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STATE OF MICHIGAN
SUPREME COURT OF MICHIGAN

LOUIS JACKSON, MICHAEL C BIRAC, LEE CRAFT AND GAYLYNN CRAFT, RONALD HAYES, SMFJ, LLC, EVERETT HODGE, DONALD SWINNEY, STEPHANIE BOYD LISASMITH CO-CLASS REPESENTATIVES ALL ON BEHALF OF THEMSELVES AND A CLASS OF ALL OTHER SIMILARLY, SITUTATED

Plaintiffs-Appellees,

v.

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, LLC, FRED ZORN (PERSONALLY AND IN HIS OFFICIAL CAPACITY), E'TOILE LIBBETT, MICHAEL MANDELBAUM (PERSONALLY AND IN HIS OFFICIAL CAPACITY), CITY OF SOUTHFIELD, ACTING THROUGH KEN SIVER, KEN SIVER, (PERSONALLY, AND IN HIS OFFICIAL CAPACITY) OAKLAND COUNTY TREASURER ANDREW MEISNER (PERSONALLY, AND IN HIS OFFICIAL CAPACITY), SOUTHFIELD NON-PROFIT HOUSING CORPORATION, SUSAN WARD-WITKOWSKI, (PERSONALLY AND IN HER OFFICIAL CAPACITY), AND GERALD WITKOWSKI (SPECIAL PROJECTS MANAGER-NRI)

Defendants-Appellants.

Supreme Court Dkt.166320
Court of Appeals No. 361397

Oakland County Circuit
Court No. 2018-162877-NZ

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SMITH LAW GROUP PLLC
Scott F. Smith (P28472)
Co-Counsel for Plaintiffs/Appellees
30833 Northwestern Hwy., Suite 200
Farmington Hills, MI 48334
248-626-1962
smithfs.law@gmail.com

MCALPINE PC
Mark L. McAlpine (P35583)
Daniel J. Pifko (P87196)
Co-Counsel for Plaintiffs/Appellees
3201 University Drive, Suite 200
Auburn Hills, MI 48326
Tel: (248) 373-3700
mlmcalpine@mcalpinepc.com
dpifko@mcalpinepc.com

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APPELLEES' SUPPLEMENTAL BRIEF
PURSUANT TO ORDER OF NOVEMBER 1, 2024

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INTRODUCTION

Oakland County in its Supplemental Briefing has rightly conceded significant issues which include:1) That a landowner has a takings claim, where the foreclosed property was not auctioned but the value of the equity in the property exceeded the tax liability; 2) There was a violation of the Michigan Constitution's Takings Clause, Article 10 § 2 as well as the 5th amendment of the United States Constitution; and 3) The aggrieved property owners should receive fair market value. *See Hall v. Meisner*, 51 F4th 185, 195 (6th Cir. 2022, (en banc Review denied 2023)). *See also Fair v. Cont'l Res.*, 143 S. Ct. 2580 (2023) (remanding case where there were no surplus proceeds for reconsideration in light of *Tyler v. Hennepin Cnty., Minnesota,* 598 U.S. 631 (2023); *Continental Resources v. Fair*, 10 N.W.3d 510, 520, 317 Neb. 391, 405 (Neb., 2024) (on remand from the Supreme Court holding there was a taking). Therefore, the parameters for answering the five (5) issues this Honorable Court has requested briefing have been defined. Furthermore, to the extent the answers lie in the interpretation of the United States Constitution it would at the least be problematic to find that a property owner under Michigan's Constitution would have less rights than the Takings Clause of the United States Constitution.

A. "Whether the Court of Appeals correctly concluded that both MCL 211.78t MCL211.78m apply retroactively."

Yes, with qualification. In both *Jackson v. Southfield Neighborhood Revitalization Initiative*, 2023 Mich. App. LEXIS 6834 (September 21, 2023) and *Proctor v. Saginaw Cnty. Bd. of Commissioners*, 985 N.W.2d 193 (Mich. App. 2022), (in the context of auctioned properties), the focus of Michigan's Court of Appeals was to the effectuate GPTA, 2020 PA 256, which removed the constitutional deficiencies in the prior text of MCL 211.78m. Specifically as it relates to this case, the former statute permitted municipalities and other state taxing authorities to have tax foreclosed properties transferred by paying the "minimum bid" which consisted of delinquent

