combined these 11. There is no mention of any such issue. I'd have to assume, based upon the way this matter was filed, there's an identifiable claimant in each case.

If you have one of these claimants is not -- is

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not identifiable as either not having been deceased and/or deceased and there's no estate, then how can -- how can you file a motion to request a disbursal to that entity?

MR. VISSER: Your Honor, just --

THE COURT: Is that --

MR. VISSER: I obviously have not -- I'm just looking right now at our motion that was filed.

MR. LAWLER: I mean, I've got a detail on each one of them. I can tell you which ones they are.

MR. VISSER: I have no -- if the Court feels that additional information is necessary, I can provide death certificates and letters of --

THE COURT: Well, you need to provide that based upon my ruling today to Mr. Lawler so that the Treasurer can put together an affidavit so that they can collect the costs associated with the foreclosure sales that they're entitled to, whether --

MR. VISSER: Sure.

THE COURT: I mean, I'm not giving them 5 percent, but on the other hand, they're entitled to the costs of interest and penalties associated with the foreclosure sale.

MR. VISSER: Your Honor, for any of the estates I'll be happy to -- I thought we had them, but I'll be happy to provide both the Court and Mr. Lawler with copies of each of the letters of authority and the death certificates for

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the parties. I believe -- if we haven't, I will, but I believe we've attached D showing vesting of all of the properties, but I'll be happy to double down on all of that to show a trial right from --

THE COURT: That clearly has to occur before the Treasurer can be required to follow my order.

MR. VISSER: Sure.

MR. LAWLER: We've also got things where we've got deeds with two people's names on them, one claimant, but did I understand your order, for clarification, to say that the 5 percent is inapplicable in this matter only --

THE COURT: Yes.

MR. LAWLER: -- or that the 5 percent is unconstitutional?

THE COURT: No. I did not say it was -- I said it's unconstitutional as applied in this matter, because I cannot apply the statute in that way, given that the claim had not yet accrued. I'm not finding any part of the statute unconstitutional, only its application to these claimants because of the factual scenario here as to when the claim accrued.

MR. VISSER: So it's an as-applied ruling, as opposed to per se.

THE COURT: Correct.

MR. LAWLER: Will we get a written opinion too, or

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--

THE COURT: No. That's my opinion.

MR. LAWLER: Then I can order a transcript from your office?

THE COURT: Certainly, absolutely.

MR. LAWLER: Okay.

THE COURT: Absolutely.

MR. LAWLER: Thank you, Your Honor.

MR. VISSER: I will just say for the record where Mr. Lawler says that there's two people on, like husband and wife where one has deceased, in fact, I think the one that you're talking about --

THE COURT: You're confident that there's clarification that there's only one entity that can claim, whether it be an individual or an estate?

MR. VISSER: Absolutely, Your Honor.

THE COURT: And in each of these 11 claimants' cases, there is clarification there?

MR. VISSER: Yes.

THE COURT: Okay.

MR. LAWLER: I just gave him -- for the record, Your Honor, I just gave him our list with all the issues.

THE COURT: Okay. All right. Thank you. We'll go off the record.

(At 3:00 p.m., proceedings concluded)

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TRANSCRIBER'S CERTIFICATE

I do hereby certify that the foregoing transcript was prepared by me from audio supplied by the Berrien County Trial Court, and that said transcript is true and correct to best of my ability to prepare.

I further certify that I am not related to or employed by any party to this cause or their respective counsel.



Janice Hanes

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT D

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

LINDA L. BAKER, an individual, and ESTATE OF NANCY RUTH KLUTE, DECEASED, by David Robert Mazurek, Personal Representative, and BAUERWOOD, LLC, a Michigan limited liability company, for themselves and all those similarly situated,

Plaintiffs,

CASE NO: 20-6360-CZ

vs

HON. JON H. HULSING

OTTAWA COUNTY, a Governmental Unit, and AMANDA PRICE, as Treasurer of Ottawa County,

Defendants.
_____/

REMOTE DEPOSITION of AMANDA PRICE

Taken by the Plaintiffs on Monday, October 9, 2023, at 2:00 P.M.

APPEARANCES:

For the Plaintiffs: VISSER AND ASSOCIATES, PLLC
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REPORTED BY: Claudia M. Weekly, CSR-2963

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Monday, October 9, 2023

2:00 P.M.

AMANDA PRICE,

having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. VISSER:

Q Good morning. Is it Ms. Price, Mrs. Price, Amanda? How would you like me to address you today?

A Amanda is fine.

Q Thank you, Amanda. Could you just make sure you state your full name for the record?

A Amanda Price.

Q And as you know just briefly, I represent a couple of claimants in this matter to surplus proceeds. My name is Donald Visser. I don't believe we've ever met before today, have we?

A I don't believe so.

Q For the record can you give me a little bit of idea about your background as far as education-wise?

A Graduated from Michigan State University. Have a certificate of completion from the Institute of Paralegal Studies in Philadelphia. I have a Master's in public administration from Western Michigan University.

Q And from the lanyard around your neck it looks like

Michigan State rises to the top.
A Well, they have a basketball team.
Q Western does, too, don't they?
A That's true. That's true.
Q Sometime in the near future we expect to see you at a Western game. Right?
A Probably not.
Q All right. You're the elected Treasurer of Ottawa County. Is that correct?
A Yes.
Q When were you elected?
A I was first appointed in December of 2018 and then elected that following cycle in 2020, took office then.
Q All right. And when you were appointed in 2018 who appointed you?
A The Clerk, the Prosecutor and the Judge, Probate Judge.
Q Do you recall which Judge that was at the time?
A Judge Fine.
Q And prior to being the clerk can you tell me a little bit of your job experience?
A Started out in banking. I was a trust officer for a bank and trust. And then I worked for a law firm in East Lansing doing probate work, real estate work. I went to work for Michigan State for a while in a policy institute. And then worked in the Michigan Senate for

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ten years and then was elected as a House member. And then following that I was appointed to this position.

Q Had you ever, prior to being appointed had you worked as a Clerk or an Assistant Clerk?

MR. VAN ESSEN: Treasurer, Don.

Q (BY MR. VISSER) I'm very sorry. Thank you. As Treasurer or Assistant Treasurer for any county?

A No.

Q The power of suggestion, I wrote clerk down here, and then just my old brain power of suggestion there.

I assume you're a member of the Association of County Treasurers.

A I am.

Q Okay. Do you have any involvement with that association other than being a member?

A I am the First Vice-President.

Q And how long have you been in that position?

A Two months.

Q All right. Prior to that have you -- prior to the last two months did you have any activity that you participated in as a member or an officer with the association?

A Well, yes. So, I was elected Treasurer of the association, served in that role for one year, and then I was elected Secretary of the association and served in

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that role. And I was elected Second Vice-President and served in that role, and now I'm First Vice-President.

Q In 2020 you're familiar with the fact that the legislature passed Public Act 256?

A Yes.

Q What role did you have in, as far as the association or member of the association or officer in discussing that act before it was adopted by the legislature?

A It was general discussion among the members about the crafting of the legislation and the committee meetings.

Q When you say discussions over crafting of the legislation what do you mean by that?

A What language would go into what the Treasurer's Association felt would be important to have in the legislation.

Q And that language that you reviewed, prior to the time it was enacted, is substantially the same language as the actual Public Act 256?

A To the best of my recollection, yes.

Q You said you also had committee meetings. What was that over? Again, language or other things?

A The committee meetings I was referring to are the committee meetings of the legislature, so when they would take testimony on that, so that was the point of discussion.

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Q So, that was in furtherance of getting PA 256 enacted?
A Yes.
Q Prior to your appointment as Treasurer were you knowledgeable about the provisions of the General Property Tax Act?
A Could you define knowledgeable?
Q Okay. That's a fair question because -- let's say -- I'm going to ask you to describe what knowledge of the General Property Tax Act you had when you became Treasurer.
A So, I had some knowledge of it because while I served in the legislature I chaired the local government committee, and legislation about the General Property Tax Act came before my committee. And so, if I had to scale it I would say my knowledge of it at that point in time was 5 percent versus now it's maybe I won't say it's 100 percent because I'm still always learning, but I'd say it's probably 90 percent.
Q What did you do when you became Treasurer about the foreclosure process specifically under the General Property Tax Act?
A That it is a process that the Treasurer oversees and it's very much dictated by State law. And to say anything further I can't say when I took over this position I knew any more than that.

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Q Okay. Did you become aware sometime that the Michigan Supreme Court issued a decision called Rafaeli versus Oakland County?
A Yes.
Q Okay. When was that that you learned about that; fairly shortly after it was issued in July of 2020 or did it take some time for it to make its way down to you?
A I believe most of the -- well, I'll just answer on my behalf. Very quickly after the decision came about.
Q In fact, the Association of Treasurers sent out a number of memos or e-mails regarding the fact that Rafaeli had been issued. Correct?
A Yes.
Q Okay. Did you have any role in writing any of those memos or e-mails?
A No.
Q So, you said you received them but you didn't write them.
A Correct.
Q Now, prior to Rafaeli -- strike that. Let me get a little more common knowledge here.

You know what the term surplus proceeds means?
A I do.
Q Okay. So, Rafaeli used the term surplus proceeds simply as we discussed it here, I may even get it wrong, but basically the sale price less all of the applicable

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charges meaning the applicable charges being the delinquent taxes, the penalties, the interest and sometimes maintenance charges, some other charges, and then necessity to get the property for sale. Is that generally how you understand it as well?

A Yes.

Q Okay. Now, using that as our benchmark then and recognizing that in general what we're talking about with Rafaeli, was there any process that you're aware of in Ottawa County that any of my clients could have utilized to get surplus proceeds before Rafaeli was issued?

A No.

Q In other words, before July 17 of 2020.

A We would have to follow the law, and I don't believe at the time there was a process by which your clients would have been able to access those funds.

Q Okay. Now, focusing on the time period from Rafaeli, that is July 17 of 2020 through the time PA 256 was passed and effective on July 22 of 2020, was there any process that your office had for return or turnover of surplus proceeds?

A No.

Q Now, focusing the time after PA 256, that is after July, December of '22, of 2020, for people that had claims before Rafaeli, in other words, before July 17 of 2020,

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has your office instituted any process by which they can obtain their surplus proceeds?

A Yes. We have followed the law on how to administer those claims.

Q So, for the claims that arose prior to Rafaeli, that is prior to July 17 of 2020 what is the process that you use for return of those surplus proceeds?

A So, could you say that again?

Q Yes. For the claims for surplus proceeds that arose prior to July 17 of 2020 what is the process by which someone can obtain their surplus proceeds?

A Prior to Rafaeli I don't believe there is a process by which to claim those excess proceeds.

Q Then I may have misunderstood or maybe you misunderstood my question because sometimes I don't always speak the clearest. Is there any way as we sit here today or other than this lawsuit we're involved in for my clients in this case, Linda Baker, the estate of Nancy Klute or Bauerwood, LLC, to obtain surplus proceeds?

A Follow the process by which is outlined in the legislation.

Q So, there is a process today that we could follow and would result in surplus proceeds being turned over to these three claimants?

A Well, I think, again, Rafaeli comes into this, so I

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believe a couple of your clients were 2015 and '16 claims, so we have to take that into account.

Q Okay. And which ones would those be?

A I believe it's Bauerwood and Baker.

Q Okay. And when you say taken into account what do you mean by that?

A The timeline for when they were filed or when the foreclosure was filed.

Q So, taking that into account or if it were not into account what procedure would have to be followed right now? For instance, for Miss Klute, for her estate what would she have to do, what would her estate have to do?

A To answer -- I'm sorry. Say that again.

Q For the estate of Nancy Klute what would Nancy, what would that estate have to do right now to get that surplus proceeds?

A Follow the law, file the claims.

Q File a claim? What claim would that be?

A Claim for excess proceeds under the law. I don't know if because she didn't file a claim in an appropriate amount of time that she would be able to file that.

Q Okay. What would have been the appropriate amount of time for her to file that claim?

