STATE OF MICHIGAN

IN THE COURT OF APPEALS

RUSSELL W. MITCHELL,

Plaintiff / Appellant,

vs.

MELANIE CAMPS, IRON COUNTY TREASURER,

Defendant / Appellee.

COA Docket No. 350182

Circuit Court No. 18-005707-CH

BRIEF ON APPEAL

*****Filed under AO 2019-6*****

ORAL ARGUMENT REQUESTED

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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STATEMENT OF JURISDICTION

Pursuant to MCR 7.203(A)(1), this Court exercises jurisdiction over appeals from final judgments or orders as defined by MCR 7.202. On July 22, 2019, the Circuit Court for the County of Iron, Judge Ninomiya presiding, entered an Order Granting a Second Motion for Summary Disposition in favor of Defendant-Appellant, Melanie Camps, in her capacity as Treasurer of Iron County, Michigan (App. 1a).

On August 12, 2019, Plaintiff-Appellant, Russell W. Mitchell timely filed a Claim of Appeal. Pursuant to MCR 7.202(6)(a)(i) and MCR 7.203(A)(1)(a), Appellant appeals the trial court's July 22, 2019 order and all rulings of law and issues preserved for review during the course of the underlying proceedings and those issues over which this Court has recognized it will exercise jurisdiction as law and justice may require.

This Court therefore has jurisdiction over Mr. Mitchell's Appeal of Right, as it is an appeal from a final judgment or order as defined in MCR 7.202(6)(a)(i).

QUESTIONS PRESENTED

This case involves a property-tax delinquency foreclosure under Michigan's General Property Tax Act (GPTA), MCL 211.1 et seq., of Mr. Mitchell's real property in Iron County, Michigan, for alleged non-payment of property taxes for the 2017 tax year, only. Appellee, Iron County Treasurer Melanie Camps, subsequently assumed ostensible title, control of and responsibility for Mr. Mitchell's real and personal property.

Mr. Mitchell filed suit to quiet title and for other relief alleging, inter alia, a violation of his constitutional rights under state and federal law. He also alleged that the Treasurer committed an unlawful conversion of his property. The Treasurer filed a motion for summary disposition arguing that Mr. Mitchell's constitutional rights in his property had not been violated. The Treasurer also argued that she was immune from liability for Mr. Mitchell's claims of wrongful conversion of property.

After a hearing held on July 10, 2019 (TR II), the trial court granted the Treasurer's motion for summary disposition.

Mr. Mitchell now challenges the trial court's order dismissing his case. He raises the following issues:

I. The United States Constitution, the Constitution of the State of Michigan and the General Property Tax Act (GPTA), require, at a minimum, notices be sent to a property owner's home address where the foreclosing governmental unit knows of the proper address, knows that prior efforts through certified mailings of the statutory notices to a post office box in Wisconsin were returned as undeliverable, and knows that the subject property is unoccupied.

Did Appellee's failure to provide this notice violate Appellant's constitutional rights?

Appellant answers: Yes.

Appellee answers: No.

Trial Court answers: No.

II. The United States Constitution, the Constitution of the State of Michigan and well-established principles of common-law prohibit the government from appropriating (taking) real and personal property without just and equitable compensation for the true value of such property.

Does a local government violate the constitution when it retains proceeds from a tax-foreclosed property, where the sale yields a windfall surplus over the amount of the tax delinquency?

Appellant Answers: Yes.

Appellee Answers: No.

Trial Court Answers: No.

III. Did the trial court err in dismissing Appellant's conversion claim on grounds of governmental immunity?

Appellant Answers: Yes.

Appellee Answers: No.

Trial Court Answers: No.

INTRODUCTION

The County Treasurer had Mr. Mitchell's proper physical home address in Wisconsin and failed to even attempt to send the notices to that address, opting instead to continue to send the notices to a post office box address that the Treasurer knew was not a viable address for Mr. Mitchell. By definition, this failure to make the necessary effort to reach out and inform a property owner of the substantial risk of losing his or her real property is a violation of the property owner's constitutional rights.