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taxes, interest and fees, i.e. the Right of First Refusal ("ROFR"). After *Rafaeli, LLC v. Oakland County*, 505 Mich. 429 (2020), 2020 PA 256 was enacted, which requires the cities and other defined taxing authorities to pay "the greater of the minimum bid or the fair market value of the property." (emphasis added). The approach to make the amended and curative version of MCL 211.78m retroactive, was adopted by *Jackson, Proctor,* and ultimately *Schafer* (Hathon) *v. Kent Cnty.,* 2024 WL 3573500, at *20 (Mich., 2024). This retroactive application, besides reconciling the U.S. and Michigan Constitutions, is more harmonious with MCL 211.78t(b) which provided that property owners with claims prior to *Rafaeli* could be pursued if a Notice of Claim is filed as defined in 211.78t and the Michigan Supreme Court orders that its decision in *Rafaeli* applies retroactively. Accordingly, there is no question that MCL 211.78m and at least MCL 211.78t(b) are retroactive. As such, the *Jackson* Court in counter-sight got it right that MCL 211.78m is retroactive albeit perhaps for the wrong reason when it stated *Proctor* was precedent.

Here, other than subpart (b) of MCL 211.78t, the rest of the text of "t" has no relevance to ROFR cases. The Notice of Claim and the other procedures in MCL211.78t expressly relate to "surplus proceeds" or "remaining proceeds." This is even conceded by the Appellant Oakland County. The legislature intended the curative and amended version of MCL 211.78t to be retroactive in a very limited manner in ROFR takings cases. Specifically, the legislature intended that the retroactive application would apply to the sections that affirmed its view that "just compensation" is the fair market value minus any unpaid debt plus compounded interest from the time the taking becomes absolute. The legislature crafted the statute to be retroactive, but only to primarily codify *Rafaeli v. Oakland County* to render the new version constitutional.

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B. "If so, whether Plaintiffs' constitutional takings claims are precluded by MCL211.78t."

Plaintiffs' constitutional claims cannot be precluded by a statute that is unconstitutional as applied and not applicable to these sub-set of Plaintiffs. Even if the claim process in MCL 211.78t could be applied retroactively in ROFR takings cases, it cannot preclude a takings claim. MCL 211.78t cannot be interpreted retroactively as to ROFR cases as it would legislate away the Plaintiffs and Putative Class Members' property rights in their equity, as the text and defined term "remaining proceeds" expressly mandates. MCL 211.78t states:

> (b) "Remaining proceeds" means the amount equal to the difference between the amount paid to the foreclosing governmental unit for a property due to the sale or transfer of the property under section 78m and the sum of all of the following:
> (i) The minimum bid under section 78m.
> (ii) All other fees and expenses incurred by the foreclosing governmental unit pursuant to section 78m in connection with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of the property not included in the minimum bid.
> (iii) A sale commission payable to the foreclosing governmental unit equal to 5% of the amount paid to the foreclosing governmental unit for the property.

There is no method of statutory interpretation that a property owner under the prior ROFR statute (as pointed out by Oakland County in its Supplemental Brief) could have a claim without requiring the cities, townships, municipalities, and villages retroactively to pay fair market value. Under the facts of this and similar cases the definition of "remaining proceeds" would always be negative. Additionally, there is no mechanism in "t" to determine fair market value which would not impede upon pre-existing rights. At this point, all the ROFR cases are tantamount to condemnation cases in which aggrieved property owners may request a jury trial on the issue of the proper evaluation of the property. There is no appraisal process or method to determine value in "t." Nowhere in "t" does it even contemplate a situation with "surplus equity," only "remaining proceeds." The distinction between "surplus proceeds" and "surplus equity" is summarized in a

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recent decision by the 6th Circuit Court of Appeals in *Bowles v. Sabree,* 121 F.4th 539 (6th Cir. 2024). This Court should adopt such a distinction.

Another existential problem with "t" as applied to ROFR cases is that the governmental entity which could effectuate a transfer at fair market value pursuant to MCL211.78m, would have no constitutional prudent standards, criteria or procedure to make a fair market value bid. In other words, what would prevent a governmental entity from making a "bad faith" and or significantly under "fair market value" bid? In sum, "t" cannot be applied to "surplus equity" by definition and would eradicate property owners' rights "ipse dixit" and such a contorted application of the statute would be unconstitutional. Finally, not utilizing the blackletter federal takings law would set up a situation where property rights under the Michigan Constitution would be below the threshold created by the United States Supreme Court in *Tyler*.

C. "If not, whether a violation of the Takings Claims of the Michigan Constitution or of the Fifth Amendment of the Constitution may occur as to a tax foreclosure when there is no public auction of the foreclosed property and a governmental unit retains or purchases the property, resulting in no surplus proceeds."