A I believe it's outlined in the legislation.

Q And from your interpretation of that what does your

office claim is the, for your office is the timeframe for filing that claim?

A I believe it's three months after foreclosure.

Q Three months. Okay. So, you're talking about a notice of intent to claim the remaining proceeds?

A Yes.

Q That's a form that was generated by the State Treasurer's office?

A Yes.

Q And if the claim wasn't filed within three months after the foreclosure then there's no other process within your office for her to claim her proceeds?

A That's my understanding, yes.

Q Okay. That's your understanding what, from your involvement with the association or your own interpretation or where does that understanding come from?

A Reading the legislation and the General Property Tax Act.

Q How long have you been an agent of the State of Michigan?

A I'm not sure I understand the question.

Q Maybe I ought to start, are you an agent of the State of Michigan?

MR. VAN ESSEN: Don, you're referring to in the collection of property taxes?

Q (BY MR. VISSER) In any regard.

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A I don't know what the term agent of the State of Michigan means.
Q Have you ever been designated in any written documentation as an agent of the State of Michigan?
A Not to my knowledge.
Q All right. As I understand you're a Treasurer of Ottawa County. Correct?
A Yes.
Q And do you handle the funds for Ottawa County?
A Yes.
Q And I take it that you write checks, your office writes checks.
A Yes.
Q Okay. And writes checks out of accounts under your control?
A Yes.
Q Okay. Are those then under your name or are they under Ottawa County's name?
A They're under the County's name where my name as a signatory.
Q You're the signatory. Correct?
A Uh-huh.
Q Yes? I'm sorry. And I don't mean --
A Yes. Thank you for the reminder.
Q I'm very, very sorry, and that's not meant to insult you

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at all. We all do that. It's simply so the record is clear.

And I assume that there's an employer identification number that the County uses.

A Yes.

Q Okay. And all the accounts that you have control over, are they under your Social Security number or the County's employer identification number?

A The County's identification number.

Q Do you have control over any accounts that have the State of Michigan or that uses the State of Michigan employer identification number?

A Not to my knowledge.

Q Okay. In regards to collection of taxes have you ever remitted any tax funds from foreclosure proceeds to the State of Michigan?

A Not to my knowledge.

Q Where do you deposit the proceeds from the foreclosure of real property for taxes in Ottawa County?

A So, are you asking for a banking institution or a fund that we have in the County?

Q That's a fair question. Let's start with a more general, first of all, the banking institution.

A For most of our accounts are with Huntington National Bank.

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Q All right. And what's the -- is there one or more accounts that the foreclosure proceeds go into?
A They're in a pooled fund, so they're likely with Huntington.
Q And what is the name of the account or accounts that you put that money into? What's it called internally?
A The delinquent tax revolving fund.
Q Are there more than one delinquent tax revolving funds in Ottawa County?
A There are subaccounts for each year of foreclosure for several years.
Q So, do you have several subaccounts at Huntington or subaccounts meaning that's what you use for internal tracking?
A For purposes of internal tracking.
Q Now, out of that revolving account do you pay certain things?
A Yes.
Q You pay, for instance, you use that account whenever a new round of taxes, that delinquent taxes are turned over to you by the local agent government you use that account. Correct?
A That's correct.
Q Now, do you ever make disbursements to the County's general fund out of that account?

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A No, I have not.
Q Okay. And I take it the reason for that is if you made disbursements out of the revolving account the alternative requirement would be that the County would have to bond that account. Correct?
A I'm not sure. I can't answer that.
Q Okay. If you disburse the amounts in the revolving fund would the County then have to bond?
A I do not know that.
Q Okay. You're not --
A I'm sorry. Yeah. I'm sorry. Can I ask you to clarify that? Because I think after you asked that I think I've understood what you're asking, but I want you to ask that again.
Q If you didn't have any money in the revolving fund then you'd have to bond to have money in the revolving fund. Correct?
A Yes, that's correct.
Q And there's expenses incurred with obtaining that bonding?
A Yes.
Q And the County is able to avoid those expenses by having enough in the revolving fund to meet its obligations to the local use of government every time the delinquent taxes come around. Correct?

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A Correct.
Q Do you ever give accounts, accountings to the State government or the State Treasurer at all for the amounts that you have in your revolving fund?
A I do not know that at this point.
Q You do get accounts, though, at least on an annual basis to the County Board of Commissioners. Correct?
A Yes.
Q And I take it from admissions that I've seen here from the County that you invest the funds in the revolving fund that earn interest or other dividends or whatever it is, some type of income from that investment?
A Yes.
(Off-the-record discussion from 2:26 PM to 2:27 PM.)
Q (BY MR. VISSER) Simply for the record I had received from you through your attorney four different sets of exhibits and this was to be responsive to a request for the foreclosure files or the return files or whatever you use for each foreclosure that you complete in Ottawa County. Just so I know, what nomenclature do you use or how do you describe your files for properties that are turned over to you by local government for delinquent taxes?
MR. VAN ESSEN: I think he's asking what you call -- I'm just showing for clarification, Don,

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Exhibit 3.

MR. VISSER: That's fine.

MR. VAN ESSEN: I think your question is what do you call what's accumulated there in Exhibit 3.

Q (BY MR. VISSER) Right. Some people call them reversion files, some call them foreclosure files, some call them return files. All of those have some relationship to language in the General Property Tax Act, but I long learned that I can't use the same term for every county.

A Personally I call them foreclosure files.

Q All right. So, when we look at foreclosure files, and I think your attorney has given you Exhibit 3 at this point which consists of 19 pages, it has at the lower hand Bauerwood 035, foreclosure file 000001. Is that then your entire foreclosure file?

A Yes.

Q All right. And the same then would be for what's Exhibit 4 would be for Bauerwood the parcel ending 036 consisting of 17 pages, that's your entire file.

A Yes.

Q What do you get to initiate the foreclosure, what the statute calls the local unit of government returning to you as the Treasurer certain delinquent taxes? What do you get that initiates you starting a foreclosure file?

A I don't have direct knowledge of exactly what we receive

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because that information goes to Kathy Dennings in my office.

Q And who is Kathy Dennings?

A Our foreclosure specialist.

Q So, you know that something comes to Kathy Dennings and you're not too sure what it is to start the process.

A Correct.

Q What is your first involvement then with the process?

A Kathy and I will review the files that have come from the local units of government, and at that point it's more general numbers of cases that have come from the local units of government rather than specific files because the number's large.

Q What is it that when you have that initial meeting with Kathy Dennings that you look at?

A The number of properties that have turned over to the County.

Q Okay. Do you look at any of the individual documentation as to whether it's the correct amount or whether taxes are actually delinquent?

A No, I do not.

Q All right. So, then what else do you have to do in the foreclosure process after that initial meeting with Kathy Dennings?

A We have ongoing meetings just updating myself as to where

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the local units of government have transmitted files or taxpayers have been in touch with our office. It's an ongoing communication.

Q So, when you talk about what you've received from local government do you look at any of those documents at all?

A No, I do not.

Q Okay. What about the communications that have been received from taxpayers, what do you look at there?

A It's typically if someone is to that point of near foreclosure and they're wanting to have assistance from our office in terms of a payment plan then Kathy and I will discuss that arrangement and set up times to meet with the individuals and discuss how we can help the taxpayer.

Q Typically do you have meetings with the taxpayers or is that left to Kathy Dennings?

A No. If someone wants to set up a payment plan Kathy and I both meet with them.

Q We also received from you or through your attorney, anyway, 33 pages of documents related to the Klute foreclosure, parcel 330-031. Those documents, did those constitute your entire foreclosure?

A Yes.

Q Also the same question about the ones that were turned over in regards to Baker, which is Exhibit Number 2

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constituting 39 pages, and that's parcel ending 206-012, is that the full foreclosure file that you had?

A Yes.

Q Now, I'm going to ask you a couple questions about the Klute foreclosure. Do you recall or have any personal knowledge at all about that foreclosure?

A Are you -- can I ask if you are talking about prior to foreclosure or after foreclosure?

Q In either instance if you have any personal knowledge.

A I do have knowledge post foreclosure.

Q Okay. And what knowledge do you have post foreclosure?

A There was a contact made by a member of the family to our County Administrator about the foreclosure because I believe the taxpayer, the family was surprised that she was being foreclosed upon and they had reached out to our County Administrator.

Q This was after the foreclosure?

A Yes.

Q And what was the substance of those communications?

A They were concerned that the foreclosure happened because I believe they communicated that they would have been able to pay the taxes on behalf of this individual if they had known about it.

Q Okay. And what was your response?

A That we followed the law, we posted the property and we

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did what we needed to do under the law.
Q No offer was made to allow them to pay the taxes and return the property to their estate?
A This was prior to I believe her passing.
Q Okay. So, there was no offer made at that point to allow her to, allow them to make the payment and return the property to her.
A No.
Q I'm looking for -- I'm sorry for the delay here. I'm trying to find my exhibits to put them on the screen. I apologize. They are no longer in my directory where I thought they were.

I think I have found them. I need to try to find the page now and share it realizing that oftentimes this ends up being an exercise in squinting when things come across the screen, but I'll try.

So, I'm going to share with you at this point one of the pages, which is Page 14. Are you able to read that at all?

MR. VAN ESSEN: Just for the record this is Exhibit 1, Page 14?

MR. VISSER: That's correct.

MR. VAN ESSEN: Kelly was kind enough to send me this exhibit and I have it in my phone and I'm going to try to blow it up so she can see it a little easier.

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MR. VISSER: I suspect what's on your end it's really small.

MR. VAN ESSEN: It's Bates stamp 14?

MR. VISSER: It is Bates stamp 14, correct.

MR. VAN ESSEN: See, I have that as City of Holland if I can blow it up here. Can you see it? I think we can read it now. We're able to blow it up at least one level.

Q (BY MR. VISSER) Thank you. And my questions are probably elementary, but first of all, toward the bottom of the page on the right side there's some handwritten notes it looks like in blue ink. It says file sent to title check. That's repeated on three times on three different lines. Whose handwriting is that?

A I would have to assume that it is Kathy Dennings.

Q It's not your signature?

A No.

Q I mean not your handwriting. I'm sorry.

A No.

Q What does it mean -- why, to your knowledge or belief, would that be handwritten on those three lines and, say, not the other four or five lines there?

A I'll have to look and see. So, bear with me, please, because I'm trying to look at dates. I believe -- so, tax notices were sent to Miss Klute on 4, April of '17,

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July of '17, October of '17. And then in January of '18 the file was sent to title check probably because I'm assuming a forfeiture notice. And the same thing with forfeiture notices to Miss Klute or the occupant.

Q Was there a policy as to what information within the folder would be sent to title check and what information would not be sent to title check?

A I'm not sure of the policy, but I believe Kathy would have done that under normal practices she's had over the years she's been employed with the department.

Q Did you have, as her supervisor did you have any directives as to what she should and should not send?

A No.

Q Did you exercise any supervision over what she did or did not do?

A She does report to another person in our department and that person reports to me, and so, not direct supervision, but the channels of the way our office is set up.

Q All right. And who is this other person that she reports to that reports to you?

A Molly Bonter.

Q And how do you spell her last name?

A B-O-N-T-E-R.

Q And what is her job description?

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A She's Deputy Treasurer.
Q And has she been Deputy Treasurer since the time you've been appointed?
A Yes.
Q Now I'm going to -- in that same file hopefully your counsel can find it as well, Page 24 of that same Exhibit 1. I'm almost there. But I can share with you again in tiny form. It's a check for $3,704 addressed to or made out to Nicewander, Berens and DeVries. Can you see that?
A Yes.
Q What was the purpose of that particular check?
A This is in Exhibit 3?
MR. VAN ESSEN: No. This is in Exhibit 1.
Q (BY MR. VISSER) Exhibit 1, Page 24.
A I believe it is the condo fees that were unpaid by Miss Klute. These were paid on her behalf.
Q Is there any known statutory authority that you're aware of to make those condo payments?
A I am not aware of the statutory authority, but Kathy likely is.
Q If I ask you any additional questions as to the why or wherefore you'd have to defer to Kathy?
A Yes.
Q Now, one of the requests that we asked you to admit was

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that neither you nor the County has attempted to return any of the proceeds remaining after payment of the taxes and related charges due on the 110 East 18th Street property since July 17 of 2020. And the answer is admitted that pursuant to the GPTA the Defendants awaiting the retroactivity issue in Rafaeli could be decided by the Michigan Supreme Court. Why are you waiting for the retroactivity to be decided by the Michigan Supreme Court?

