STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ

2 CROOKED CREEK LLC and RUSSIAN ALLOYS, INC.,

Plaintiffs-Appellants,

v

CASS COUNTY TREASURER,

Defendant-Appellee.
_____/

Supreme Court No. 159856

Court of Appeals No. 342797

Court of Claims No. 14-000181-MZ

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

BRIEF OF AMICUS CURIAE MICHIGAN DEPARTMENT OF TREASURY

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Department of Treasury is the Foreclosing Governmental Unit (FGU) in eight of Michigan's 83 counties under MCL 211.78(3), provides standard forms required under the property tax collection sections of the law (e.g., MCL 211.78g(2); 78g(6)), and serves a general supervisory role under Michigan's General Property Tax Act (GPTA) as provided in MCL 211.57a. Treasury has a keen interest in the proper interpretation and application of the GPTA, especially as to the tax foreclosure provisions at issue here given Treasury's role as FGU.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Together, MCL 211.78k and MCL 211.78*l* originally provided that property owners had to exercise their statutory rights to pay the taxes, seek relief from the circuit court, appeal to the court of appeals, or otherwise act prior to March 31. After that date, tax foreclosures were final no matter the circumstances, and the only remedy was a claim for monetary damages in the Michigan Court of Claims.

That included property owners that were not provided due process prior the foreclosure, a scenario this Court held was, and is, unconstitutional. *In re Treasurer of Wayne County, (Perfecting Church)*, 478 Mich 1 (2007). Now a circuit court's judgment of foreclosure under MCL 211.78k is only final, depriving the circuit court of jurisdiction to modify its order, if the FGU's efforts in *sending* notice satisfied constitutional due process requirements. Yet MCL 211.78*l*, referencing damages claims that require a threshold showing that the claimant did not "receive any notice required under [the tax foreclosure act]," remains valid Michigan law.

1. Was the trial court correct when it reviewed the facts relative to notice and held that the Property Owner was not entitled to damages?

Property Owner's answer:	No.
County's answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.
Treasury's answer:	Yes.

2. Does the statute require any additional notice to mortgage holders beyond what was provided in this case?

Property Owner's answer:	Yes.
County's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.
Treasury's answer:	No.

STATUTE INVOLVED

MCL 211.78*l* provides:

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

(2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

(3) An action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k.

(4) Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the interest in the property held by the person bringing the action under this section on that date, less any taxes, interest, penalties, and fees owed on the property as of that date.

(5) The right to sue for monetary damages under this section is not transferable except by testate or intestate succession.

INTRODUCTION

The primary question in this case is whether the damages provision in MCL 211.78*l* requires a claimant to allege that *one* of the many notices required under this taxing statute was not received or whether the claimant must allege that *none* of the notices required under the act were received. In other words, is this about technical non-compliance (one missed notice amongst many) or does the damages provision only apply if no notice was provided?

The Court of Appeals held that foreclosed property owners must show that they received no notice, including measures that provide constructive notice, and that the claimants were not entitled to damages. Treasury argues that the Court of Appeals was correct. The statute does not require "actual notice," but provides a "right to sue" if a claimant shows it "did not receive any notice required" under the law, making it one of two avenues for relief, after *In re Treasurer of Wayne County, (Perfecting Church)*, 478 Mich 1 (2007), for property owners that are foreclosed for unpaid property taxes but had no notice of the pending foreclosure.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus curiae was not a party to the initial tax foreclosure or the subsequent litigation and therefore adopts the facts as determined by the two trial courts, the circuit court in the prior action and the Court of Claims in the instant case, as affirmed and relied upon by the Court of Appeals. The amicus offers some background legal points for this Court on the statutory provision at issue.

A. History of the Damages Provision

As originally written, the damages provision in MCL 211.78*l* was the only remedy for a tax foreclosure that was final under Michigan law. That was true whether or not the foreclosure was preceded by adequate notice; the plain language of the statute limited relief to monetary damages, even for due process violations. In *In re Treasurer of Wayne County, (Perfecting Church)*, 478 Mich 1 (2007), this Court held that:

> [T]he intervening parties respond that regardless of the property owner's claim, the statute only provides for one remedy once the redemption and appeals period has passed—a claim for monetary damages under MCL 211.78*l* . . . we believe that the intervening parties' interpretation of the GPTA is correct. [478 Mich at 462.]

