STATE OF MICHIGAN

IN THE SUPREME COURT

RAFAELI, L.L.C., and ANDRE OHANESSIAN,

Plaintiffs-Appellants,

v

OAKLAND COUNTY and ANDREW MEISNER,

Defendants-Appellees.

/

Supreme Court No. 156849

Court of Appeals No. 330696

Oakland County Circuit Court No. 15-147429-CZ

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

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SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES OAKLAND COUNTY AND ANDREW MEISNER

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SUPPLEMENTAL ARGUMENT

I. Plaintiffs do not contest that the Treasurer lacked discretion after the foreclosure judgments had entered. And when the GPTA transferred Plaintiffs' property for nonpayment, there was no taking.

At the November 7, 2019 oral argument in this case, it was suggested several times that the Treasurer could have simply accepted Plaintiffs' post-judgment offer to pay their delinquent taxes, with cost and interest. But that was not an option once judgment had entered. There is no Michigan statutory provision that vests foreclosing authorities with any discretion after a foreclosure judgment has entered and becomes final. Instead, the GPTA requires the Treasurer to take the steps expressly identified in the statute regardless of the amount of the delinquency.

Treasurer Meisner ran for office because of his strong financial experience and his desire to prevent foreclosures before they occur. During his tenure, the Treasurer has prevented thousands of foreclosures by entering into partial-payment arrangements with thousands of taxpayers who timely acted before the March 31st redemption deadline. But once Plaintiffs failed to pay their taxes for more than 2½ years, failed to respond to seven notices from the County and the Oakland County Circuit Court, ignored notices published in the Oakland Press for three weeks, failed to attend a Show Cause hearing, and failed to appear at the Judicial Foreclosure hearing, judgment was entered and the foreclosure judgment became final. At that point, the GPTA required Plaintiffs to redeem before March 31 or full, fee-simple title to the property would automatically be transferred to the Treasurer. Treasurer Meisner had no statutory authority to do anything different.

Plaintiffs do not contest this point. 11/25/19 Pls' Opp Br, pp 1–2. Instead, they say their takings' claim "arose at the time the County took their private property without just compensation." *Id.* But the County did not "take" anything; Plaintiffs relinquished their property. That is why, when Justice Markman specifically asked Plaintiffs' counsel, "What is the clear, Supreme Court precedent" that best supports Plaintiffs' theory?, the best counsel could offer was *Armstrong v United States*, 364 US 40 (1960), and *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155 (1980). 11/7/19 Oral Argument 6:09–7:09, https://bit.ly/2sjN4Na. *Armstrong* involved plaintiff materialmen whose liens were involuntarily extinguished when their general contractor defaulted, and the United States took possession. *Webb's* involved a statute under which a county took as its own the interest accruing on an interpleader fund deposited in the county court. In both cases, the plaintiffs *were powerless to stop the government from taking their property*.

Not so here; Plaintiffs had numerous opportunities to keep their property. Mr. Rafaeli could have simply paid his small tax debt. He could have sold the property, paid the debt, and kept the surplus. Or, if he was unable to make that payment, he could have attended the Show Cause hearing to seek a payment plan. If unsuccessful with that request, he could have attended the Judicial Foreclosure hearing, where the circuit judge has statutory discretionary authority – which they commonly exercise – to remove a property from the judgment.

This was the U.S. Supreme Court's point in *Nelson v City of New York*, 352 US 103 (1956). New York similarly lacked a mechanism for the owner of tax-foreclosed property to seek a surplus; it merely had a procedure allowing the owner

to file an answer in the tax-foreclosure action, 352 U.S. at 110 n10, just as a delinquent property owner can do in Michigan. Yet the U.S. Supreme Court *upheld* the City's retention of a surplus because, assuming adequate steps were taken to notify the owner of the foreclosure proceedings, "nothing in the Federal Constitution prevents this." *Id.* at 110. And even though such a regime can, in the rare case, be "harsh" or result in "extreme hardships," *id.* at 110–111, relief "is the responsibility of the state legislature and not of the courts." *Id.* at 111. That is because the consequences are a result of the taxpayer's own actions, not those of the government. *Sheehan v Suffolk County*, 490 NE2d 523, 525–526 (NY, 1986).

II. Plaintiffs have no claim for unjust enrichment.

It was also suggested at oral argument that this Court has already held, in *Dean v Michigan Department of Natural* Resources, 399 Mich 84; 247 NW2d 876 (1976), that it is unjust enrichment for a governmental foreclosing entity to keep surplus equity when foreclosing on a property for non-payment of taxes. For numerous reasons, *Dean* is of no help to Plaintiffs here.