A Could you tell me which property you're referring to again?

Q This is request to admit in this case.

MR. VAN ESSEN: The Klute property, I think.

Q (BY MR. VISSER) Exhibit 6. Okay?

A I believe you mentioned 18th Street.

Q Just a second. I may be --

MR. VAN ESSEN: Don, what request was that, Request Number what, 18?

MR. VISSER: Just a second here. It's Number 24, Page 6.

MR. VAN ESSEN: Okay. That's Baker's property.

THE WITNESS: Yeah. We don't know if we have the authority on this because of the retroactivity under, the retroactivity has not been settled per Rafaeli.

Q (BY MR. VISSER) Let me break this down into the first

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part. That you do agree that you haven't, you nor the County have attempted to make a return of any those proceeds. Correct?

A Correct.

Q And then the rationale is you're awaiting the retroactivity issue in Rafaeli to be decided by the Michigan Supreme Court.

A Correct.

Q You're aware that the Court of Appeals has decided in a public decision that Rafaeli is retroactive, are you not?

A I believe I am.

Q Okay. And you received that info from the communications from the Association of Treasurers. Correct?

A Yes.

Q Okay. That's the case of Schafer versus Kent County?

MR. VAN ESSEN: If you know.

THE WITNESS: I'm not sure of the lawsuit, but . . .

Q (BY MR. VISSER) So, as a published decision what is it that you believe that you're able to disregard that while you await for some other Court to make a ruling?

MR. VAN ESSEN: I'll object to the form of the question, Don. It asks for a legal conclusion.

MR. VISSER: I'm just asking for her opinion since she's the one that presented the fact that she's

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awaiting the retroactivity.

THE WITNESS: There are a number of lawsuits still pending, including Oakland County, on this matter, and I believe that it is not over until the Supreme Court weighs in.

Q (BY MR. VISSER) Okay. If you look up the page a little further to Request Number 22, it says that you admitted that you invested the funds, the delinquent funds into the delinquent tax revolving fund pursuant to Michigan law. What law were you referring to?

A Well, in the reading of it will I would say that's PA 20, which directs the Treasurer to invest funds that the Treasurer is responsible for.

Q Any other laws that you were referring there to?

A No.

Q All right. Now, in a number of instances the responses that we have received, particularly in this instance to the amended complaint here, indicate that you have, that you're acting on behalf of the State of Michigan. Can you describe how you act on behalf of the State of Michigan?

A Well, I believe the tax foreclosure law allows for the State to foreclose and that some counties were given the option to perform that responsibility versus the State.

Q When you say that understanding that you just recited, is

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that from being at your job as Treasurer or being in your job as a Representative or both?

A As Treasurer.

Q Okay. As Treasurer. And so, you understand that some Counties have acted as the foreclosing governmental unit instead of the State?

A Yes, I understand that.

Q Okay. And that's from your reading of the statute or some other documents?

A The statute along with the resolution that our County Board passed.

Q All right. So, getting back to the question then is can you describe how or if at all you receive the proceeds on behalf of the State of Michigan, the foreclosure proceeds?

MR. VAN ESSEN: Don, I'll just state an objection to the extent that question calls for a legal conclusion. You're asking for her understanding of the General Property Tax Act?

MR. VISSER: No. At this point -- I may get to that, Doug, but right now I'm just asking is her factually understanding of how she receives that on behalf of the State of Michigan.

THE WITNESS: I'm not sure I understand that question.

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Q (BY MR. VISSER) Well, previously I asked you whether the bank account that you put the money into was under the State's name or the County's name and the State's EIN or the County's EIN. I think you indicated in both cases it was the County. Correct?
A Correct.
Q Is there any instances at all that indicates that you're doing this factually on behalf of the State of Michigan?
A Other than the statutory requirement that foreclosure happens I believe we're doing it as a subset of the statute at the county level.
Q All right. So, your tie to that would be in reference to the statute.
A Correct.
Q There's no other documents that you're aware of that names you as an agent or acting on behalf of the State of Michigan.
A Correct.
Q Okay. Are you aware that the statute describes the conduct of operating as a foreclosing governmental unit by the County to be totally voluntary?
A I am aware of that, yes.
Q Okay. And you believe that the County has elected to operate as a foreclosing governmental unit, Ottawa County has?

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A Yes.
Q And the County can only do that, right, if the Treasurer is in concurrence with that action. Correct?
MR. VAN ESSEN: Objection to the legal nature of that question.
Q (BY MR. VISSER) To your knowledge is that correct?
MR. VAN ESSEN: Do you have any knowledge about whether the Treasurer can opt out if the County wants in?
THE WITNESS: I don't have any knowledge of that, no. I will say that the resolution that the Board passed I believe in 2004 acknowledged that the County Treasurer was in agreement with the action.
Q (BY MR. VISSER) All right. Have you ever expressed to the County that you no longer wish to be designated the foreclosing governmental unit?
A No, I have not.
Q In fact, you have willingly fulfilled that role ever since your appointment. Correct?
A Correct.
Q All right. As we look at Exhibit 8, is that the resolution that you reference reading?
A Yes.
Q All right. And the first three pages of that resolution indicate that the County wishes to act as the foreclosing governmental unit and reverse a previous election to have

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the State operate as the foreclosing governmental unit. Correct?

A That is correct. That's how I read that.

Q All right. And Exhibit A, which is the next two pages, are the 1999 resolution that Ottawa County Board of Commissioners designated or elected, I'm sorry, to have the State Treasurer operate as the foreclosing governmental unit. Correct?

A Yes.

Q All right. And the first page of that indicates that Mary Richardson, who appears to be the Ottawa County Treasurer at that time, concurred in that election. Correct?

A Correct.

Q Then if we go two additional pages later to Exhibit B, which is dated December 14 of 2004, there's a page titled Exhibit B where Mary Richardson, then the Ottawa County Treasurer, concurred in the rescission of the prior resolution and Ottawa County consents pursuant to the authority granted to the Treasurer to rescind it and have the County Treasurer operate as the foreclosing governmental unit. Correct?

A Yes.

Q All right. To your knowledge since 2004 -- well, to your knowledge at any time period that you've been the

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Treasurer have you taken any steps to not be the foreclosing governmental unit?

A No.

Q Do you know of any steps that the County has taken to designate the State Treasurer as the foreclosing governmental unit?

A No.

Q Is it your belief that you're doing this then on behalf of the State, foreclosing on behalf of the State or on behalf of the County?

MR. VAN ESSEN: Again, objection to the legal nature of that question.

Q (BY MR. VISSER) Do you have any idea which authority you're operating under?

MR. VAN ESSEN: Are you asking whether she's operating under the General Property Tax Act?

MR. VISSER: No. I'm asking her what her understanding is that she's operating under. I'm not asking for a binding legal conclusion.

THE WITNESS: I believe I'm operating under the law, the General Property Tax Act, which allows Counties to serve as the foreclosing governmental unit.

Q (BY MR. VISSER) All right. If you would turn with me to Exhibit Number 9.

MR. VAN ESSEN: She has it in front of her.

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She doesn't need you to share. You may, but we do have this printed out.

Q (BY MR. VISSER) I'm sure it's a lot easier to read in full size rather than on the screen. Do you recognize that as a letter dated January 4 of 2021?

A Yes.

Q Do you recognize receiving that in January sometime of 2021?

A Yes.

Q Did you do anything with that letter?

A I forwarded it to our corporate counsel.

Q And who was that?

A Mr. Van Essen.

Q Did you do anything else with it as far as filing a response or anything else?

A Under advice of counsel, no.

Q Then if we look at Exhibit Number 10, which is a letter dated October 16 of 2020 --

A Yes.

Q -- did you receive that letter sometime in October of 2020?

A Yes.

Q Did you do anything as far as responding to that letter?

A Forwarded this letter to corporate counsel.

Q Okay. Other than forwarding to corporate counsel did you

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prepare a response to either the Baker estate or Mrs. Baker or to my office?
A No.
Q Then Exhibit Number 11. It's a letter dated October 21 of 2020. Correct?
A Correct.
Q All right. And did you receive that sometime in the last half of October of 2020?
A Yes.
Q Did you respond to this or forward it simply to counsel again?
A Forwarded it to counsel.
Q All right. But you realize this letter was for a 2019 tax sale. Correct?
A Yes.
Q And you had surplus over $60,000. Correct?
A Yes.
Q And you realize at that time that Rafaeli had been issued. Correct?
A Yes.
Q All right. And Public Act 256 had not been yet voted on even. Correct?
A Correct.
Q What was your basis for not turning the money, the surplus proceeds over that Rafaeli had said belonged to

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the Klute estate?

MR. VAN ESSEN: Objection to the mischaracterization of the Rafaeli decision.

Q (BY MR. VISSER) What was your rationale or your basis for not turning over the surplus proceeds in October of 2020 to the Klute estate?

A Our counsel suggested and told us that we should not do that because Rafaeli had not been implemented with legislation.

Q Why did you need legislation?

A I believe the Supreme Court decision stated that the legislation should come forth and describe a process by which to claim excess proceeds.

Q Any other reason?

A No.

Q Now, I understand that Ottawa County has described itself as a constitutional county.

MR. VAN ESSEN: Objection. All counties are creatures of the constitution.

Q (BY MR. VISSER) Has Ottawa County passed a resolution declaring itself to be a constitutional county?

A I believe so, yes.

Q All right. And how does that impact your office?

A It has had no impact on our office.

Q No impact.

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A No.
Q Okay. One of the things that it says is that it embraces the constitutional principles involved in this case and that is the due process of law and takings claims. It also says no funds are to be advanced for defense of the claims. And my question for you is do you know who's paying for Mr. Van Essen?
A Yes, I do.
Q And who is paying Mr. Van Essen?
A The Treasurer's office.
Q Have you hired Mr. Van Essen to defend you or did someone else hire Mr. Van Essen?
A Mr. Van Essen acts as corporate counsel, and so, the County has hired him.
Q Has the State at all hired Mr. Van Essen in this matter to your knowledge?
A Not to my knowledge.
Q To your knowledge is the State paying any of Mr. Van Essen's expenses or costs?
A Not to my knowledge.
Q To your knowledge has the County Board of Commissioners acted on any financial requests from Mr. Van Essen or his office?
A In what way?
Q Well, maybe that's a poorly stated question, so let me

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start over again. How do Mr. Van Essen's bills get paid?
A They are paid through the County Insurance Authority.
Q Through the Insurance Authority?
A Uh-huh.
Q Yes. Okay. So, does that mean, is that a fund of The county's or is that an outside source?
A I'm not certain how to answer that. Mr. Van Essen is more equipped to answer that, if he can.
Q Unfortunately, I can't take his deposition today. I may get in line to do it sometime later.

So, when you say you've paid Mr. Van Essen I assume you've written a County check.
A An Insurance Authority check.
Q Is that another account that you have control over?
A I do not. There's a Board that controls the Insurance Authority.
Q Okay. Is that an Ottawa County Board?
A Yes.
Q Is Ottawa County self-insured?
A Yes.
Q All right. So, do you pay a certain amount of money every, or periodically into that account?
A You mean the Treasurer's office, do they pay something into it?
Q Yes.