This provision worked in harmony with the jurisdictional limitation in MCL 211.78k which, regardless of the circumstances, dictated that the circuit court's judgment of foreclosure was final and could not be "modified, stayed, or held invalid after March 31," the deadline set by law. *Id* at 470, quoting MCL 211.78k(5)(g).

This bright line approach to tax foreclosure was an attempt to avoid extended tax delinquencies and title dispute litigation and came in direct response to the prior statute (pre-1999); under the old system tax delinquencies often extended for six or more years and still resulted in cloud on title. The "amendments . . . streamlined and expedited the real property tax foreclosure process" in comparison to the outgoing statute. 478 Mich at 463 (Weaver, J., concurring). This was done "to encourage[e] the efficient and expeditious return to productive use of property returned for delinquent taxes." *Id*.

The prior statute required tax lien sales to private lien buyers (as opposed to selling title to property like the current law) and over time could result in numerous competing lienholders giving inconsistent and incomplete efforts to foreclose on those liens. (*See* House Legislative Analysis, PA 123 of 1999, stating that, "It is important to note that properties that remain delinquent after the sale of a tax lien can come up for bid at subsequent tax sales for [later tax years]. It is therefore possible for several liens, held by different interests, to be outstanding on the tax delinquent property."[1]) These competing lien holders were then responsible for recouping payments from the property owner or foreclosing on the lien, and the latter required the private lien buyer to carry out the functions now completed by the FGU (e.g., do title work to discover other interest holders, provide each with notice, provide time to redeem, and only then foreclose). Those efforts were

[1] available at https://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/pdf/1999-HLA-4489-B.pdf

inconsistent and often incomplete, resulting in cloud on title that discouraged investment and impacted surrounding property values, further driving down tax revenue. *Id.*, citing Citizens Research Council, Delinquent Property Taxes as an Impediment to Development in Michigan, April 1999.

The Legislature, through 1999 PA 123, rewrote the entire delinquent property tax collection law to provide for improved notice procedures and more certainty—both as to tax collections and what happens after a tax foreclosure is final. In rewriting the law, the Legislature showed a clear preference for finality and ensuring clear title. (E.g., the Legislature expressed its desire to "encourag[e] the efficient and expeditious return to productive use of property returned for delinquent taxes." MCL 211.78(1).) The new law expedited the process, roughly halving the number of years from delinquency to foreclosure and moved from tax lien sales to deed sales.

B. The Statutory Notices

Although the Legislature sought to expedite the delinquent tax collection process and limit the ability to challenge a circuit court judgment of foreclosure, it did not do so at the expense of notice. Michigan's tax law provides for myriad notices over a nearly three year period, then frontloads the available remedies through the delinquency period and up through (and even after) the circuit court hearing, protections that meet and then exceed the procedures and protections upheld in *Nelson v City of New York*, 352 US 103 (1956). The law includes an extensive list of notices intended to provide notice of a pending tax foreclosure and

the rights and remedies available to avoid any property loss and to sort out the rights, responsibilities, and options available *before* foreclosure. Specifically, the county treasurer or FGU must send notice:

- On or after April 1 in the first year of delinquency to the property owner by first class mail with address correction requested under MCL 211.78b;
- On or after July 1 in the first year of delinquency to the property owner by first class mail with address correction requested under MCL 211.78c;
- No later than February 1 of the second year of delinquency to the property owner by certified mail return receipt requested, and by first class mail to any occupant, and by publication in a local newspaper or a website under MCL 211.78f;
- On March 1 of the second year of delinquency property is forfeited, and by that April the county treasurer must record a certificate of forfeiture with the county register of deeds under MCL 211.78g(2);
- No later than May 1 in the second year of delinquency (forfeiture stage), the county treasurer must begin title work and record searches for each parcel consistent with MCL 211.78i.
- The FGU must send each identified interest holder (and those requesting notice under MCL 211.78a(4)) the notices of pending foreclosure and hearing information by certified mail return receipt requested under MCL 211.78i(2);
- The FGU must visit each property and attempt hand delivery ("personally serve") the notice of foreclosure under MCL 211.78i(3). If personal service is possible, the FGU must also provide a verbal notice under that same provision. The FGU must also ascertain whether the person personally served appears to understand the explanation and, if not, take additional steps under MCL 211.78i(3)(c); or
- If unimproved (no building) or unoccupied (no one home) the FGU must attempt to post notice on the property under MCL 211.78i(3)(d);
- The FGU must take additional reasonable steps under MCL 211.78i(4) if it discovers one of the prior methods was ineffective;

- If a current mailing address is not available or if the FGU knows that mailings were incomplete the FGU may publish notice in a newspaper and/or on a website as a remedial measure under MCL 211.78i(5);

- Finally, the FGU must send tax delinquency, forfeiture, and foreclosure notices to requesting persons under MCL 211.78a(4), i.e., non–owners or those with an unrecorded property interest.

Each provides not only notice of delinquency but also notice of what will happen—foreclosure and loss of all right, title, and interest in the property—if the property owner does not take timely action before the statutory deadline. The notices explain the right to administrative and circuit court review, the right to redeem, and the right to object to the foreclosure or show cause why the property should not be foreclosed for unpaid taxes.

Yet, if those comprehensive notice provisions somehow fail to "satisfy the minimum requirements of due process," as set forth in MCL 211.78(1), the jurisdictional limitation and damages provision in MCL 211.78k and MCL 211.78*l*, respectively are "patently unconstitutional." *In re Treasurer for Wayne County (Perfecting Church),* 478 Mich 1, 10 (2007). Real property is not fungible and money damages do not provide an adequate remedy for a foreclosure without due process. *People v $176,598 United States Currency*, 242 Mich App 342, 347 n 4 (2000), citing *US v Sperry Corp*, 493 US 52 (1998). This Court struck the limiting provisions of MCL 211.78k and MCL 211.78*l* if due process is violated, allowing property owners to petition the circuit court to set aside the foreclosure. But this Court did not strike 78*l* entirely. The question before this Court, then, is what the statutory language means when it refers to a lack of "any notice."

STANDARD OF REVIEW

This Court has been asked to interpret and apply a statutory damages provision following tax foreclosure. Statutory interpretation presents a question of law that this Court reviews de novo. *In re Complaint of Rovas Against SBC Michigan,* 482 Mich 90, 97 (2008).

ARGUMENT

I. The property owner was not entitled to any damages award.

Michigan's property tax law requires an FGU to make extensive efforts to notify interest holders when real property is in danger of tax foreclosure. The comprehensive notice provisions evidence the Legislature's strong desire to ensure that each and every interest holder is aware of the delinquent taxes, the forfeited status of the property, the pending circuit court hearing (and opportunity to be heard by the circuit court on the matter), and the final deadline and amount to pay to avoid foreclosure. See *Republic Bank v Genesee County Treasurer*, 471 Mich 732, 737 (2005) (holding that the statute "imposes procedural safeguards in order to afford persons with an interest in [tax delinquent] property an opportunity to be heard. Among those safeguards are various notice requirements"). Notice, with time to make an informed decision, is vital to this tax collection statute.

The primary objective of every FGU should be collecting taxes, not acquiring real property. The way to show that priority is to make best efforts to provide each interest holder notice so that the owner can pay, appear in court to raise objections, or otherwise act before the foreclosure deadline. When, on the whole, the FGU provides notice even if one or more notices are not *received*, the FGU should not be held at fault for a property owner's failure to timely exercise statutory remedies.

