STATE OF MICHIGAN
IN THE SUPREME COURT

2 CROOKED CREEK LLC, an Indiana limited liability company, and RUSSIAN FERRO ALLOYS, INC., an Indiana corporation,

Plaintiffs-Appellants,

v

TREASURER OF THE COUNTY OF CASS,

Defendant-Appellee.
_____/

Michigan Supreme Court No. 159856

Court of Appeals No. 342797

Court of Claims No. 14-000181-MZ

SUPPLEMENTAL REPLY BRIEF OF 2 CROOKED CREEK LLC AND RUSSIAN FERRO ALLOYS, INC.

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INTRODUCTION

The Treasurer's supplemental brief is most notable for what it does not say: it fails to identify even a single instance under its interpretation in which MCL 211.78*l* would do any work. But there is no reason to think that this omission results from a lack of effort on the Treasurer's part; rather, it follows from the reality that her interpretation necessarily renders § 78*l* a dead letter. After all, if § 78*l* does not apply when a foreclosing government has provided constructive notice sufficient to satisfy due process, then § 78*l* will apply only when a constitutional violation has occurred, which means § 78*l* will never be needed. That alone demonstrates that the interpretation adopted by the Court of Appeals cannot reflect the Legislature's intent, for it is "a fundamental rule of statutory construction . . . that the Legislature did not intend to do a useless thing." *City of S Haven v Van Buren Co Bd of Com'rs*, 478 Mich 518, 532 (2007) (per curiam).

REPLY ARGUMENT

I. The Treasurer misinterprets § 78*l*.

A. The statutory structure and context do not support the Treasurer's interpretation.

The Treasurer offers one response to 2CC's and RFA's arguments about the statutory structure. According to the Treasurer (at 14), § 78(2) governs the scope of the entire act and reveals that the Legislature intended to limit the entire act, including § 78*l*, to claims for "deprivation of due process . . . ." But the Treasurer

fails to address either of the two limitations included in § 78(2)'s plain text that give it a much narrower scope.

First, § 78(2)'s plain language shows it does not govern the entire act: it addresses only "the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes." MCL 211.78(2). And this plain language shows that § 78(2) does not limit § 78*l*, because § 78*l* is not one of "those provisions." MCL 211.78(2). As explained in our supplemental brief (at 11–12), § 78*l* does not relate to the *return* of the property (because it expressly forbids "an action for possession of the property"—i.e., for the property's return), and it provides no mechanism for undoing either the *forfeiture* or the *foreclosure* (because it applies only after "a judgment of foreclosure is entered" and because it authorizes only money damages, not a reversal of the forfeiture or foreclosure). MCL 211.78*l*(1). The Treasurer never addresses this "return, forfeiture, and foreclosure" language or even attempts to rebut these textual points.

Second, and again as explained in our supplemental brief (at 12–13), § 78(2) is a directive to the courts to refrain from "constru[ing]" "a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes" to "create a claim" that extends beyond the minimum requirements of due process. MCL 211.78(2). This provision is not a directive to the courts to ignore the fact that the Legislature itself created a cause of action in § 78*l*, which applies *post*-foreclosure. Nor does the Treasurer offer any explanation for why the Legislature repeatedly used language in § 78*l*—in MCL 211.78*l*(1), (2), (3), (4), and (5)—that

expressly creates a cause of action and a right to sue if the Legislature did not want that cause of action to ever be used. 2CC's Suppl Br, p 13.

B. The text of § 78*l* does not support the Treasurer's interpretation either.

Turning to the text of § 78*l*, the Treasurer appears to argue (at 14–16) that § 78(2) proves that the phrase "any notice required under the act" in § 78*l* must mean constructive notice, because § 78(2) shows that the act requires only constructive notice, not actual notice. But just as the Treasurer overlooked language in § 78(2), she also overlooks language in § 78*l*. Specifically, she isolates the phrase "any notice required under the act" from the word that immediately proceeds it: § 78*l* creates a cause of action for interest holders who "did not *receive* any notice required under this act." MCL 211.78*l* (emphasis added). And as explained in our supplemental brief (at 14–16), the ordinary meaning of "did not receive" does not fit with the concept of constructive notice. One does not *receive* constructive notice; indeed, that is the whole point of constructive notice—that the law imputes notice to someone regardless of whether the person received it. Read in context, the Legislature's use of the word "receive" shows that it intended to create a cause of action for interest holders who did not actually receive notice. And the Treasurer does not deny that the lower courts both acknowledged that they were deviating from the plain meaning of the word "receive," by using scare quotes when saying 2CC "received" constructive notice and by saying 2CC was "charged with having received" notice. Appellants' App 15a, 16a, 33a, 35a, & 36a. In fact, the Treasurer

even puts the words "constructively received" in scare quotes (at 15), which is consistent with the fact the phrase is an oxymoron.