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A Not to my knowledge.
Q All right. So, if I get the mechanics of this, that Board approves payment, but you actually issue the check then pursuant to their direction.
A The Insurance Authority, there's staff that is assigned to the Insurance Authority and they issue the check.
Q Do you have signature authority over that fund?
A I believe -- I'm not sure. I'd have to go back. I sign so many checks. I don't believe I'm the Treasurer of that Board. I believe I'm a different officer in that Board.
Q All right. And how is that Board then funded?
A It's a combination of -- it's actually a longstanding organization that has funding from a number of sources, and I'd have to do a little bit more research, so . . .
Q Is the account funded by -- excuse me. I'm sorry. I thought I turned that off.

Is the account funded at all from other County funds?

MR. VAN ESSEN: Can I ask you what the relevance is to the case here?

MR. VISSER: I think it has to do with the constitutional aspect and the resolution of the Board of Commissioners in this instance.

MR. VAN ESSEN: That resolution has no impact

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at all on the Ottawa County Insurance Authority, nor, frankly, does it have any impact on Ottawa County.

MR. VISSER: That's what I'm trying to figure out. I have to admit that this is all new to me, so that's why I'm trying to figure it out.

MR. VAN ESSEN: Yeah. That resolution has no legal effect.

MR. VISSER: I don't know if we want to jointly announce that to the Board of Commissioners or not.

MR. VAN ESSEN: You may.

MR. VISSER: I am not too sure where it goes, either, Mr. Van Essen. But all I know is that it was passed and that's why I'm inquiring.

MR. VAN ESSEN: It's political, not legal.

Q (BY MR. VISSER) Do you know -- I'm sorry. And I lost track and you probably answered my question. Do you know whether the County funds this insurance fund?

A Because it's not a public body I'm a little hesitant to answer your questions because it is -- I'm not sure what I need to have a wall between my role as Treasurer and my role on the Insurance Authority.

Q Okay. As far as your role as Treasurer of the County are there funds that are disbursed from the County's treasury from its general account or other account under your control to this insurance board?

A At times there could be, but I'm not sure how often that happens.
Q All right. When you say it was self, the County is self-funded describe that self-funded insurance to me.
A Rather than having an outside insurance firm we handle our own claims for anything from lost or damaged computers to Sheriff's cars that are damaged in accidents.
Q But I guess how is it funded?
A Again, there's a mix of funding that's occurred over several decades since the Insurance Authority has been in existence, so -- yeah.
Q And who are the -- when you say a mix of funding who are the people that fund it or the entities that fund it?

MR. VAN ESSEN: If you know.

THE WITNESS: I don't know. Yeah, I don't know. Yeah, I don't know at this point.

Q (BY MR. VISSER) That's fair. Getting back to this dichotomy between acting on behalf of the County or acting on behalf of the State did you send any of the bills, for instance, the one for the association expenses in the Klute matter, did you send any of that to the State for approval?
A No.
Q Do you or anyone on your staff, Kathy Dennings or Molly

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Bonter, do they get any direction at all from the State of Michigan?

A Not to my knowledge.

Q Do they provide any accountings or seek permission from the State of Michigan for anything that they do?

A With regard to accountings not to my knowledge, no.

Q So, internally Molly reports to you and Kathy reports to Molly and that's the reporting structure and who they're accountable for and no one at the State of Michigan.

A That's correct.

Q And none of their paychecks come from the State of Michigan.

A That's correct.

Q All right. I believe that's all the questions I have and I appreciate your time. Mr. Van Essen may have some questions and he may not. I'll leave that up to him.

MR. VAN ESSEN: No. I have no questions.

(Deposition concluded at 3:20 PM.)

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CERTIFICATE OF NOTARY PUBLIC

DEPONENT: AMANDA PRICE
RECORDED: October 9, 2023

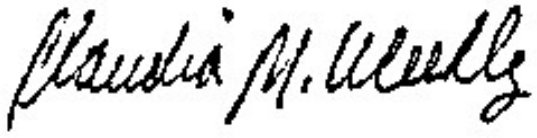
(STATE OF MICHIGAN)
(SS)
(COUNTY OF GENESEE)

Being a notary public duly commissioned and qualified in and for the State of Michigan at Large, I do hereby certify that pursuant to notice there came before me the deponent herein, who was by me first duly sworn to testify to the truth and nothing but the truth touching and concerning the matters in controversy in this cause.

Being thereupon carefully examined under oath, said examination was recorded stenographically, and was later reduced to transcription under my supervision; said transcription being a true record of the testimony given by the witness to the best of my ability.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto subscribed my signature this 12th day of October, 2023.



CLAUDIA M. WEEKLY, CSR-2963

GENESEE COUNTY, MICHIGAN
MY COMMISSION EXPIRES:
March 6, 2025

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT E

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SCHOOLCRAFT

SCHOOLCRAFT COUNTY TREASURER,

Plaintiff,

V

CERTAIN PARCELS OF LAND,

Defendant.

File No. 20-5456-CZ

Hon. Brian D. Rahilly

LUCAS V. MIDDLETON (P79493)
Attorney for Plaintiff
622 W Kalamazoo Ave.
Kalamazoo, MI 49007
(269)585-1271

Donald R. Visser (P27961)
VISSER AND ASSOCIATES, PLLC
Attorney for Claimant Blake Barclay
2480-44th Street, S.E., Suite 150
Kentwood, MI 49512
(616) 531-9860

Opinion and Order

At a session of said Court on July 1, 2022,
Schoolcraft County, State of Michigan,
PRESENT: HON. BRIAN D. RAHILLY
Circuit Judge

Background

Claimant Barclay filed a motion for seeking disbursement of tax sale proceeds pursuant to MCL 211.78t. The Treasurer responded asserting a defense that Claimant did not timely file a Notice of Intention to Claim Proceeds, as required by MCL 211.78t(2). Claimant filed a supplemental brief arguing that provision is unconstitutional. Claimant further argues the 5% commission under MCL 211.78t(9) is an unconstitutional taking.

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Discussion

The statute, at issue in this case, was enacted after and in response to the Michigan Supreme Court's holding in *Rafaeli, LLC v Oakland County*, 505 Mich 429 (2020). *Rafaeli* held that former property owners, whose properties were foreclosed and sold, have a vested property right in the "surplus proceeds" resulting from the tax-foreclosure sale of their properties. Surplus proceeds are any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less. *Id* at 483-84. Retention of the surplus proceeds by the government is an unconstitutional taking in violation of the Takings Clause of the Michigan Constitution. *Id* at 485-86.

MCL 211.78t codifies the procedure a claimant must follow to claim an interest in "remaining proceeds." Remaining proceeds are defined in the statute similar to surplus proceeds, but additionally includes a 5% commission be paid to the foreclosing governmental unit.

In enacting MCL 211.78t the legislature attempted to codify the holding in *Rafaeli* and provide a sole procedure and remedy for former property owners. It appears to this Court that the legislature failed in doing so. Instead, it has created a mechanism for former property owners to recapture "remaining proceeds" but is silent as to "surplus proceeds." *Rafaeli* defines "surplus proceeds" differently than the legislature defines "remaining proceeds."

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Rafaeli protects former property owners' rights in surplus proceeds relying on the Takings Clause in the Michigan Constitution. Former property owners are entitled to just compensation in the way of surplus proceeds. The definition of surplus proceeds does not include a 5% commission being paid to the foreclosing governmental unit. "Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual." *Rafaeli* fn 133, citing *In re State Hwy Comm'r*, 249 Mich 530, 535 (1930). The statute does not codify the rights discussed in *Rafaeli*.

The government argues that *Rafaeli* invited the legislature to enact MCL 211.78t. *See Rafaeli* fn 108 citing *Nelson*, 352 US 110 (1956). In that case, the United States Supreme Court upheld a statutory scheme like MCL 211.78t. Of course, that case is analyzed under the Federal Constitution and not the Michigan Constitution. Michigan's Takings Clause affords property owners greater protection than its federal counterpart. *Rafaeli* at 454. *Rafaeli* defines property rights under the Michigan Constitution, not the United States Constitution.

Conclusion

The Court cannot conclude that the statute is unconstitutional as the Claimant argues. Because of that, it must deny Claimant's request for "remaining proceeds" for failure to follow the required procedure in MCL 211.78t. However, the Court concludes that Claimant would have a separate cause of action to claim the "surplus proceeds" as defined in *Rafaeli*. Clearly the legislature attempted to provide a sole

remedy to former property owners for this issue. It failed and has created a separate statutory right to recoup "remaining proceeds." A former property owner can go through the procedure as provided in MCL 211.78t and agree to pay the 5% commission; or it can choose to file suit if the government fails to refund the "surplus proceeds" as defined by *Rafaeli*.

It is ordered.

Date: 7/1/22

Hon. Brian D. Rahilly
11th Circuit Court Judge

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT F

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION
811 Port Street, St. Joseph, MI 49085 | Telephone 269.983.7111

IN THE MATTER OF THE PETITION OF THE BERRIEN COUNTY TREASURER FOR THE FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID 2018 AND PRIOR YEARS' TAXES, INTEREST, PENALTIES AND FEES.

Petitioner.

CASE NO. 2020-0105-CH
HON. STERLING R. SCHROCK

CHARLES A. LAWLER P65164
ZACHARY C. LARSEN P72189
CLARK HILL PLC
215 South Washington Square, Suite 200
Lansing, MI 48933
Attorneys for Petitioner Berrien County Treasurer

DONALD R. VISSER P27961
DONOVAN J. VISSER P70847
BRIA ADDERLEY-WILLIAMS P84876
VISER AND ASSOCIATES, PLLC
2480 44th Street, S.E., Suite 150
Kentwood, MI 49512
Attorneys for Claimants, Ronald Arent, II, The Eileen H. Globensky Children's Trust, Mary Anne Heinze Romano Children's Trust, and Mary Ellen Heinza Trust by Hanorah Globensky-Blum as Trustee; The Estate of Jackie Eldon Snow by James D. Snow as Personal Representative, The Estate of Diane M. Woodford by Jason R. Woodford as Personal Representative, The Estate of Jane Whetstone by Joel Whetston as Personal Representative, Elizabeth Kell, The Sandra K. Nimtz Living Trust by Randy Bettich as Trustee, The Benjamin E. Marshall Trust by Marie Marshall as Trustee, and The Estate of William Kanalos by Dean Kanalos as Personal Representative

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Order Following Hearing on Motion to Disburse Remaining Proceeds from Tax Foreclosure Sale Re: 11 Named Claimants

This matter was before the Court for hearing on 11 named Claimants' Motion to Disburse Remaining Proceeds from Tax Foreclosure Sale by the Petitioner Berrien County Treasurer done pursuant to the General Property Tax Act and, more particularly, based on MCL 211.78t. The Court, having the benefit of briefing by the Parties and having heard oral argument on April 18, 2023, now Orders as follows:

For the reasons stated on the record, Petitioner, Berrien County Treasurer shall disburse the remaining proceeds from the tax foreclosure sale on each parcel belonging to the 11 named Claimants, to each of the individual Claimants that are a party to this Motion.

It is further ordered that Petitioner Berrien County Treasurer shall submit an affidavit as to each individual Claimant setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of the individual Claimants parcels, and for the reasons stated on the record, this shall not be in the form of a 5% commission that is otherwise afforded a Foreclosing Governmental Unit. The Claimants, through their Attorney, shall then submit proposed orders for each individual Claimant for the dispersal of the related surplus proceeds for each parcel.

Objections to the amount of dispersal in any proposed order will be heard by the Court on the filing of a written objection.

It is so ordered.

Dated: 4/21/2023

Hon. Sterling R. Schrock
Berrien County Trial Court Judge, Civil Division

Certificate of Service:
I certify that on this date, I served a copy of the foregoing document on the parties and/or their attorneys by:
e-mail / first class mail
4/21/23 Amber Wady

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EXHIBIT G

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN

BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION

811 Port Street, St. Joseph, MI 49085 | Telephone 269.983.7111

IN THE MATTER OF THE PETITION OF THE BERRIEN COUNTY, TREASURER FOR THE FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID 2018 AND PRIOR YEARS' TAXES, INTEREST, PENALTIES AND FEES.