Here, the property owner did not take action to protect its interests before the March 31 deadline. After the judgment of foreclosure was final under the statute, the property owner still had a chance to challenge sufficiency of pre-foreclosure

notice consistent with *Perfecting Church*; the circuit court that heard the original foreclosure action reviewed the notices and determined that due process was satisfied, and the Michigan Court of Appeals affirmed. *In re Petition of Cass County Treasurer for Foreclosure*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2016 (Docket No. 324519). The foreclosure was final.

The property owner then filed a claim under MCL 211.78*l* in the Court of Claims. As a threshold point, the statute requires the property owner not to have received "any" notice, meaning not a single one. The Court of Appeals correctly ruled on that issue. "[W]hen the Legislature stated that an owner must claim that it 'did not receive any notice required under the act,' it referred to the situation when an owner received no notice whatsoever." (App 031a.) And even apart from this point, the Court of Claims reviewed each of the property owner's claims relative to notice and held that, to the extent the property owner alleged that it "did not receive any notice required under" the tax law, the record did not support that allegation nor any damages award. This was the proper resolution.

A. The Court of Appeals correctly ruled that the property owner is not entitled to relief because it cannot show that it did not receive a single notice, i.e., "any notice," as the law requires.

The property owner argues that "MCL 211.78*l* awards damages for anything less than *actual* notice." (App 030a (emphasis in original).) The Court of Appeals disagreed, holding that the interpretation "flies in the face of the statute's actual language." (App 11.) Specifically, the Court of Appeals held that:

> Because 'any' is commonly understood to encompass a wide range of things," the Legislature did not intend to limit the notice referenced in MCL 211.78l to actual notice. Instead, when the Legislature stated that an owner must claim that it "did not receive any notice required under the act," it referred to the situation when an owner received no notice whatsoever. [App 031a, quoting *People v Harris*, 495 Mich 120, 131 (2014).]

For the reasons cited by the County Defendants and adopted by the Court of Appeals, that is the correct application of the statute's plain language.

Here, the property owner was not entitled to damages because it could not show it received "no notice." In reaching that conclusion, the Court of Claims considered credibility. (App 032a.) The Court of Claims determined that the property owner's notice claims were not credible. While the Court of Claims believed that the claimant "might not have appreciated the full extent of the consequences of some of the notices or that he otherwise took a cavalier attitude towards the same," the court "did not find his denial with regard to whether he received *any* notice to be credible." (App 032a-033a, quoting App 014a-015a.)

And beyond inferences and credibility determinations, the Court of Claims held that the property owner received constructive notice via posting on the property. (App 033.) The notice, "posted in a conspicuous place on the property," here affixed to the front door, was delivered "at a time when [the property owner] was exercising dominion and control over the property by contracting for the construction of a home on the property." (App 033a quoting App 016a.)

That type of notice—a posting on a property that had visible, recent, and ongoing activity on site—was sufficient to show that notice "was received . . . in accordance with the mandates of the statute," thereby negating a damage claim

under 78*l*. (App 033a quoting App 016a.) Notice was also published in a newspaper circulated in the county where the property is located. (App 034a.) After considering the record and forms of notice provided, including making credibility determinations as to the circumstances and parties' respective allegations, the Court of Claims determined that the property owner had received notice and damages were not warranted under 78*l*.

B. The damages provision in 78*l* was the only remedy for a lack of notice. Now it is one of two ways a foreclosed property owner may seek relief when a foreclosure occurs with no notice.

1. Now there are two remedies for insufficient notice.

The Court of Claims held that "the issue of whether plaintiff received due process has already been fully litigated" in the prior circuit court action. (App 028a quoting App 003a.) Yet, it also held that "the issue" in an action under 78*l* is whether a claimant is entitled to "monetary damages based on whether plaintiff received any notice required under the act." (*Id*.) The Court of Claims held that, in order to recover damages, the property owner first "had to establish that they did not receive any notice, notwithstanding the fact that the foreclosing governmental unit satisfied minimum due process requirement." (*Id*.) The lower court affirmed.