The Treasurer also argues that the phrase "did not receive" means the same thing as "was not given." Treasurer's Suppl Br, p 19. But here too common usage cuts against the Treasurer. If a father tells his daughter that he mailed a gift of $50 to her at college, but she never receives it, she would probably not say to her friends that she was given $50. Basic principles of property law would be on her side, as one cannot accept a gift that was never received. E.g., *Green v Langdon*, 28 Mich 221, 225 (1873) (explaining that in the eyes of the law, a gift is not valid if it is not accepted: "[d]oubtless" for "a gift *inter vivos*, delivery and acceptance were essential to its validity").

Turning to the word "any," the Treasurer now agrees (at 17) that fixating too closely on the word "any" is not helpful. This concession undercuts her argument, as the Court of Appeals' sole textual ground for its decision was the word "any." See Appellants' App 30a–31a. Further, she affirmatively acknowledges that context is important when interpreting the word "any": she notes that the entry in Black's Law Dictionary for the word "any" specifically advises that "its meaning in a given statute depends upon the context and the subject matter of the statute." Treasurer's Br, p 17. And the statutory context is why the Treasurer's argument fails. In the context here, where § 78*l* does not come into play under the statutory structure until after there has been a constitutionally valid foreclosure—that is, one that was

preceded by a high level of constructive notice—the phrase "any notice" necessarily refers to actual notice.

Although confronted with numerous examples showing this common usage, 2CC's Suppl Br, pp 16–21, the Treasurer does not offer a response to even a single one. Instead, she provides yet another example by using the phrase "did not receive any notice" to mean "did not receive actual notice": after mentioning "Mr. Antipov's testimony that he did not receive *any notice* of tax foreclosure proceedings," she correctly recognizes that this testimony was about the fact that 2CC "did not receive '*actual*' *notice*.'" Treasurer's Br, pp 23–24 (emphasis added).

And perhaps most notably, the Treasurer does not even address this Court's own usage in *Perfecting Church*, where this Court treated the phrase "any notice" in § 78*l* as meaning "actual notice." *In re Treasurer of Wayne Co for Foreclosure (Perfecting Church)*, 478 Mich 1, 8, 10 (2007). Yet *Perfecting Church* shows that this Court also understood § 78*l*'s plain language, in its statutory context, to provide "a damages remedy that is not constitutionally required" in "situations in which constitutional notice is provided, but the property owner does not receive actual notice." *Id.* at 10.

C. The Treasurer's proposed limitation on which unrecorded interests are covered by § 78*l* is not supported by the text.

Even though § 78*l* expressly extends its cause of action to those who hold an "unrecorded" interest in the foreclosed property, the Treasurer argues that only those interest holders who qualify under § 78i(6) can benefit from § 78*l*. Treasurer's

Br, pp 20–21. But again the Treasurer fails to grapple with the statute's actual text. As explained in our supplemental brief (at 24–25), the limitation found in § 78i(6)—that a treasurer needs to look only at the interests recorded before the certificate of forfeiture is recorded—is expressly limited to those entitled to notice "under this section." MCL 211.78i(6). Here, RFA is entitled to notice under a different section, namely § 78a(4). The Treasurer never addresses the plain language of § 78a(4), which imposed on her an obligation to notify RFA: "The county treasurer *shall* notify . . . holders of undischarged mortgages if delinquent taxes on the property are returned within the year." MCL 211.78a(4) (emphasis added). That plain text covers RFA, the holder of an undischarged mortgage.

Instead of responding to the fact that her interpretation rewrites three parts of the statute—it (1) removes the word "unrecorded" from § 78*l*, (2) removes the words "under this section" from § 78i(6), and (3) reads into § 78a(4) a limitation not present in the statutory text—the Treasurer relies on policy arguments. She argues that "[t]here is no reasonable manner" in which local governments could find unrecorded interests. Treasurer's Suppl Br, p 21. But the mortgage in this case can be considered "unrecorded" only if the limitation found in § 78i(6)—that the interest must be recorded "before the county treasurer records the certificate" of forfeiture, MCL 211.78i(6)—is copied and pasted into § 78a(4). But see *Hegadorn v Dep't of Human Services Dir*, 503 Mich 231, 261 (2019) (recognizing a legislature is presumed to act "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act"). In this

case, the mortgage interest was recorded in the County's own records, on July 10, 2013, more than eight months before the redemption period expired. It should not be "too great a burden," as the Treasurer contends (at 21), for the County to be aware of the contents of its own records on a property that it is about to take from the property owner. Indeed, this issue can be resolved narrowly in this case without reaching the "unrecorded" issue, simply by recognizing that RFA's interest *was recorded* and by holding that § 78i(6)'s identifiable-before-the-date limitation does not apply under § 78a(4).