Petitioner.

CASE NO. 2020-0105-CH
HON. STERLING R. SCHROCK

CHARLES A. LAWLER P65164
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CLARK HILL PLC
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Lansing, MI 48933
Attorneys for Petitioner Berrien County Treasurer

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BRIA ADDERLEY-WILLIAMS P84876
VISER AND ASSOCIATES, PLLC
2480 44th Street, S.E., Suite 150
Kentwood, MI 49512
Attorneys for Claimants, Ronald Arent, II, The Eileen H. Globensky Children's Trust, Mary Anne Heinze Romano Children's Trust, and Mary Ellen Heinza Trust by Hanorah Globensky-Blum as Trustee; The Estate of Jackie Eldon Snow by James D. Snow as Personal Representative, The Estate of Diane M. Woodford by Jason R. Woodford as Personal Representative, The Estate of Jane Whetstone by Joel Whetston as Personal Representative, Elizabeth Kell, The Sandra K. Nimtz Living Trust by Randy Bettich as Trustee, The Benjamin E. Marshall Trust by Marie Marshall as Trustee, and The Estate of William Kanalos by Dean Kanalos as Personal Representative

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Opinion and Order Denying Petitioner's Motion for Reconsideration

This matter is before the Court on Petitioner's Motion for Reconsideration of the Court's Order entered April 21, 2023, following a motion hearing regarding Claimants' Combined Amended Motions to Disburse Remaining Proceeds from Tax Foreclosure Sale Together with Enforcement of Agreement filed on December 19, 2022 and Petitioner's Brief in Support of its Response in Opposition to Claimants' Amended Motions to Disburse Remaining Proceeds from Tax Foreclosure Sale Together with Enforcement of Agreement filed on February 12, 2023. As the claims had not accrued at the time notice was required by the statute, this Court held that MCL 211.78t as applied to these Claimants amounts to an unconstitutional taking, ordered that the Berrien County Treasurer submit an affidavit as to each individual claimant setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of the parcels, and ordered that the Claimants, through their attorneys, shall submit proposed orders for each individual Claimant for the dispersal of the related surplus proceeds for each parcel.

Analysis

A motion for reconsideration is controlled by MCR 2.119(F) which provides the following:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A palpable error is defined as an error that is "'[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.'" *Stamp v. Mill Street Inn*, 152 Mich.App. 290, 294, (1986), quoting Black's Law Dictionary (5th ed.), p. 1000." A mere difference of opinion between two judges regarding equities of the matter does not constitute a palpable error. *Luckow v Luckow*, 291 Mich App 417, 427 (2011). The palpable error provision found in MCR 2.119(F)(3) is not mandatory. *People v Walters*, 266 Mich App 341, 350 (2005). It only provides guidance to a court in its determination as to whether it is appropriate to grant a motion for reconsideration. *Id.*

In Petitioner's Motion for Reconsideration, Petitioner asserts that reconsideration is appropriate because the Court erred in ruling that the MCL 211.78t is unconstitutional as applied to the Claimants of this case. Petitioner sets forth 4 primary arguments as restated here: (1) the deadline set forth in MCL 211.78t and other analogous deadlines have been consistently upheld by other courts; (2) MCL 211.78t provided a process by which claimants could avail themselves pursuant to *Rafaeli;* (3) the 5 percent commission fee was contemplated and approved by the court in *Rafaeli;* and (4) the Death Savings Doctrine is inapplicable.

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The Deadline Set Forth in MCL 211.78t and Other Analogous Deadlines Have Been Consistently Upheld by Other Courts

Petitioner first argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to the Claimants in this case because the deadline for a Notice of Claim and other analogous deadlines have been consistently upheld by other courts. [1] This issue was expressly ruled on by the Court. On April 21, 2023, this Court held that the July 1 deadline found in MCL 211.78t amounts to an unconstitutional taking when applied to the Claimants in this case based upon the reasoning set forth in *Rafaeli.* As noted in the Court's opinion, the Supreme Court of Michigan held in *Rafaeli* that a property owner has a common-law, vested property right to the surplus proceeds from a tax foreclosure sale and that right survives the foreclosure process; this is a property right that does not exist and for which a claim does not accrue, until the foreclosure sale produced a surplus. *Rafaeli, LLC v Oakland Cnty.*, 505 Mich 429, 476, 477 (2020). Further, the fact that other courts may not agree with this Court's ruling is irrelevant as a mere difference of opinion between judges does not amount to a palpable error. This argument is merely addressing an issue already expressly ruled on by this Court and presents no error by which the parties were misled.

MCL 211.78t Provided a Process by which Claimants Could Avail Themselves Pursuant to *Rafaeli*

Next, Petitioner argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to the Claimants because the statute provides a process by which claimants can avail themselves to recover surplus proceeds. Again, this issue was already ruled on by the Court. In its holding, this Court stated that a former property owner has a common law right to surplus proceeds that is not compensable until the property is sold for an amount in excess of the debt. [2] Additionally, Petitioner has not demonstrated how this ruling amounts to a palpable error. Petitioner argues that MCL 211.78t does not extinguish a claimant's vested right in surplus proceeds because it provides a method of recovery. However, there was no process by which the Claimants in the instant case could avail themselves. In *Rafaeli,* the Supreme Court of Michigan explained that a former property owner has a vested right to surplus proceeds and they may make a claim for those proceeds once the sale has produced a surplus. *Rafaeli,* 505 Mich at 477. The Claimants in this case did not have vested rights until the completion of the foreclosure sales, which did not occur until after the statutory deadline. One does not have a vested right to proceeds that do not exist. Once the foreclosure sales were completed, their rights vested and they had a constitutional right to make a claim for any surplus proceeds but MCL 211.78t failed to provide them an avenue to do so. Therefore, Petitioner again raises an issue already expressly ruled on by the Court and fails to demonstrate any error the correction of which would compel a different result.

---

[1] Notably the Petitioner's brief cites MCL 600.6431 as discussed in cited cases; the statute at issue by its terms applies to "accrued" claims. It is entirely unclear whether other courts in the State of Michigan referred to in Petitioners Motion were ruling on the issues raised here; i.e. claims that had not yet accrued at the time of the statutory deadline for notice.

[2] As applied to these Claimants, the application of the statutory notice requirement would have been constitutional had the foreclosure sale occurred creating the surplus property right before the statutory deadline. It is, as ordered, in the application, not the process, that an unconstitutional taking occurred on these facts.

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The 5 Percent Commission Fee was Contemplated and Approved by the Court in Rafaeli

Petitioner also argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to these Claimants because the 5 percent commission fee is consistent with *Rafaeli.* Additionally, Petitioner asserts that other Michigan courts have found MCL 211.78t to be constitutional as applied so this Court should as well. First, this issue was already ruled on by the Court. As indicated in the Court's Order, Petitioner is required to submit an affidavit as to each individual Claimant setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of the parcels. That order is consistent with *Rafaeli.* The Supreme Court of Michigan stated in *Rafaeli* that "just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id.* at 483-484. *Rafaeli* provides for fees reasonably related to the foreclosure, not a blanket commission fee that may exceed that amount. Second, Petitioner fails to demonstrate how this ruling amounts to an obvious error. The fact that other judges may disagree with this ruling does not constitute a palpable error. *Luckow v Luckow,* at 427. As to their third argument, Petitioner fails to present an issue not already ruled on by the Court and does not demonstrate a palpable error.

The Death Savings Doctrine is Inapplicable

Finally, Petitioner argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to these Claimants because the claims cannot be saved by the Death Savings Doctrine. As stated in the Opinion, the Court did not find it necessary to address other theories raised by Claimants, such as the Death Savings Doctrine. It would have been superfluous of the Court to address the Death Savings Doctrine as that theory merely provided a way in which Claimants could avoid the statutory deadline set forth in MCL 211.78t, which the Court had already ruled was unconstitutional as applied to these Claimants. Furthermore, Petitioner failed to demonstrate that the Court's holding on this issue amounts to a palpable error. Petitioner argues that these Claimants had no standing, but does not explain how they lack an interest in the surplus proceeds that they have a vested right to and no method by which to claim them. Petitioner again raises an issue already ruled on by the Court and does not demonstrate a palpable error by which the court and the parties have been misled.

Conclusion

For the reasons stated above, and because it is clear that Petitioner's Motion for Reconsideration merely presents the same issues ruled on by the Court and demonstrates no palpable error, Petitioner's Motion must be denied.

Order

For the reasons stated in the above Opinion, Petitioner's Motion for Reconsideration is hereby denied.

It is so ordered.

This is not a final order and does not close the case.

Dated: 5/24/2023

Hon Sterling R. Schrock

Berrien County Trial Court, Civil Division

Certificate of Service:

I certify that on this date, I served a copy of the foregoing document on the parties and/or their attorneys by:

e-mail / ~~first class mail~~

5/24/23

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT H

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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Pending Appeals Index

Docket #	Case Name
368086	Alever, et al v Kalkaska Co.
363797	Andrews, et al v Ingham Co.
366025	Bauman, et al v Montcalm Co.
363764	Beeman, et al v Muskegon Co.
365754	Bloss/Meadows v Allegan Co.
363463	Brott et al v Kent
367856	Butterworth v Macomb Co.
362826	Carpenter v Hillsdale Co.
367801	Cornish, et al v Calhoun Co.
363723	Culp, et al v Manistee Co.
368740	Flagg, et al v Lake Co.
363766	Hewitt v Oceana Co.
363804	Joseph v Iron Co.
363803	McGee v Alger Co.
360920	Mead v Barry Co.
368382	Polich/Tousignant v Iron Co.
363873	Potter, et al v Osceola Co.
363808	Powell, et al v Kalamazoo Co.
362464	Preston, et al v Van Buren Co.
164975	Schafer v Kent Co. (MSC)
365005	Schwerin v Luce Co.
364114	Shaw v Cass Co.
366509	Whetstone, et al v Berrien Co.

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EXHIBIT I

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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VISSER AND ASSOCIATES, PLLC
LEGAL AND MEDIATION SERVICES
2480 - 44TH STREET, S.E. – SUITE 150
KENTWOOD, MICHIGAN 49512
Telephone: (616) 531-9860
Facsimile: (616) 531-9870

October 20, 2020

Sherry Godfrey
Delta County Treasurer
310 Ludington St.
Escanaba, MI 49829

Re: Christopher Klinter
15771 20th Lane, Garden Township, MI
2019 Tax Sale Amount Owed $56,250.00
Our File No. 20-561

Dear Ms. Godfrey:

Our office represents Christopher Klinter in regard to the foreclosure of property at 15771 20th Lane, Garden Township, MI in 2019 for delinquent property taxes pursuant to the General Property Tax Act. Our investigation has indicated that $56,250.00 in surplus funds from the sale of that property is owed to our client. That money belongs to the property owner as determined by the Michigan Supreme Court in *Rafaeli v County of Oakland*.

Demand is hereby made for immediate payment of the amount due. The purpose of this letter is to invite voluntary remittance of the surplusage without the necessity of our office filing suit. In exchange for voluntary payment, we can offer waiver of a claim for interest on this past due amount. Additionally, the County will be spared the attorney fees associated with litigation. The important part is to realize that my clients are legally entitled to these funds and it is improper to retain the funds. We are fully cognizant of the fact that until issuance of the *Rafaeli* decision, county treasurers, like yourself, may have retained the funds in good faith. However, since the issuance of the *Rafaeli* decision, there is no basis for retaining the funds. It will be our position that failure to promptly remit the funds constitutes conversion of funds belonging to my clients.

Thank you for your prompt attention to this matter. This offer will remain open for two weeks from the date of this letter. If our office is not in receipt of the payment by that date, we will feel at liberty to file suit at any time thereafter.

Please give this matter your immediate consideration.

Very truly yours,

Donald R. Visser

DRV/lkr
Client

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EXHIBIT J

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

KAKALIA MANAGEMENT, LLC,

Plaintiff-Appellant,

v

OTSEGO COUNTY TREASURER and COUNTY OF OTSEGO,

Defendants-Appellees.