The outcome is correct under these facts; the damages provision in 78*l* is now one of two alternative remedies if a property is foreclosed for unpaid taxes without adequate notice. A litigant claiming a lack of notice may seek damages under MCL 211.78*l* or, after *Perfecting Church,* may seek relief from the judgment of foreclosure in circuit court. But no litigant should get two bites at the apple.

2. How the damages provision must work and how the Court of Claims applied the provision.

a. The FGU can only be responsible for damages if the claimant first shows it had no notice.

Whether a foreclosed property owner attempts to revive its redemption period (set aside the circuit court's judgment of foreclosure) or seeks monetary damages in the Court of Claims under 78*l,* the relevant inquiry is whether the owner was provided notice of the pending foreclosure. Under 78*l*, a property owner cannot reasonably claim that the FGU caused harm if the litigant received notice by any means while there was still time for the owner to exercise its rights to avoid tax foreclosure. The statute does not provide for monetary damages unless the claimant first asserts that it received "no notice whatsoever." (App 031a.)

This reading is consistent with this Court's discussion of 78*l* in *Perfecting Church* when it held that "the GPTA provides property owners who claim they did not receive any notice an action for monetary damages in the Court of Claims." 478 Mich at 461. "The only possible remedy for such a property owner would be an action for monetary damages *based on a claim that the property owner did not receive any notice." Id* at 462. In contrast, this Court also appeared to distinguish between "situations in which constitutional notice is provided, but the property owner does not receive actual notice," the latter referring to potential claims available under 78*l* "in cases where the foreclosure the [FGU] complies with the GPTA notice provisions." *Id* at 463. Yet, in either circumstance, a finding that at least *one* of the notices reached its mark must negate setting aside the foreclosure

(through a challenge in the original circuit court action) or an award of damages under 78*l* (in the Court of Claims); if the claimant received notice under the statutory provisions then the claimant, and not the FGU, is responsible for failure to timely take action.

b. How the Court of Claims applied 78*l*

The circuit court reviews the same factual record in a claim for return of property (under a due process analysis) that the Court of Claims considers in a damages claim under 78*l*. In that regard, the County and lower court are right—the circuit court's notice findings are subject to principles of collateral estoppel and res judicata. (App 034a, citing MRE 201(b) "[B]oth the trial court and this Court are permitted to take judicial notice of the facts contained in this Court's opinion in the previous appeal . . .".) Yet, the words "damages" and "receive" in 78*l* do imply a somewhat different legal analysis than the circuit court's due process review.

Due process, relative to notice, focuses on the actions of the sender. "[A]ny proceeding which is to be accorded finality" must be preceded by "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank &Trust Co*, 339 US 306, 314 (1950). Although actual notice is dispositive in favor of satisfying due process, it is not required to pass constitutional muster. Ultimately, regardless of actual notice, the "means [of attempting to provide notice] must be such as one desirous of actually informing

[the intended recipient] might adopt to accomplish it." *Id.* The Court of Claims noted this distinction, reviewed the notice record, again, and made its decision.

In that regard, *two separate* trial courts reviewed the same record as it relates to notice. Both determined that the property owner received notice, and each decision was affirmed on appeal. Those findings were supported because the FGU sent notice to the last known mailing address provided by the owner. (App 027a.) The FGU also posted notice on the real property the claimant owned, controlled, and had agents working at. (App 009a; 015a; 033a; 034a.) The record included a photograph showing notice posted on the front door of the home. (App 022a.) There was also testimony that the property owner's agent(s), i.e., construction workers building a home on the property, relayed the fact that notice was posted on the property to the property owner or the property owner's other agents via telephone. (App 022a; 034a, 043a.) The circuit court found that "there was evidence of activity on the property" at the time notice was posted, being the construction workers, confirmed by "at least three witnesses [that] indicated that they saw the posting." (App 034a, 035a.) The property owner's "dominion and control over the property by contracting for the construction of a home on the property" at the time when notice was affixed to the home showed that the property owner "received" notice "for purposes of MCL 211.78*l*." (App 033a.)