Yes, it is definitely settled law that a takings violation occurs under federal law where there is no public auction and the government or one of its units retains or purchases the Property. *See Hall v. Meisner*, 51 4th at 196; *Tyler*, 598 US at 643. "The owner's right to a surplus after a foreclosure sale instead follows directly from [their] possession of equitable title before the sale. The surplus is merely the embodiment in money of the value of equitable title." *Hall*, 51 F4th at 195. After the 6th Circuit Court of Appeals issued its opinion in *Hall* which has nearly an identical fact pattern as to the present case, en banc review was denied. Additionally, the United States Supreme Court in *Tyler* cited *Hall* favorably as it pertained to a property owner's interest after tax foreclosure. *See Tyler*, 598 US at 642-643. Thereafter, Oakland County had its writ of certiorari

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denied. Furthermore, *United States v. Lawto*n, 110 US 146, 149-150 (1884) is directly on point in recognizing a taking when there was no public auction and the 'surplus' was calculated in reference to fair market value as opposed to the sale price, because no such sale price existed. *See Tyler* 598 US at 643.

In *Rafaeli,* the Michigan Supreme Court also relied on *Lawton* which implies that Michigan jurisprudence also recognizes property rights under the circumstances of this case. In *Jackson,* the Court of Appeals summarized the relevance of the federal court rulings stating:

> Consequently, even though we are not strictly bound to follow the holding in *Hall*, 51 F4th at 196, it appears to be well-founded on precedent of the United States Supreme Court, which is binding on us, *Tyler*, 598 US at 643: *Lawton*, 110 at 149-150.

This Court has already remanded this case prior to *Hall* and *Tyler* indicating that just because a property wasn't auctioned does not deny relief under the Michigan Takings clause. This Honorable Court should retain this precedent by upholding *Jackson*'s primary conclusion, that the principles embodied in *Rafaeli* apply to the present case and does not preclude Takings Claims under the Michigan Constitution.

D. "Whether there was a violation of either Takings Clause by Oakland County under the facts of this case."

Yes, under both the Takings clause of the United States and under Michigan's Constitution, a reading of *Lawton, Tyler, Hall, Bowles* and the analysis from the Court of Appeals in this case would precedentially mandate that Oakland County violated the 5th Amendment takings clause of the United States Constitution. Likewise, since this Court is bound by decisions of the United States Supreme Court, Oakland County committed a taking under Article 10 §2 of the Michigan Constitution. Furthermore, in *Bowles,* 121 F.4th at 555, the 6th Circuit Court of

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Appeals recently ruled that MCL211.78t (11) could not be the "exclusive remedy" relying on *Knick v. Twp. of Scott*, 588 U.S. 180, 185, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019).

E. "If so, what compensation, if any the taxpayer is entitled to from Oakland County."

As discussed above, it is well settled under Federal Constitutional law that when there is a physical taking, the aggrieved landowner is entitled to the fair market value of his real property plus interest. "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. In *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933), it was held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time." *Knick v. Twp. of Scott*, 588 U.S. 180, 190 (2019). The determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous. Furthermore, 42 USC 1988 and applicable case law interpreting the fee shifting statute provides for reasonable attorney fees and costs. Accordingly, under *Hall* and *Tyler,* the Plaintiffs are entitled to the "surplus equity" which is the fair market value less any unpaid taxes plus reasonable interest from the time of taking along with reasonable attorney fees and costs.

Michigan law is not as developed but is based on the same bedrock principles. The Court of Appeals in *Jackson* correctly found that at the minimum "Rafaeli requires the 'surplus' to be calculated on the basis of the property retained, less what was legally owed" *Jackson*, No. 361397 at *16. The effect of *Rafaeli* is to vindicate the constitutional rights of individuals against unlawful takings of property. The core concept of making the property owners whole for legally unjustified takings emanates from centuries of Anglo-American jurisprudence. The remedy for a "taking"

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where the government does not auction the property as in this case is derived from the Michigan Constitution.

Under Michigan law, "just compensation" was a legal phrase of art in 1963 that was understood to mean that the proper amount of compensation for property takes into account all factors relevant to market value, and it is this meaning that the constitutional drafters and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963. *See Ind. Mich. Power Co. v. Cmty. Mills Inc.,* 333 Mich. App. 313 (2020). The largest body of Michigan law which defines remedies for government takings of real property occurs in the context of eminent domain law. Therefore, Plaintiffs strongly contend that this court should rely on its precedents from such a body of law. The legislators used the phrase "just compensation" when the Uniform Condemnation Procedures Act, MCL §§ 213.51 et seq., was enacted in 1980.*See Ind. Mich. Power Co. v. Cmty. Mills Inc.*

In *Silver Creek Drain Dist. v. Extrusions Div., Inc., 468 Mich.* 367 (2003) this Court observed that the doctrine of eminent domain, the power of the government to take private property for a public use and with just compensation, is firmly established in both our federal and state constitutions. Dating back to the earliest days of statehood, Michigan's various constitutions, including the most recent 1963 have reserved this power to the state. Const 1963, art 10, § 2 states, in relevant part, that "private property shall not be taken for public use without just compensation . . . .."