UNPUBLISHED
April 13, 2023

No. 361621
Otsego Circuit Court
LC No. 18-17383-CH

Before: GADOLA, P.J., and PATEL and MALDONADO, JJ.

PER CURIAM.

The issue on appeal is whether plaintiff Kakalia Management, LLC has a compensable takings claim under Article 10, § 2 of the 1963 Michigan Constitution and/or a claim for unjust enrichment following a tax-foreclosure sale of its property. Kakalia claims that because defendant county of Otsego purchased the property under the then-existing version of MCL 211.78m(1)[1] and the property was not sold at a public auction, Kakalia is entitled to be compensated for the fair market value of its property, less the tax liability owed (i.e., its pre-foreclosure equity in the property). Our Supreme Court held in *Rafaeli, LLC v Oakland Co,* 505 Mich 429, 477; 952 NW2d 434 (2020) that "a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus[,]" in which case "the former owner may make a claim for the surplus proceeds." (emphasis added). It is undisputed that there were no surplus proceeds in this case because the county purchased the property from defendant Otsego County Treasurer for the minimum bid amount, which Kakalia acknowledges equaled its tax-liability. The *Rafaeli* Court "reject[ed] the premise that just compensation requires that [former property owners] be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all." *Id.* at 483. Accordingly, we affirm the trial court's order granting defendants' motion summary disposition under MCR 2.116(C)(10).

[1] MCL 2.11.78m was amended by 2020 PA 255, effective January 1, 2021, which was after the August 2018 tax-foreclosure sale.

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I. FACTUAL BACKGROUND

The underlying facts are not in dispute. In January 2012, Kakalia acquired a commercial property in Gaylord, Michigan known as the Royal Crest Motel or the Econolodge. Kakalia sold the property by land contract in June 2015, but the land contract vendee defaulted and forfeited its interest back to Kakalia in June 2017. On February 5, 2018, a judgment of foreclosure was entered on the property pursuant to the General Property Tax Act (GPTA), MCL 211.1 *et seq*., because Kakalia owed delinquent taxes, unpaid assessments, fees, penalties, and/or interest totaling $89,609.47. Kakalia failed to redeem its property, and the judgment of foreclosure became effective on April 2, 2018, which resulted in absolute title to the property vesting to the Otsego County Treasurer. See MCL 211.78g(2).

The tax-foreclosed property was scheduled to be auctioned on August 13, 2018. On July 18, 2018, under the then-existing version of MCL 211.78m(1), the county exercised its statutory election right to purchase the property from the Otsego County Treasurer for a minimum bid amount of $89,609.47.[2] At the time of the foreclosure purchase, the tax-delinquent property was worth approximately $455,000 based on the facts alleged here.

In August 2018, Kakalia filed a complaint to quiet title against the Otsego County Treasurer, alleging that it did not receive actual or proper notice of the tax-foreclosure proceedings. The trial court dismissed Kakalia's claim under MCR 2.116(C)(4), but Kakalia was afforded leave to amend its claim. Kakalia amended its claim to allege that the Takings Clause of the Michigan Constitution required the county to pay Kakalia just compensation equal to the fair market value of the property less the amount owed to the Otsego County Treasurer for delinquent taxes.

Defendants moved to dismiss Kakalia's claim under MCR 2.116(C)(10), arguing that the sale of the property to the county did not yield any "surplus proceeds" and thus Kakalia had no right to recovery pursuant to *Rafaeli*. In response, Kakalia asserted that *Rafaeli* was inapplicable because (1) there was no "foreclosure sale" in the instant matter and (2) the taking in *Rafaeli* was the "common law property right to retain any surplus proceeds from a foreclosure sale," while the taking in the instant was the "real property itself." Relying on Justice Viviano's concurring opinion in *Rafaeli*, Kakalia asserted that the *Rafaeli* majority did not address whether a former property owner has a vested property right to equity held in the property.

After initially denying the Otsego County Treasurer's motion for summary disposition, the trial court granted the motion after reconsideration:

> The Michigan Supreme Court has held that one who loses a "property interest" through tax foreclosure has a common law right to any "surplus proceeds" actually realized by the government through the sale of the property and that such right is protected [by] the Takings Clause of the Michigan Constitution. *Rafaeli, LLC v Oakland County*, 505 Mich 429, 470-3 (2020).

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[2] "Because of the property's proximity to the downtown County Building," the county maintained that it wished to retain the property "for potential County growth."

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> The plaintiff in this case challenges the sale of its former real estate after property tax foreclosure via direct sale by the Otsego County Treasurer to Otsego County for $89,609.47, which is the owing for unpaid real estate taxes. Although not binding precedent, the court is persuaded by the analysis of the United States District Court for the Eastern District of Michigan in *Hall v Oakland County Treasurer*, Case No. 20-12230 (ED Mich, May 21, 2021).[3] Consistent with the Hall courts [sic] reasoning, this court finds that defendant in this case is entitled to summary disposition pursuant to MCR 2.116 (C)(7) [sic].[4]

Thereafter, the court granted Kakalia leave to file a third amended complaint adding the county as a party defendant, adding a claim for unjust enrichment, and seeking a declaratory judgment to confirm its present legal interest in the surplus equity in the subject property. Contemporaneous with the order granting leave, the court granted summary disposition in favor of defendants under MCR 2.116(C)(10) as to all of Kakalia's claims asserted in the third amended complaint. This appeal followed.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodring v Phoenix Ins Co,* 325 Mich App 108, 113; 923 NW2d 607 (2018). We consider all evidence submitted by the parties in the light most favorable to the non-moving party. *El-Khalil*, 504 Mich at 160. Summary disposition under MCR 2.116(C)(10) is only appropriate when there is no genuine issue of material fact. *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

III. TAKINGS CLAIM

Kakalia argues that its surplus equity interest in the tax-foreclosed property was improperly taken and that just compensation requires that it be compensated for the fair market value of its property, less the tax liability owed. We disagree.

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[3] After this appeal was filed, the Sixth Circuit Court of Appeals reversed the district court's dismissal of the *Hall* plaintiffs' takings claim under the U.S. Constitution, vacated the district court's dismissal of their takings claims under the Michigan Constitution, and remanded with instructions for the district court to abstain from adjudicating the takings claims under the Michigan Constitution. *Hall v Meisner*, 511 F4th 185, 196-197 (CA 6, 2022).

[4] The trial court subsequently amended its order to reflect that its holding was based on MCR 2.116(C)(10).

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Under the GPTA, any property taxes that remain unpaid from the preceding twelve months are "returned as delinquent for collection" on March 1 of each year. MCL 211.78a(2). If the delinquent property taxes remain unpaid by March 1 of the following year, the property is "forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees." MCL 211.78g(1).[5] Forfeited property may be redeemed by paying the total amount of unpaid delinquent taxes, interest, penalties, and fees to the county treasurer on or before the March 31 immediately succeeding the entry of a foreclosure judgment. MCL 211.78g(3).

When property taxes are delinquent, a county treasurer may elect to act as the foreclosing governmental unit (FGU) for the municipality where the property is located; otherwise the state will do so. MCL 211.78(3), (8). If the property owner does not redeem the forfeited property, the FGU may file a petition for foreclosure. MCL 211.78h(1). If the property owner does not pay the delinquent taxes, interest, penalties and fees by the March 31 immediately succeeding the entry of the foreclosure judgment, fee simple title to the property will vest absolutely to the FGU without any further redemption rights. MCL 211.78k(5).

Under the then-existing version of MCL 211.78m for the time periods relevant to this action, the state had a "right of first refusal" to buy the foreclosed property "at the greater of the minimum bid or its fair market value." MCL 211.78m(1).[6] If the state declined, the city, village or township in which the property was located could purchase the property by paying the FGU the "minimum bid." *Id.* And if the city, village or township declined, the county in which the property was located could purchase the property by paying the FGU the "minimum bid." *Id.* Otherwise, the foreclosed property would be sold by the FGU at public auction. MCL 211.78m(2). If a governmental body exercised its statutory right to purchase the property from the FGU before the public auction, the purchasing governmental body was free to sell the property. MCL 211.78m(1). But, under the then-existing version of the GPTA, the property's former owner did not have a right to any of the surplus proceeds from the sale. See *Rafaeli*, 505 Mich at 447 (noting that the GPTA "does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds.")[7]

Michigan's Takings Clause provides, in relevant part:

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[5] MCL 211.78g was amended by 2020 PA 33 and 2020 PA 256, but the language we have cited remained unchanged.

[6] As used in this section, "minimum bid" is the amount of tax delinquency, including interest, penalties, and fees due on the property. MCL 211.78m(11).

[7] In response to *Rafaeli*, the Legislature passed amendments to the GPTA to provide a mechanism for persons to obtain surplus proceeds after a tax-foreclosure sale. *Proctor v Saginaw Bd of Comm'rs*, 340 Mich App 1, 9; 985 NW2d 193 (2022). Specifically, MCL 211.78t, which was added by 2020 PA 256, outlines how a former property owner or other claimant may claim an interest in the remaining proceeds following a sale of foreclosed property. The Legislature also amended the GPTA to require any governmental body that purchases tax-foreclosed property to pay the FGU "the greater of the minimum bid or the fair market value of the property." See MCL 211.78m(1), as amended by 2020 PA 255.

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> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. . . .
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph. [Const 1963, art 10, § 2.]

"A 'taking' . . . means that the government has permanently deprived the property owner of any possession or use of the property without the commencement of formalized condemnation proceedings." *Rafaeli*, 505 Mich at 454. "When such a taking occurs, the property owner is entitled to just compensation for the value of the property taken." *Id.* at 454-455. The *Rafaeli* Court concluded that Michigan's "common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property." *Id.* at 470. The Court also found that Article 10, § 2 of Michigan's "1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale[.]" *Id.* at 473. And because this common-law interest is protected by the Takings Clause, the GPTA could not abrogate it. *Id.* But the Court held that "a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus." *Id.* at 477 (emphasis added).

The remedy for a government taking is "just compensation for the value of the property taken." *Id.* at 482 (cleaned up). The *Rafaeli* Court determined that "just compensation" was the surplus proceeds generated from the tax-foreclosure sale. *Id.* at 481-482. In doing so, the Court made it clear that "the property improperly taken was the surplus proceeds, not plaintiffs' real properties." *Id.* at 483. The Court expressly "reject[ed] the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all" because "this would run contrary to the general principle that just compensation is measured by the value of the property *taken*[,]" "plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full[,]" and "[i]f plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." *Id.* at 483. The Court concluded that "when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—*no more, no less*." *Id.* at 483-484 (emphasis added).

In this case, Kakalia's property was not sold at a public auction; instead the county exercised its statutory election to purchase the property from the Otsego County Treasurer, the FGU, for the minimum bid pursuant to the then-existing version of MCL 211.78m(1). It is undisputed that no "surplus proceeds" were generated by the tax-foreclosure sale to the county.

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But Kakalia attempts to distinguish this case from *Rafaeli* by arguing that "the property improperly taken *was* Kakalia's real property, not the surplus proceeds from a public auction." Kakalia has failed to demonstrate that its real property was improperly taken. Pursuant to MCL 211.78k(5), absolute title to the subject property vested to the Otsego County Treasurer when the foreclosure judgment became effective. Because Kakalia did not challenge the foreclosure proceedings, there is no dispute that the Otsego County Treasurer properly acquired title to the property. Once absolute title vested to the Otsego County Treasurer with no further rights of redemption, Kakalia no longer had a vested property right to the real property itself. Albeit arguably in dictum, the *Rafaeli* Court stated that it is "unaware of any authority affirming a vested property right to equity held in property generally." *Id.* at 484 n 134.[8] And Justice Viviano recognized in his concurrence that "the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government." *Rafaeli*, 505 Mich at 518 (VIVIANO, J., concurring). We adopt the dicta set forth in *Rafaeli* and affirm the trial court's dismissal of Kakalia's takings claim.