Mr. Mitchell has substantial constitutional property rights at stake in this tax foreclosure litigation. He owned six contiguous parcels in the Upper Peninsula of Michigan and has cultivated and improved this property over the course of his many years of ownership. It is undisputed that he holds a property interest in the subject property; accordingly, he has a constitutional right to due process before the government can take it. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508-09; 751 NW2d 453 (2008). Mr. Mitchell's fundamental constitutional property rights have been compromised without affording him the process that is due to him according to jurisprudence

interpreting and applying the GPTA, the Michigan Constitution of 1963 and the United States Constitution.[1]

Mr. Mitchell was not provided with the constitutionally required minimum, adequate notice of the judicial foreclosure proceedings. The Treasurer had the address to which the notices of foreclosure proceedings upon Mr. Mitchell's real property ***should have been sent*** – a proceeding in which Mr. Mitchell would be ***absolutely*** and ***finally*** deprived of his real property.[2] The Treasurer had knowledge of Mr. Mitchell's home address in Wisconsin and knew that he was not

[1] The Due Process Clause of the Michigan Constitution states: "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The corresponding provision of the United States Constitution is applicable to Michigan through the Fourteenth Amendment, and provides in part, "nor shall any person…be deprived of life, liberty, or property, without due process of law." US Const, Am V. See also *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508-09; 751 NW2d 453 (2008).

[2] Although the Treasurer contracted with a private entity, Title Check, LLC, to conduct the notices of foreclosure under the GPTA, the Treasurer is still responsible for the actions of private entities with whom it contracts for the exercise of the government's function of property tax foreclosures. (App. 2a – 5a, Contract between Iron County and Title Check, LLC). Interestingly enough, Title Check, LLC, which is responsible for sending the constitutionally adequate notices to the property owners of the foreclosure proceedings and tax delinquencies, also runs the auction house and disposes of the personal property. This scheme creates an automatic conflict of interest and it is specious at best to believe that this circumstance does not incentivize profiteering at the expense of the constitutional rights of property owners.

receiving the notices at the Property in Michigan, which was not being occupied by Mr. Mitchell, nor at the post office box in Wisconsin, after the notices sent to that address were returned as undeliverable. **Yet, the Treasurer failed to send the critical notices to Mr. Mitchell's home address in Wisconsin, even though that was the only reasonably certain way to actually inform him of the pending loss of his entire rights to his property. This is true even though the Treasurer admitted at her deposition that they had the proper home address and even sent the notice of the foreclosure judgment to that address in February 2018!**

In such circumstances, the United States Supreme Court has held, and the Michigan Supreme Court agrees, that "[d]eciding to take no further action ***is not what someone 'desirous of actually informing'*** [the property owner] would do; such a person ***would take further reasonable steps if any were available***." *Jones v Flowers*, 547 US 220, 230; 126 S Ct 1708; 164 L Ed 2d 415, 428 (2006); *Sidun*, 481 Mich at 511. The Treasurer pointed to no documents in support of her motion for summary disposition demonstrating that an affirmative effort was made to send the pre-judgment notices of the foreclosure and show cause proceedings to the known home address even receiving the

information that the notices were sent to a defunct post office box address and were returned undeliverable. What the Treasurer submitted was the *regular* and *minimum* evidence of the mailed, posted and published notices in keeping with the dates and requirements of the statutory scheme of the GPTA. However, as the Michigan Supreme Court has made clear referring to the GPTA, "[e]ven if ***a statutory scheme*** is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" *Sidun*, 481 Mich at 511, citing *Flowers*, 547 US at 230.

Here, the Treasurer cannot demonstrate that Mr. Mitchell was afforded his constitutionally ***due*** process when he was dispossessed of his real property for the nonpayment of property taxes for the 2017 tax year, because the county actually had the proper street address for Mr. Mitchell at his home in Wisconsin *before* the foreclosure and during the time the notices were being sent out by the contractor hired to both serve notice upon the taxpayer and to sell his or her property. Summary disposition was not warranted and the Circuit Court committed reversible error in grating the Treasurer's motion.