First, Plaintiffs did not plead an unjust-enrichment claim and abandoned any such claim on appeal. App. 65a–66a n6. For good reason. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designated specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987) (citing 2A Sands, *Sutherland*

Statutory Construction (4th ed), § 50:05, pp 440–441). And here, the General Property Tax Act is such a statute. It has carefully reticulated notice procedures and prescribes precisely when a taxpayer must act and how to do so. There is no room for a common law unjust-enrichment theory given this comprehensive regulation. As the trial court concluded in denying Plaintiffs' motion for reconsideration and for leave to amend, "[t]here is no common law claim for unjust enrichment because it was superseded and replaced by the GPTA." 12/8/15 Order, App 57a.

Second, *Dean*, decided more than 20 years before the complete overhaul of the GPTA in 1999, did *not* hold that the plaintiff there had proven unjust enrichment or that such a claim was even viable; the Court said only that a claim was not barred by the limitations period or the foreclosure judgment. 399 Mich at 93–94.

Third, unjust enrichment depends on a defendant's "unjust retention of a benefit owed to another." *Wright v Genesee County*, 504 Mich 410, 418; 934 N2d 905 (2019) (citing Restatement Restitution, 1st, § 1, comment a, p 12). A claim for unjust enrichment arises only when a party "has and retains money or benefits which in justice and equity belong to another." *Id.* (citing *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 583 91952)). "In keeping with the doctrine's focus on the *unjust* nature of the enrichment, 'it is well settled that restitution will be denied where application of the doctrine would involve a violation or frustration of the law.'" *McBride v Boughton*, 123 Cal App 4th 379, 389 (2004) (cleaned up). Here, recognizing a new, unjust-enrichment claim would most certainly frustrate the GPTA. Indeed, such a claim would eviscerate the carefully reticulated statutory scheme entirely.

Fourth, as this Court explained in *Wright*, an unjust-enrichment claim must always be grounded in equity. 504 Mich at 418 (citing McCreary, 333 Mich at 294). And a complainant seeking equity from a court must do so with so-called "clean hands." *McKesson v Davenport*, 83 Mich 211, 217; 47 NW 100 (1890). When debtors fail to make payments for debts that are legally required, they "do not come into court with clean hands." *Id.* And yet that is precisely the posture of Plaintiffs' claims here. Unlike in *Dean*, where the plaintiff engaged in good-faith efforts to redeem her property, Plaintiffs ignored multiple notices and allowed their properties to be foreclosed for the nonpayment of taxes. The Court should not use equitable principles to reward Plaintiffs for failing to pay tax debts or responding to court notices.

Fifth—and consistent with their failure to even bring an unjust-enrichment claim in their Complaint—Plaintiffs do not really want to pursue such a claim. In their answer opposing the County's motion for leave to file this supplemental brief, Plaintiffs urged the Court not to address the unjust-enrichment question and instead insisted they have stated a claim for a taking. 11/25/19 Pls' Opp Br, pp 2. That is because the plaintiffs in the class-action lawsuits currently pending in every single Michigan state and federal court want a windfall far greater than they could obtain through unjust enrichment: 125% of the fair market value of their properties at the time of foreclosure plus attorney fees. (That is why Plaintiffs say their remedy may be more than surplus proceeds from a tax sale.) Such an outcome could devastate county budgets that support law-enforcement activities such as the sheriff, prosecutor, courts, 9-1-1 systems, health services, and other vital services.

Finally, Plaintiffs' unjust-enrichment theory suffers from the same fatal flaw as their takings' theory: it respects no deadline whatsoever. For example, if the Legislature were to enact a version of HB 4219 that included a 90-day window for property owners to seek a return of any surplus from a tax sale (over and above the amount of back taxes, penalties, and interest owed), and a delinquent taxpayer failed to file a claim until day 91, Plaintiffs would still say a taking or unjust enrichment had occurred. There is no self-limiting principle. And Plaintiffs do not explain why they are entitled to any post-foreclosure remedy when they failed to avail themselves of their numerous *pre*-foreclosure remedies and allowed their property to be forfeited for the nonpayment of taxes. This Court should decline to adopt any alternative, unjust-enrichment theory that would allow Plaintiffs to avoid the natural consequences of their own inaction and failure to respond.

III. None of the unique language of the takings provision in Michigan's Constitution changes the analysis.

It was also suggested at oral argument that unique language in Article X, § 2 of Michigan's Constitution might be the proper way to resolve this case. Not so.

Section 2 begins by stating that: "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." This prohibition is substantively identical to its federal counterpart, the Fifth Amendment to the U.S. Constitution, which states that "private property [shall not] be taken for public use, without just compensation." But § 2 then goes further and explains that a 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*." 1963 Const art X, § 2 (emphasis added). The suggestion is that when a county forecloses on a tax-delinquent property and obtains more money in a subsequent sale than the amount of back taxes, interest, and penalties owed, then the county has improperly enhanced its tax revenue. But that is not at all what § 2 prohibits.