IV. UNJUST ENRICHMENT

Next, Kakalia argues that the trial court erred in dismissing its unjust enrichment claim. We disagree.

"Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019) (cleaned up). To establish a claim of unjust enrichment, a plaintiff must show "(1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2012). "Not all enrichment is unjust in nature, and the key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit." *Id.* at 23. Our Courts recognize a viable claim for unjust enrichment for violation of a plaintiff's common-law property rights protected under our state's Takings Clause to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. See *Rafaeli*, 505 Mich at 468-470, 473; *Proctor*, 340 Mich App at 17, 19-20.

Kakalia's unjust enrichment claim alleges that the county "has received a benefit from [Kakalia] by retaining the market value of the subject property in excess of the amount needed to

[8] The Court went on to state, "[n]or is it necessary for us to do so here." *Rafaeli*, 505 Mich at 484 n 134. The Court explained that the issue was "whether a former property owner retains the ability to collect any surplus proceeds that might result after the government seizes title to real property for failure to pay taxes and then sells that property for more than the tax delinquency." *Id.* "It is a well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication," and are "not binding on this Court." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007). But it is permissible for an appellate court to find dictum persuasive and decide to follow it. *Dykstra v Dep't of Transp*, 208 Mich App 390, 392; 528 NW2d 754 (1995).

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pay" the delinquent taxes, interest, penalties, and fees, which "is an inequitable result . . . because the value of the property was far greater than the amount [Kakalia] owed . . . for unpaid taxes." Kakalia alleges that the county "has been unjustly enriched by retaining the surplus equity in [Kakalia's] property."

Kakalia has failed to demonstrate that the county has received a "benefit" from Kakalia. At set forth in Issue III, *supra*, it is undisputed that no "surplus proceeds" were realized from a "tax-foreclosure sale," and Kakalia has failed to demonstrate a property right or amount or benefit that was "unjustly" taken from it by the county, which properly acquired the subject property from the Otsego County Treasurer after proper tax-foreclosure proceedings. The *Rafaeli* Court made clear that a plaintiff's only "property interest" surviving a tax-foreclosure is not in the real property itself, but only in the surplus proceeds resulting from the tax-foreclosure sale, if any. In this case, there are no such surplus proceeds. Further, there was nothing improper or unlawful with the Otsego County Treasurer's foreclosure of the subject property, or the county's exercise of its statutory election to purchase the property from the Otsego County Treasurer for the minimum bid pursuant to the then-existing version of MCL 211.78m(1). No evidence suggests that the county has unjustly benefited by its legal purchase of the property for the minimum bid amount. "One is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution." *Tkachik v Mandeville*, 487 Mich 38, 48; 790 NW2d 260 (2010) (cleaned up). Accordingly, the trial court did not err in dismissing Kakalia's unjust enrichment claim.

V. DECLARATORY JUDGMENT

Finally, Kakalia argues that it is entitled to a declaratory ruling that the county is obligated to pay Kakalia any surplus proceeds from a future sale of the subject property. We disagree.

Because the subject property was sold under MCL 211.78m "before July 18, 2020," MCL 211.78t(1)(b) now provides the exclusive mechanism for a former property owner to claim the surplus proceeds from a tax-foreclosure sale. See MCL 211.78t(11). But since the tax-foreclosure sale already occurred and it's undisputed that there were no "surplus proceeds," Kakalia has no further remedy. Accordingly, we affirm the trial court's dismissal of Kakalia's claim for a declaratory judgment.

Affirmed.

/s/ Michael F. Gadola
/s/ Sima G. Patel
/s/ Allie Greenleaf Maldonado

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Lynette Hathon, et al v State of Michigan

MSC Docket No. 165219

EXHIBIT K

to Amicus Curiae Brief of

The Donna Emanouil Trust and Edward Sattler

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN THE MATTER OF THE PETITION OF MUSKEGON COUNTY TREASURER FOR THE FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID 2018 AND PRIOR YEARS' TAXES, INTEREST, PENALTIES, AND FEES

COA Docket No. 363764

Lower Court: Muskegon County Circuit
LC Case No. 20-2044-CZ

_____/

TRANSCRIPTION OF ORAL ARGUMENTS

FROM VIDEO FILE PROVIDED BY

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Judge Brock A. Swartzle
Judge Kathleen A. Feeney
Judge Colleen A. O'Brien

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No exhibits were marked.

Grand Rapids, Michigan

September 6, 2023

JUDGE SWARTZLE: Our seventh case on our docket, Docket Number 363764 in re petition of Muskegon County Treasurer for foreclosure.

You're lucky enough to not have to move tables.

MS. GENOVICH: I was just thinking that.

MR. VISSER: May it please the Court, Donald Visser on behalf of the five appellants. I'd like to reserve five minutes, if I may, for rebuttal.

JUDGE SWARTZLE: Okay.

MR. VISSER: I'd just like to set the stage a little bit for what's going on. You're the first panel to handle one of the appeals. There's probably 18 or so appeals currently pending either filed by our office or by the counties.

JUDGE SWARTZLE: I know. We drew -- we drew the lucky straw on this one. And we're well aware of the facts.

MR. VISSER: Oh, okay.

JUDGE SWARTZLE: I mean, I think the key question is why -- why does your client -- why do your clients not have to follow 78t?

MR. VISSER: Because it's an unconstitutional restraint on the -- on their powers -- I mean, on their property. They have a right under Rafaeli to have surplus

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proceeds.

JUDGE SWARTZLE: And Rafaeli indicated that the legislature can put forward a reasonable means to -- to attempt to satisfy that constitutional right.

MR. VISSER: They did.

JUDGE SWARTZLE: The legislature reacted to Rafaeli, enacted 78t. Why isn't that the end of the story?

MR. VISSER: If the Court is telling me it's reasonable? That's your question right there, is that a reasonable timeline? If you look at what Rafaeli -- Rafaeli says you don't have a property right until you have a sale. There's nothing there. You have all of the case law that says there is no cause of action, there's nothing there. So now all of a sudden you have a notice before you. That's the same type of thing in -- you look at in Mays versus Snyder and so forth when you look at notices. And, by the way, I should warn the Court there was a recent decision by the Sixth Circuit last week, a week ago. The case was Ingram versus Wayne County. The docket number is 221262.

JUDGE SWARTZLE: Is that the one where it was against essentially the police officer -- or sheriffs who were seizing property?

MR. VISSER: That is the Wayne County statute for seizing vehicles. And they had a discussion and looking at whether it was reasonably related -- the time frames were

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reasonably related. It was one of those things where there was personal service. They had a contact of 3 to 14 days to the prosecutor's office, you had to attend the pretrial conferences, and then about an eight-month delay for hearing. It was asserted that it was based upon health, safety, and drugs. That was the rational basis. The Court said no way, there's just simply no rational relationship there. In our case we don't have personal service. We have at least 1. -- I mean, I'm sorry, 11.5 months, almost a year of minimum time before you get your property back. Certainly surplus proceeds are at least as valuable and fundamental, at least that's what Rafaeli says, as vehicles. And what we -- what the Sixth Circuit said in Ingram is the Matthews test is going to apply. The County interest in this case was financial -- is there anything but -- we don't have anything other than financial interest in our case that's pending before you -- and the seizure there was to obtain money. What do we have here? So you look at what you have is you have a process that you have to, first of all, define when the taking occurs. PA 256 says nothing about ownership. Rafaeli says my clients own the property. So when did you take it? Did you take it July 2? Did you take -- when did you take it along the process? At that particular point the Michigan Constitution, Article 10 Section 2, says you must provide compensation. It says, in fact, you have to provide

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compensation before the taking.

JUDGE SWARTZLE: I think -- I think it would be helpful when you're talking about taking the property that you clearly distinguish between taking the real property through foreclosure versus the surplus. So it would just be helpful for me, and I think the rest of the panel, if you just keep those two distinct categories in mind. So when you're making the argument you just made are you talking about the foreclosure on the real property or are you talking about keeping the surplus?

MR. VISSER: The surplus only.

JUDGE SWARTZLE: Thank you.

MR. VISSER: Yeah, the surplus only. I think that ship on taking the property sailed a long, long time ago with Rafaeli. It -- Rafaeli discussed the fact that they're two separate takings, one occurs later, and Rafaeli says it doesn't occur until -- you don't have a claim until there's a surplus created.

JUDGE SWARTZLE: Is it fair to say that your primary argument is that when the legislature enacted Section 78t the time frames for a property owner to exercise their constitutional right to those -- to those surplus proceeds is just too short? It's -- it does not give them sufficient time? It doesn't give the normal person sufficient time to act and try to exercise their

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constitutional right to that surplus proceeds? Is that just a fair summation of your primary argument?

MR. VISSER: Maybe a small encapsulation of it. My argument goes beyond that. First of all, I think you have a duty as a court to second guess whatever the legislature does. Is that really true? That's what happened in the recent decision from the Sixth Circuit, they second guessed. That's what happened, I believe, in Mays as well. You have to look at in the totality of the circumstances is that appropriate. You've got to look at the people that are involved. You've got to realize that these are people that need protection. They oftentimes are lower functioning people. How in the world do they get all of this done? And they're in the throes of being evicted from their houses. How do they --

JUDGE FEENEY: Let me ask that. So I wasn't able to find any like proofs of service in the file. So were these people sent a form -- were they sent the Form 5743 to their home, which was the property that was being foreclosed on, or was it sent to whatever address that they're registered under?

MR. VISSER: It was -- typically the County as a process goes -- often the counties, and I believe Muskegon does, they usually use Title Tech to do it. They mail it to the address. And the process under the GPTA is also to post,

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but you realize that the GPTA for the underlying foreclosure is an in-rem action. You don't have an in-rem action for the surplus because that's not created until later, and now you don't have any service on the people. And, in fact, the ones that were mailed earlier in bold letters at the tops -- if it were missing as the Consumer Protection Act claimed -- it says you've been misled because it says you have lost all your equity in this property. That's what's in the top part of the form.

JUDGE FEENEY: All right. So they get no notice, you're saying, that they have to act by that July 1 date?

MR. VISSER: This postcard -- or this notice that goes out is mailed to that address --

JUDGE SWARTZLE: Sir, can you please stay behind the line.

MR. VISSER: Oh, I'm very, very sorry. It is mailed to that property address. And in the scope of the foreclosure of the real estate that makes sense because it's calculated to give the people actually notice, along with posting on the property. But you just -- once you're gone from that property there's no proofs in this case that there was actual service of anything on these people to let them know, even if the time frames are okay, that they actually got notice of the property. I'm just simply saying it really -- in the concept of what the Constitution requires

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for compensation you have to, first of all, define when the taking occurs.

JUDGE FEENEY: Okay. But are you saying then that only for the first -- I'm going to call it the first taking, the foreclosure. That's the only time they get notice, and then once the sale occurs there's no notice?

MR. VISSER: That is correct. Some of the counties are sending out -- and I believe Muskegon did. They sent out a form between -- or shortly after the foreclosure. I'm sorry, after, yeah, the foreclosure of March 31. That's the one that says you -- started off you've lost all of your equity and it says you might be able to do a form. But there's nothing -- absolutely nothing in any county in this state that I'm aware of where anything is ever sent after -- after the foreclosure sale. After the res is generated that they're going to take nothing is done.

JUDGE SWARTZLE: Is there -- is there anything in the record to suggest that the county here did not comply with Section 78t?

MR. VISSER: No, I don't think there's any -- there's no --

JUDGE SWARTZLE: So correct me if I'm wrong, your main contention is that the statute itself is deficient in terms of not permitting your clients the reasonable ability to exercise their constitutional rights here?

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MR. VISSER: That -- it's facially wrong and as applied it's wrong. That's my contention. There are some problems with construction of the statute, because as you look at Subsections 4 and 6, which are the two --

JUDGE SWARTZLE: I just -- I wanted to make clear that you're not making an argument that the County did not comply with the statute. You're making an argument that compliance with the statute is not sufficient to comply with the Constitution?