The trial courts also found that notice was published in a local newspaper. (App 023a; 044a; 045a.) The court found that additional first-class mailings were

sent, consistent with *Jones v Flowers*, 547 US 220, 234 (2006), after certified mailings were returned as "unclaimed" by the addressee. (App 035a; 036a.)

The property owner resided outside this state (i.e., did not use the subject property as a principal residence or primary mailing address) but did not update their mailing address with the local government when they moved from one out-of-state address to another. (App 027a; App 010a.) Nor did the property owner familiarize himself with Michigan property laws or property tax responsibilities. (App 027a.) Specifically, the owner "never updated [his] address with [the local or county governments] . . . because he 'didn't think that there was anything being issued to [the owner] to begin with,'" operating under the apparent assumption that since "he was waiting for the occupancy certificate" for the property he did not have any tax responsibilities. (App 027a.) Yet, in Michigan, "[e]very owner of land is held to know the law." *Cole v Shelp*, 98 Mich 56, 58 (1893). With that, "[h]e knows that his land is subject to taxation; that he must pay his fair share of the public revenue; and that, if he fails to do so, proceedings will be taken under the law against his land." *Id*. That is true of vacant land or improved property, whether the improvements are approved for occupancy or are not yet completed. MCL 211.1.

The Court of Claims also noted that the mortgage was not recorded until after the statutory title search was completed and the FGU had no duty under MCL 211.78i to "continually" update that title search thereafter. (App 028a.) The County had also recorded its certificate of forfeiture with the register of deeds under MCL 211.78g(2) before the mortgage was recorded. (App 028a.) That notice was

easily discoverable had someone searched the public record. (App 012a.) The damages provision requires a claim that "any notice required under this act" was not received. MCL 211.78*l*(1). The mortgage holder's claim is based on something *not* required by the statute: a "continually" updated title search. (App 028a.)

The circuit court found notice sufficient to satisfy due process without, perhaps, fully delving into the reasons why some of the notices were not received. (App 047a.) The Court of Claims considered the same record but also considered the facts and circumstances, including the credibility of the parties, and denied the property owner's damages claim. (App 022a, 028a.) The Court of Claims also held that the property owner did not prove any damages. (App 018a-019a.)

The Court of Claims looked behind the allegations as to receipt, including the posting of the property and alleged removal of that notice by the property owner's agents. (App 016a.) The trial court determined that the property owner's claims were unconvincing and that he had "no right to relief." (App 016a.) The Court found that "[the mortgage holder] was not entitled to notice under the GPTA . . . . [and] 2CC was not entitled to relief on the facts presented." (App 028a.)

In other words, regardless of the definition of "any" or the property owner's use of the words "actual notice" rather than "did not receive any notice," the Court of Claims let the property owner exercise the "right to sue for money damages" under 78*l*(5) and after allowing for further argument, the Court of Claims held that the property owner had notice, was provided all the notice it was entitled to under the statute, and did not show entitlement to damages.

3. A claimant must show it "did not receive any notice required" under the law. Constructive notice is still notice and the FGU is not required to show "actual notice" to avoid paying damages.

The property owner argues that the damages provision in 78*l* requires a showing of "actual notice," otherwise, they are entitled to damages. (Appellant's Br at 4, passim.) The Court of Appeals "rejected plaintiffs' position that only actual notice will prevent damages under MCL 211.78*l*." *2 Crooked Creek*, __ Mich App __, ____ (2019), slip op at 13. Separate from their misreading of the notice provision of the statute, see I.A above, the property owner's argument is flawed in two ways.

The statute does not use the word "actual"; it uses the words "did not receive any notice required under this act." MCL 211.78*l*(1). When "the language of the statute is plain as it reads" there is no authority or reason to "change its meaning by substituting another word for the one the Legislature used." *People v Crucible Steel Co of America*, 150 Mich 563, 567 (1907) (citations omitted). The property owner's argument not only adds words but effectively replaces the existing statutory language with "actual notice," a rewrite that unnecessarily complicates the analysis since, depending on the type of notice at issue, "receive" may mean different things.