Additionally, Mr. Mitchell's statutory conversion claim under MCL 600.2919 sought to recoup the value of Mr. Mitchell's lost personal property that was upon and in the Property. As such, the Treasurer's governmental immunity defense to Mr. Mitchell's conversion claim is misplaced, as the Governmental *Tort* Liability Act (GTLA), MCL 691.1401 et seq. immunizes the governmental entity and governmental employees from *tort* liability, only, not compensatory claims based in the statutory conversion allowed under MCL 600.2919. The GPTA also allows monetary damages to be imposed, evidencing recognition that as against governmental entities and the officials that exercise authority over the foreclosure of properties with unpaid taxes, such claims are legislatively outside of the defense of immunity from *tort* liability. Moreover, recent Michigan jurisprudence suggests that the government may be liable for causes of action which are not seeking to impose traditional *tort* liability against the governmental entity or governmental official. In fact, the Michigan Supreme Court recently held that equitable claims seeking compensation for wrongful retention of property (in the form of refunds) and unjust enrichment are not subject to immunity. See *Wright v Genesee County*, 504 Mich 410; 934 NW2d 805 (July 18, 2019). A cause of action seeking restitution for the

loss of property does not sound in tort. The Supreme Court has now held that such claims *are not barred* by the GTLA. Mr. Mitchell respectfully suggests that recent case law in Michigan trends towards recognizing his claim for compensation for the wrongful conversion of his personal property notwithstanding governmental immunity from *tort* liability provided by the GTLA. Therefore, the Treasurer was not entitled to summary disposition on Mr. Mitchell conversion claims on immunity grounds and the Circuit Court erred in this regard as well.

Finally, and perhaps most importantly, the entire constitutionality and propriety of the property tax foreclosure system in Michigan is under severe scrutiny by the Michigan Supreme Court. See *Rafaeli LLC v Oakland County Treasurer*, Supreme Court Case No. 156849 (argued November 2019). Under the current scheme, Michigan county treasurers and their private-party contracted surrogates (auctioneers and title companies like Title Check LLC in this case, see App. 2a – 5a) are being allowed to reap extreme profits by foreclosing on real property with nominal or extremely disproportionate property taxes owing compared to the value of the property. This deprives the owners of equity and value that they have added to the property over many years of ownership. In other words, a county and third parties can profit by

having access to the entire remaining equity of real property because of a failure of the property owner (some of whom were, as in this case, deprived of due process) to pay his or her property taxes on time. This is true even where the amount owing in property taxes is a mere scintilla of the true value of the real property. In the instant case, even if this Court were to affirm the Circuit Court's ruling concerning affording Mr. Mitchell due process, the fact is that he spent years cultivating and improving his property and its current value is well in excess of the amount of taxes he owed on the property for the single tax year of 2017! This is a travesty of justice and the Supreme Court is poised to consider the continuing questionable viability of the GPTA and its effect of allowing this mercenary profiteering to take place.

In the least, this Court should hold this case in abeyance pending the outcome of *Rafaeli*.

BACKGROUND

The Treasurer (and the Treasurer's agent, Title Check, LLC (the same company that auctions the property for the county under a contract, see App. 2a – 5a) sent notices to a Post Office Box in Schofield, Wisconsin of Mr. Mitchell's tax delinquency for the 2017 tax year. In fact, as the Treasurer conceded at her deposition and at oral argument on her second motion for summary disposition, all of the notices leading up to the February 2018 judgment of foreclosure were sent to this defunct post office box address. Hearing Transcript, July 10, 2019 (TR II), p. 8, ll. 5-15. The Treasurer's Deposition Transcript is provided in the Appendix. (App. 6a – 63a)

As of December 2017, also conceded by the Treasurer, this post office box was closed, defunct and no longer a viable address. The mailings to this post office box attempting to provide notice to Mr. Mitchell were returned by the post office with a notice saying that the post office box had been closed, there was no forwarding address, and the items sent to that address were undeliverable. (TR II, ll.16-23; App. 65a – 84a, Mailings Notifying Returned as Undeliverable, and Notice of Judgment Mailing Proof at Proper Address in February 2018 (only after the judgment was entered on February 9, 2018)) In other words,

the Treasurer never sent the delinquency notices and pre-judgment hearing notices to Mr. Mitchell's home address even though it had this address and even though it sent regular tax bill notices to this address in the past. (App. 64a – 85a, Tracking Reports from Iron County Mailings).