But even as to the broader issue about "unrecorded" interests that are not in a county's own records, a policy argument cannot overcome plain statutory text: "The county treasurer shall notify . . . holders of undischarged mortgages if delinquent taxes on the property are returned within the year," MCL 211.78a(4), and "the owner of any extinguished . . . unrecorded interest" who "did not receive any notice required under this act . . . may . . . bring an action to recover monetary damages as provided in this section," MCL 211.78*l*(1). As this Court has previously explained, an argument that something is a bad policy "is directed at the wrong branch of government." *Johnson v Recca*, 492 Mich 169, 187 (2012) ("It is to be assumed that the legislature had full knowledge of the provisions and we have no right to enter the legislative field and, upon assumption of unintentional omission, supply what we may think might well have been incorporated.") (cleaned up); see also *Dye by Siporin & Assocs, Inc v Esurance Prop & Cas Ins Co*, 504 Mich 167, 180 (2019) ("Neither will this Court 'rewrite the plain statutory language and substitute

our own policy decisions for those already made by the Legislature.'"); *People v Harris*, 499 Mich 332, 345 (2016) ("The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature. Our role as members of the judiciary is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result.") (footnote omitted).

The Treasurer is also wrong in contending that giving effect to § 78*l*'s text will allow taxpayers "to avoid foreclosure and consequently forever avoid paying their taxes," Treasurer's Suppl Br, p 16. Neither of those results occurs under § 78*l*; indeed, if the plaintiffs here ultimately prevail under § 78*l*, the foreclosure will not be undone, and the County will have its tax debt satisfied. The only result will be that the County has to return all money it kept *in excess of* the tax debt.

II. The Treasurer's other arguments also fail.

While the Treasurer asserts that the appellants have cited facts not part of the record below, she does not identify which facts she is referring to. Treasurer's Suppl Br, pp 3, 4 n 5. But there are factual allegations that the Treasurer cites that were not before the Court of Claims and that therefore are not part of the record in this case. Specifically, she refers to affidavits (by James Frye and two subcontractors), but those affidavits were not presented to the Court of Claims and were not a basis for its decision. See Treasurer's Suppl Br, p 11 (acknowledging that those affidavits were filed in a separate case, in the circuit court), 27; Appellants' App 1a–18a (Court of Claims' opinion never mentioning Frye or subcontractor

affidavits); see also Treasurer's Suppl Br, p 12 (noting that Frye was "available to testify," but not mentioning that he did not actually testify).

The Treasurer also tries to dismiss the evidence of the value of the property by characterizing testimony about its value as non-responsive. But Sergei Antipov's testimony was responsive. The Treasurer's counsel asked Antipov the basis for the $3.5 million mortgage, and he replied that it was based on the house's value:

> Q. Okay. Now, the mortgage is 3.5 million dollars?
>
> A. Correct.
>
> Q. Does that number reflect anything?
>
> A. That's the value of the house.
>
> Q. Okay. That's the money you put into the house or the land or do I have that wrong?
>
> A. No. The money that was put in the improvements of the land and then the land itself equals 3.4; something like that. [TR. 121:15–23.]

That testimony by itself is sufficient reason to reject the Court of Claims' alternate ruling (not adopted by the Court of Appeals) that the plaintiffs failed to submit any evidence of damages. Further, the Treasurer cannot seriously dispute that the plaintiffs suffered a financial loss when she herself concedes that this property in 2014 (i.e., at the time of the foreclosure) was an "almost complete luxury home," Treasurer's Suppl Br, p 4–5, and when she relies on an appraisal of the property for $1.6 million, Treasurer's Suppl Br, p 10, an amount that, while too low, is still more than 100 times the amount of the roughly $14,000 tax debt.

CONCLUSION AND RELIEF REQUESTED

For these reasons, this Court should grant the application, reverse the decision of the Court of Appeals, and hold (to borrow from this Court's words in *Perfecting Church*) that "MCL 211.78*l* provides . . . a damages remedy" in "those situations in which constitutional notice is provided, but the property owner does not receive actual notice," 478 Mich at 10. Further, because the bench trial was only partially completed (because the case was dismissed at the close of the plaintiffs' proofs) and because the Court of Claims' judge who was the fact finder has retired, this Court should remand for a new trial before the new fact finder.

Respectfully submitted,

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