Whether newspaper publication is considered an effective effort to give notice cannot turn on a property owner's decision to read or skip the notice section of the newspaper; the content of the published notice matters but the medium of print news has long been recognized as a reasonable measure—especially as one method among many employed here. See, e.g., *Briggs v Prevost,* 293 Mich 677 (1940) (reviewing the specific content of a published notice but never questioning the

sufficiency of published notices generally). Likewise, whether recording a certificate of forfeiture with the register of deeds is an effective method of providing notice cannot turn on whether a new mortgage holder is prudent in searching title before executing a mortgage. In fact, future interest holders are charged with notice under Michigan's real property laws if the FGU properly records its notice of forfeiture; notice of that type is received upon recording. MCL 565.29. Tax liens themselves, as distinct from forfeiture notices, need not be recorded to be effective. MCL 565.25. But even more specific to the issue at hand, after-acquired mortgage holders in land with unpaid property taxes are charged with notice of a pending tax foreclosure if the FGU complies with MCL 211.78g by recording a notice of forfeiture. That recorded notice "[specifies] that the property has been forfeited to the county treasurer" and if no action is taken "that absolute title to the property shall vest in the county treasurer on the March 31 [after] entry of a judgment foreclosing the property." MCL 211.78g(2).

And physically posting notice on an improved property when there are signs of activity at that property is an effective method of providing notice that cannot be negated by self-serving statements about what happened *after* the notice was properly posted. In fact, if "the addressee had moved" from the last known address without providing a new mailing address to the FGU a "reasonable follow-up measure . . . would be to post notice on the front door." *Sidun v Wayne County Treasurer*, 481 Mich 503, 512 (2008). In short, not every form of notice required by this statute is conducive to confirmed physical *receipt*, yet each method has long

been recognized under Michigan law as an acceptable way to provide notice. See, e.g., *Drabinski v Brown,* 296 Mich 463 (1941); *International Salt Co v Herrick*, 367 Mich 160 (1962). Posting notice on an active property, especially given the record and credibility determinations made in this case, is consistent with receiving notice.

The damages provision does not reference, much less require, actual notice. The property owner incorrectly assumes 78*l must* be a remedy for a different scenario than the circuit court's due process review—i.e., it must mean something other than receiving constructive notice. (Appellant Br at 7.) But that is not necessarily the case since that is *not* how the statute was originally written.

This Court, through *Perfecting Church*, recognized a second remedy: a return to the circuit court to set aside the foreclosure and revive the redemption period, including all statutory rights and remedies to pay, seek relief from the circuit court, or take other appropriate defensive actions; essentially thereby returning the property owner to the position it would have been in had notice been provided. But under 78*l*, at least as originally written, money damages were the only remedy, even if property was foreclosed without due process of law (i.e., without notice). *Perfecting Church* did not strike this remedy from the law, it expanded property owners rights; the damages provision is now one of two options to seek relief when a judgment of foreclosure is entered despite the fact that the property owner was unaware of the pending foreclosure action and, thus, could not act to protect its property interest. Or, a litigant may seek monetary damages under 78*l*.

But here the property owner received notice via posting and publication and any alleged lack of notice lacked credibility based on the record evidence.

II. The statute does not require any additional notice to mortgage holders beyond what was provided in this case.

The property owner claims that a mortgage, first recorded with the register of deeds after the property had already been forfeited to the FGU for unpaid property taxes and after the FGU had completed title work as required by the statute, nevertheless entitled the mortgage holder to notice that it did not receive. (App 027a.) Based on that premise, the mortgage holder claims that it is entitled to damages under *78l*. The Court of Claims disagreed, holding the mortgage holder was not entitled to any additional notice under these facts and the lower court affirmed. (App 037a.) That was the correct result.

Under this statute, the FGU must undertake title work not later than May 1 in the year a property is forfeited (two years behind on taxes) to the FGU. MCL 211.78i(1). The law requires "a title search," singular, followed by various notices "after conducting *the* search." MCL 211.78i(2) (emphasis added). Once that title work is completed the FGU must begin the process of sending notice to identified interest holders discovered in part through that title work.