The genesis for § 2 was the U.S. Supreme Court's decision in *Kelo v City of New London*, 545 U.S. 469 (2005), which held, 5-4, that a "public use" under the federal Takings Clause included the transfer of land from one private owner to another private owner to further economic development or for the enhancement of government tax revenues. This Court reached the exact opposite conclusion in *Wayne County v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). But disturbed by the outcome in *Kelo*, Michigan citizens amended the State Constitution to ensure that *Kelo* would never become the law of Michigan.

Hence, § 2 was amended to exclude from the definition of "public use" the taking of private property for transfer to another private owner for the purpose of economic development or enhancement of tax revenues." In context, the original public meaning of this exclusion was straightforward: a Michigan government cannot take private property and give it to a private party "for the purpose [1] of economic development or [2] of enhancement of tax revenues." The prefatory clause—"transfer to a private entity"—modifies both subsequent phrases, including "enhancement of tax revenues." As the Mackinac Center for Public Policy explained Proposal 4 (the ballot measure that added this new language), this language was understood only to codify anti-*Kelo* principles:

> Proposal 4 would place an explicit prohibition in the Michigan Constitution on any government takings for the purpose of economic development or the enhancement of tax revenue. Economic development and enhancement of tax revenue are two of the justifications cited by the city of New London, Conn., in the *Kelo* taking. Those rationales were also cited by the Michigan Supreme Court in the 1981 *Poletown Neighborhood Council v. Detroit* decision, [410 Mich 616 (1981),] which allowed an entire community to be taken and converted into an auto plant. The legal rationale behind the *Poletown* ruling has since has been overturned [by this Court's ruling in *Hathcock*]. [Patrick J. Wright, *Policy Brief: The Provisions of Proposal 4* (Oct 5, 2006), https://bit.ly/38uDBmY.]

This case, of course, is nothing like *Kelo* because it does not involve a property transfer from one private property owner to another. Instead, it arises from the nonpayment of taxes and a relinquishment via tax foreclosure that resulted in fee-simple title vesting absolutely in Oakland County. Accordingly, the anti-*Kelo* language in Article X, § 2 does not impact the outcome here.

Plaintiffs have not disputed this point. They did not invoke this unique language in § 2 in their merits briefing. *And in response to Oakland County's request for supplemental briefing, Plaintiffs did not defend the language as a reason to rule in their favor*. Instead, Plaintiffs asked the Court to hold that, when a property owner voluntarily relinquishes real property for the nonpayment of taxes, such relinquishment is a taking under the federal Constitution. 11/25/19 Pls' Opp Br, pp 3–4. That result is inconsistent with the weight of federal and state authorities across the country. And as a practical matter, it would end the current tax-foreclosure regulatory regime. No foreclosing entity would be willing to take the risk that, after foreclosure and sale, a property owner may come back and sue for 125% of the property's fair market value plus attorney fees.

When governmental entities stop foreclosing, property-tax revenues inevitably plummet. When the City of Detroit started ignoring tax-delinquent properties because there were too many to foreclose, the percentage of property owners who paid their tax bills dropped to about 50%, depriving the City of some $246.5 *million* in taxes and fees that otherwise would have supported the City, Wayne County, Detroit Public Schools, and the Detroit Public Library. Christine MacDonald & Mike Wilkinson, The Detroit News, *Half of Detroit property owners do not pay taxes* (originally published Feb 21, 2013, updated June 14, 2018), https://bit.ly/2qIfkIZ. Seventy-seven City blocks had only *one* owner who paid taxes. *Id.* Yet this is the very tax regime Plaintiffs ask this Court to impose on state and local governments. As the U.S. Supreme Court held in *Nelson*, that request should be referred to the Legislature for relief. 352 U.S. at 111.

CONCLUSION AND RELIEF REQUESTED

This Court should follow the U.S. Supreme Court's decision in *Nelson*, affirm the unanimous Court of Appeals and Circuit Court opinions, and hold that a delinquent property owner who desires to keep alleged excess equity in real property has three choices: (1) pay the taxes and keep the property, (2) sell the property, pay the taxes out of the proceeds, and keep any surplus, or (3) persuade the Legislature and the Governor to enact legislation awarding the owner any excess equity, even when the owner flatly refuses to exercise any responsibility by taking steps (1) or (2). Alternatively, the Court could dismiss this appeal as improvidently granted.

The Legislature may, in fact, take action to address this issue by enacting a version of HB 4219 that includes a window for property owners who have already been affected by a foreclosure of their tax-delinquent property to seek a return of any surplus from a tax sale over and above the amount of back taxes, penalties, and interest owed. Such legislation could, among other things, impose a reasonable time limit for submitting a claim, eliminate class claims that inevitably involve differing equities and individualized damages, limit attorney fees if appropriate to protect property owners, and specify the rules for calculating damages. A court ruling could impose very few of those reasonable requirements.

Respectfully submitted,

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