The Legislature enacted the UCPA in 1980 to make uniform the statutes that govern the exercise and procedure of eminent domain. Consistent with the constitutional mandate to award "just compensation," the UCPA similarly demands that individuals receive "just compensation" when their property is taken by the government. When we interpret the UCPA in light of art 10, §

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2, we must remember that "to the degree the Constitution has been construed to outline the nature of 'just compensation,' the statute must be similarly construed because no act of the Legislature can take away what the Constitution has given." Thus, the Legislature, through the UCPA or any other statute, cannot lower the constitutional minimum of "just compensation" established by the 1963 constitution. *Silver Creek,* 468 Mich at 374-377.

The UCPA authorizes the property owner to recover attorney fees and costs incurred in a condemnation action. *See* MCL 213.66; *See also Ind. Mich. Power Co. v. Cmty. Mills Inc*., 333 Mich. App. 313, 315(2020) The same should hold true here as the remedy emanates from the same Constitution and understandings at the time of its ratification in 1963. The Michigan Constitution Art.10 § 2 provides in pertinent part:

> 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. Compensation shall be determined in proceedings in a court of record.

The Michigan Constitution as enacted requires that when private property is taken unconstitutionally, the aggrieved property owner must be made whole. The minimum "just compensation" for residential property is 125% plus any other reimbursement allowed by law. The Court should clarify that in an inverse condemnation case, interest is required if compensation is not paid contemporaneously with the taking and if it amounts to more than 25% recovery in a residential inverse condemnation case plus reasonable attorney fees and costs. See also MCL 213.65 Additionally, in these ROFR cases, since the County was already reimbursed the delinquent taxes, interest and fees by a third party (the Southfield Neighborhood Revitalization Initiative LLC), it would be inequitable to deduct the taxes, interest and fees which Oakland County has

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already been reimbursed. Furthermore, SNRI has already received a windfall in keeping the equity in the property.

CONCLUSION AND REQUEST FOR RELIEF

Plaintiffs request that this Honorable Court remand this case to the Circuit Court to compute damages as fair market value plus interest from the date of the taking plus reasonable attorney fees and costs. Furthermore, the Court should clarify that the MCL 211.78t is inapplicable to first right of refusal cases and further that the tolling of the six (6) year statute of limitations as explained in *Hathon* shall apply to claims that accrued prior to the enactment of GPTA, 2020 PA 256.

Date: December 26, 2024

/s/ Scott F. Smith
Scott F. Smith (P28472)
SMITH LAW GROUP, PLLC
30833 Northwestern Hwy, Suite 200
Farmington Hills, MI 48334
(248) 626-1962
Co-Counsel for Appellees/Plaintiffs

/s/ Daniel J. Pifko w/permission
Mark L. McAlpine (P35583)
Daniel J. Pifko (P87196)
MCALPINE PC
3201 University Drive, Suite 200
Auburn Hills, MI 48326
(248) 373-3700
Co-Counsel for Appellees/Plaintiffs

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Date: December 26, 2024

/s/ Scott F. Smith
Scott F. Smith (P28472)
SMITH LAW GROUP, PLLC
30833 Northwestern Hwy, Suite 200
Farmington Hills, MI 48334
(248) 626-1962
Co-Counsel for Appellees/Plaintiffs

/s/ Daniel J. Pifko w/permission
Mark L. McAlpine (P35583)
Daniel J. Pifko (P87196)
MCALPINE PC
3201 University Drive, Suite 200
Auburn Hills, MI 48326
(248) 373-3700
Co-Counsel for Appellees/Plaintiffs

CERTIFICATE OF SERVICE

On December 26, 2024, I electronically filed this document through the Michigan Supreme Court Mi File True Filing System, which will send notice of electronic filing to the attorneys/parties of record.

/s/ Scott F. Smith
Scott F. Smith (P28472)
SMITH LAW GROUP, PLLC
30833 Northwestern Hwy, Suite 200
Farmington Hills, MI 48334
(248) 626-1962
Co-Counsel for Appellees/Plaintiffs

/s/ Daniel J. Pifko w/permission
Mark L. McAlpine (P35583)
Daniel J. Pifko (P87196)
MCALPINE PC
3201 University Drive, Suite 200
Auburn Hills, MI 48326
(248) 373-3700
Co-Counsel for Appellees/Plaintiffs