MR. VISSER: That is correct, Your Honor.

JUDGE SWARTZLE: Thank you.

MR. VISSER: Yes. So, no, I'm not saying that there wasn't compliance with the statute. I'm simply saying there wasn't compliance with the constitutional mandates to give notice before you take, recognizing that the surplus proceeds is a separate taking from the underlying foreclosure. And no one challenges that. The United States Supreme Court decisions and as well as Michigan Supreme Court decisions say that's permissible. But both Tyler and Rafaeli say you can't take any more -- no more and no less. Tyler then comes in and says you can't use the toehold of a tax statute to be able to come in and get some more. And that's exactly what PA 256 does. That's the toehold that they get there and say, okay, now we want to take more.

JUDGE SWARTZLE: Thank you. You'll have some time

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for rebuttal.

MR. VISSER: Thank you, Your Honor.

MS. GENOVICH: Good morning again, Your Honors. Laura Genovich on behalf of Muskegon County Treasurer. I want to first address the questions regarding notice that Judge Feeney asked. There is no dispute, again, that the County complied with the statute. And the issue before the trial court on this motion was not whether notice was sent, was not whether notice was received, but whether the notice was sufficient. And there is -- if you look at the trial court transcript on that motion, which I think we've excerpted in our brief, you know, Mr. Visser conceded it's about whether the notice itself is sufficient. They were sent two notices of the July 1 deadline, and we've put copies of those in the record. There are proofs of service in the trial court file. Because this was a post-foreclosure proceeding motion the file -- the underlying case number is, I'm sure, a huge file, so I don't know if the trial court sent the whole thing up. Because, again, this was not an original lawsuit that was filed. This is not a takings lawsuit or a due process lawsuit. This was a post-foreclosure motion, so we don't necessarily have the benefit of the robust pleading we would have in the original case. But I just wanted to narrow that, that there is no dispute that the County complied in all respects with the

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statute, provided the notice required. The issue is was it sufficient. Sufficient because it was sent before the July 1 deadline, which makes sense to me that it would be sent before the July 1 deadline, but not later after the sale, realizing the sale takes place after July 1.

But I'm going to step back a bit and go back to the beginning to say -- and Your Honor led with Rafaeli, of course. I would say there are three major decisions, two US Supreme Court and one Michigan Supreme Court case, holding that the Foreclosing Governmental Unit's retention of these remaining proceeds, or surplus, is constitutional if there is a statutory process by which the former owner can make a claim to that. We know in Rafaeli at that time the statute didn't provide that process. The Supreme Court said "Nothing in our holding today prevents the legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds."

We have Nelson versus City of New York, US Supreme Court case from 1956. In that case the City of New York had an ordinance for water charges, and they were foreclosing on property for failing to pay water charges. In that case the amount of time that someone had to make a claim to the proceeds was two months and 20 days. It was actually two months to object to the foreclosure and 20 days to ask for

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the surplus back. And the argument was you took my property, the plaintiff there did not claim the surplus in time, and the US Supreme Court said that is not an unconstitutional taking. Your procedural due process rights were not violated because you had notice of it and it was not an unconstitutional taking because there was a process in place for you to claim those proceeds and you did not do so. There has been criticism -- as you know, there are many of these cases out there right now, and up 'til this year a lot of those cases the plaintiffs were criticizing Nelson. But Tyler versus Hennepin County, a US Supreme Court decision that came out during the briefing in this case in May of 2023, favorably cited Nelson not for those facts, because in Tyler there was no process. So Tyler was more like Rafaeli where the statute says Foreclosing Governmental Unit gets to keep the surplus no matter what. And the County there tried to rely on Nelson. And, of course, again, in Nelson there was a process, and if you have a process then it's not an unconstitutional taking. What Tyler said is there's no taking where the local ordinance "did not absolutely preclude an owner from obtaining the surplus proceeds of a judicial sale but instead simply defined the process through which the owner could claim the surplus."

So, again, we have the US Supreme Court saying, yeah, if there's a process to claim the surplus proceeds and

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someone doesn't do it then it's not a taking when those surplus proceeds are forfeited to the local governmental unit. So the legislature did that. We have PA 256, 211.78t where this process was created. But plaintiff's -- or claimant's position here is that not only is this process not enough but that no process would be enough. That there is no scenario in which the surplus proceeds can be taken without paying for those surplus proceeds, effectively a trading of money.

JUDGE SWARTZLE: I think, I mean, Rafaeli made it quite clear that the legislature can put in place a process. I'm guessing the Supreme Court also had in mind that it had to be a reasonable process, and you're arguing that 78t is reasonable?

MS. GENOVICH: It is. Many claimants do timely file their notices by July 1. Realize, if we're talking about a 2021 foreclosure, those are 2018 property taxes that weren't paid. So this is not -- the entire process has been going on for a while. There's ample information out there. But once we get up to that period between March 31, which is the Judgment of Foreclosure, and July 1, the deadline, two notices are sent out that are very explicit -- and, again, we have excerpted in our brief -- that say you must file a claim, here's where you get the form. If -- you don't need a lawyer, but if you need a lawyer here's the State Bar's

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number, you can get help doing this, you have to file this form to get your surplus proceeds. That's a reasonable process.

And that July 1 date is not arbitrary. It's not something that the County came up with at all and it's not something the legislature just pulled out of a hat. It's important for a couple of reasons. One is that there's a right of first refusal for local municipalities to purchase tax foreclosed property. To protect the former owner's equity the statute now provides that if a claim has been made then a city or township has to pay the greater of the delinquent tax minimum bid or fair market value, right? So a city can't get a steal on tax foreclosed property if someone has made a claim, that former owner, because we want to make sure --

JUDGE SWARTZLE: Thanks for using that term. We have that case tomorrow. So --

MS. GENOVICH: Oh, okay. So you have -- you have a -- I lost my train of thought for a moment there. Sorry.

JUDGE SWARTZLE: I don't think it's your county, so you're okay.

MS. GENOVICH: Okay. You have that July 1 date there for a reason, right? We need to know what claims are being made so that we know how much a local unit of

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government would have to pay in exercising that right of first refusal. We've listed a lot of other practical reasons why it isn't workable for the County to hold onto what would eventually be millions of dollars indefinitely waiting for claims and where you, as well, will have sometimes competing claims. And the legislature contemplated that, because it's not just the former fee owner who can make a claim to those proceeds. It could be a lienholder; it could be somebody with a future interest in the property. So you have to have a deadline, as we have deadlines in every aspect of the law from statute of limitations to deadlines for filing an appeal with this court, deadlines for filing your tax returns if you want a refund of your own tax money. That is to me analogous, right? If you -- if you've overpaid the government your taxes and you want a refund you have to file your tax return within a certain time or else you do not get your refund. Now maybe that will be the next cottage industry of class action lawsuits, but it is another example that there are many examples in the law where you do have to file a piece of paper to claim your property.

So it's a -- very briefly, I know the Court is exceptionally aware of all of the arguments. I don't think that the exclusivity argument gets very far the plaintiffs have made. I mean, the statute says that it is exclusive. The section is the exclusive mechanism for a claimant to

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claim and receive any applicable remaining proceeds. I don't think there's any other way to get at them.

The argument under Mays that the deadline is too harsh, again, talking about the practicality of it, there are options for people. Even in this foreclosure process the statute provides a time frame before this for the former owners to seek -- I think it's even before the March 31 foreclosure. I believe it's in January -- to seek a financial hardship extension of time. So there are options out there that when you read it all together does not make this unreasonably harsh. And the standard in Mays -- realizing Mays was a Flint water crisis case where the facts were dramatically different and there were findings that in that case the deadlines were actively concealed by the government after. That's not the case here. But even in that case the Mays court said "to warrant relief is strict enforcement of the limitations period must be so harsh and unreasonable in its consequences that it effectively divests a plaintiff of access to the court intended by the grant of a substantive right." That's not the case here. Again, many people filed these claims on time. I know, because at least for Muskegon County I handled those hearings. There were many people who had no trouble filing them on time. And, again, there are extensions available under the statute, so I don't think that argument gets very far.

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Procedural due process I think we've touched upon with the notice. The notice is very clear. It's unambiguous. It says what you have to do and how to do it, and it's reasonably calculated to provide the appropriate notice. And, again, we would rely on Rafaeli, on Nelson, and on Tyler for the holding that it is not an unconstitutional taking because there is a statutory process in place to claim those proceeds. You know, there's a substantive due process argument, but as we've argued in our brief I don't think you get there because you can't have a substantive due process claim that's really a takings claim. There's case law on that that says, look, basically pick one, right? If you have a takings claim that's more specific you don't also get a substantive due process claim.

JUDGE SWARTZLE: We understand that.

MS. GENOVICH: Yeah. Okay. So we've got all that covered.

And then, finally, on the 5 percent fee, frankly, one of the downsides of the procedural posture is that there is no discovery here on the costs the County incurred in these sales. You know, the Court is not in a position I don't think to do a Bolt versus City of Lansing analysis and figure out if this is an appropriate regulatory fee or a tax because we don't have that factual development, but the legislature defined this as a reasonable amount for covering

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the costs that a county has or Foreclosing Governmental Unit has in these cases.

So happy to answer any other questions the Court has, otherwise we would ask the Court to affirm.

JUDGE SWARTZLE: Thank you.

MS. GENOVICH: Thank you.

JUDGE SWARTZLE: We have time for a brief rebuttal.

MR. VISSER: Thank you, Your Honor. I don't think it was a Freudian slip when we talked about "get a steal." That's exactly what's at issue here, and that's a financial consideration. That's the only thing that's the justification for this action. Knochelmann versus Commissioner, which is a Sixth Circuit 2011 decision, says that challenges alleging an unlawful taking require more than a -- or that the rational basis test does not apply. Hudson versus Palmer, a two thousand -- I mean, a 1984 US Supreme Court decision, says you have to have an adequate post-depravation remedy for property loss. Knick versus Township of Scott, Pennsylvania, a 2019 Supreme Court decision, says the fact that the state has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law. Tyler just came down May 25 of this year from the United States Supreme Court. It says

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there is a Fifth Amendment taking claim in this particular case. Perez versus Campbell, a two thousand -- I'm sorry, a 1971 case, says any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the supremacy clause. I don't know how the counties get past what Tyler just came down with saying this is a property right. And Tyler nixed this whole idea that the state can define what the property laws are, said that's been the normal policy and procedure, but because of the mischief that can be caused we are finding that this right derives from fundamental rights beyond state law.

Finally, Section -- or Article 10 Section 2 says private property shall not be taken for public use without just compensation therefore being first made. I don't think we can just simply ignore what's in the -- what's in the Constitution, "being first made." The counties appear to have taken even -- taken this property, we're talking and surplus proceeds, sometime after -- on or after July 1. The Constitution cannot be ignored, no matter what we find elsewhere, that you must first provide compensation for that taking. I can't get the counties to define it. They're all over the place wherever I go as to when they think they took it. Some treasurers say, well, we didn't take it, we hold it in escrow. Yeah. But in the end they're saying we want the money. That's the financial justification. The purpose of

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256, as announced in the legislature, was to get full implementation of Rafaeli. This act falls far short of that and, therefore, it not only does not meet strict scrutiny, it does not meet rational basis even because it does not fulfill the intent of the statute.

Thank you.

JUDGE SWARTZLE: That case is submitted.

(End of proceeding.)

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CERTIFICATE

STATE OF MICHIGAN

COUNTY OF OTTAWA

I, Carrie S. Clark-Berry, a Notary Public in and for the above county and state, do hereby certify that to the best of my ability this is an accurate transcription of the audio recordings provided to me.

I am not related nor of counsel to either party and am not connected to the events of this case.

CARRIE S. CLARK-BERRY, CSR-4402
Registered Professional Reporter
Notary Public
Ottawa County, Michigan
My commission expires: 06/23/2024