But here the mortgage was executed after the certificate of forfeiture was already recorded; the property was already statutorily forfeited and notice of that status was publicly available through a title search, had the mortgage holder

completed such a search. (App 025a.) And the mortgage was first recorded after the FGU had already completed its title work as required by the statute. (*Id.*)

As the Court of Appeals held, if a mortgage holder "could maintain an action for damages under these circumstances," that "would only serve to encourage the recording of mortgages and other property interests without [first] checking the register of deeds." (App 037a.) And an FGU would never know about those after-recorded interests "absent an unduly burdensome requirement to daily check all title records," allowing lenders to "remain forever ignorant based on their own failure to review the [register of deeds]" yet leave the lender entitled to seek damages arising from their own lack of due diligence. (*Id.*)

Practically and legally there is no need for the FGU to continually update its title search; after the notice of forfeiture is recorded with the county register of deeds under MCL 211.78g(2) the burden reverses and after-acquired interest holders are charged with notice of the forfeiture and pending tax foreclosure. MCL 211.78k(5)(f). But just as important, the statute does not require the FGU to continually update its title search. (App 028a.) A damages claim predicated on a failure of a statutory requirement must start with a statutory requirement.

Finally, the mortgage holder is correct that "recorded and unrecorded" interest holders may bring claims under MCL 211.78*l*. But this mortgage holder cannot claim any right to notice because the phrase "recorded interest" is a property law term of art meaning recorded with a central registry. See, e.g., *Atwood v Bearss,* 47 Mich 72 (1881); *Dunn v Papenfus*, 202 Mich 131 (1918). In Michigan,

that is the appropriate county register of deeds office. MCL 565.29. So, while unrecorded interest holders may make a claim for damages under MCL 211.78*l*, only discoverable interest holders are entitled to notice. Like a potential purchaser of real property that needs to be sure there are no other interest holders or liens, the FGU must be able to readily identify present interest holders otherwise even the best of intentions to provide notice could be "defeated by a secret or pocket deed." *Gray v HM Loud & Sons Lumber Co*, 128 Mich 427, 434 (1901). Or, as here, an after-acquired or after-recorded mortgage that the FGU was unaware of.

Fortunately, unrecorded interest holders have a statutory device to protect themselves, beyond timely recording their interest or doing a prudent title search, as MCL 211.78a(4) also provides:

> Any person with an unrecorded property interest . . . who wishes at any time to receive notice of the return of delinquent taxes on a parcel of property may pay an annual fee not to exceed $5.00 by February 1 to the county treasurer and specify the parcel identification number, the address of the property, and the address to which the notice shall be sent. Holders of any undischarged mortgages wishing to receive notice . . . may provide a list of such parcels in a form prescribed by the county treasurer and pay an annual fee not to exceed $1.00 per parcel to the county treasurer and . . . .The county treasurer shall notify the person or holders of undischarged mortgages if delinquent taxes on the property or properties are returned within that year.

Nothing in the record indicates the claimant made such a request. This damages provision is predicated on a failure of statutory notice requirements ("any notice required under this act"), and the trial court was correct that "[the mortgage holder] was not entitled to notice under the GPTA." (App 028a.) Without a requirement, there can be no failure to meet that requirement. This Court should

affirm the Court of Appeals' decision because, after a thorough review by two trial courts and two appellate courts, under these facts, no relief is warranted.

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CONCLUSION AND RELIEF REQUESTED

This damages provision allows a claimant to assert that it "did not receive any notice required under" the delinquent tax collection law but does not use the words "actual" notice. Instead, using tort law language, it requires an initial showing that the claimant received no notice and then a showing of entitlement to damages. Here the property owner received notice and did not show damages.

The trial court allowed the property owner to make its case. Based on the trial court's thorough review of the record, including credibility determinations, the court found that the claimant received notice, no damages were warranted, and that the mortgage holder was not entitled to any additional notice beyond what the FGU provided. That is the correct result and the Michigan Department of Treasury asks that this Court affirm.

Respectfully submitted,

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