On February 9, 2018, a judgment of foreclosure was entered. On April 2, 2018 the Treasurer asserted by virtue of operation of the GPTA absolute title to Mr. Mitchell's property.

Mr. Mitchell filed an action to quiet title and to set aside the foreclosure, asserting, inter alia, that his constitutional rights had been violated. (App. 86a – 120a) Mr. Mitchell also claimed conversion and sought compensation for the loss of his personal property. *Id*.

The Treasurer filed motions for summary disposition under MCR 2.116(C)(8) and 2.116(C)(10). The parties briefed the issue of whether Mr. Mitchell was afforded due process in the Treasurer's foreclosure proceedings under the GPTA. Hearing Transcript, July 10, 2019 (TR II). The Treasurer conceded that the Circuit Court had jurisdiction to consider the constitutional issues. TR II, p 6, ll. 7-15.

At the conclusion of the hearing, the Circuit Court granted summary disposition for the Treasurer reasoning that "actual notice" of the

foreclosure proceedings was not required and that ample effort was made by the Treasurer to provide notice to Mr. Mitchell. TR II, p. 30. The Circuit Court also held that the Treasurer was immune from Mr. Mitchell's statutory conversion claim.

LEGAL ARGUMENT AND ANALYSIS

I. THE TREASURER HAD THE PROPER PHYSICAL STREET ADDRESS FOR MR. MITCHELL AND YET CONTINUED TO SEND NOTICE OF HIS TAX DELINQUENCY TO A DEFUNCT POST OFFICE BOX ADDRESS. BY DEFINITION THIS CONSTITUTES A FAILURE TO AFFORD THE PROPERTY OWNER ADEQUATE DUE PROCESS IN FORECLOSING AND TAKING OF HIS REAL PROPERTY.

A. Summary of Argument

Appellant has substantial constitutional property rights at stake in this tax foreclosure litigation. It is undisputed that he holds a property interest in the subject property; accordingly, he has a constitutional right to due process *before* the government can take it. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508-09; 751 NW2d 453 (2008). Appellant's fundamental constitutional property rights have been compromised without affording him the process that is due to him according to jurisprudence interpreting and applying the GPTA, the Michigan Constitution of 1963 and the United States Constitution.[3]

[3] The Due Process Clause of the Michigan Constitution states: "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The corresponding provision of the United States Constitution is applicable to Michigan through the Fourteenth Amendment, and provides in part, "nor shall any person…be deprived of life, liberty, or property, without due process of law." US Const, Am V. See also *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508-09; 751 NW2d 453 (2008).

Appellant was not provided with the constitutionally required minimum, adequate notice of the judicial foreclosure proceedings. Appellee had the address to which the notices of foreclosure proceedings upon Appellant's real property ***should have been sent*** – a proceeding in which Appellant would be ***absolutely*** and ***finally*** deprived of his real property. Appellee had knowledge of Appellant's home address in Wisconsin and knew that he was not receiving the notices at the Property in Michigan, which was not being occupied by Appellant, nor at the post office box in Wisconsin, after the notices sent to that address were returned as undeliverable. **Yet, the Appellee failed to send the critical notices to Appellant's home address, even though that was the only reasonably certain way to actually inform him of the pending loss of his entire rights to his property.**

In such circumstances, the United States Supreme Court has held, and the Michigan Supreme Court agrees, that "[d]eciding to take no further action ***is not what someone 'desirous of actually informing'*** [the property owner] would do; such a person ***would take further reasonable steps if any were available***." *Jones v Flowers*, 547 US 220, 230; 126 S Ct 1708; 164 L Ed 2d 415, 428 (2006); *Sidun*, 481 Mich at 511. Appellee pointed to no documents in support of her summary

motions, which demonstrated an affirmative effort to send the notices of the foreclosure and show cause proceedings to the known, proper address after having received information that the prior notices of these proceedings sent to a post office box address were returned undeliverable. What Appellee submitted was the *regular* and *minimum* evidence of the mailed, posted and published notices in keeping with the dates and requirements of the statutory scheme of the GPTA.

However, as the Michigan Supreme Court has made clear referring to the GPTA, "[e]ven if ***a statutory scheme*** is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" *Sidun*, 481 Mich at 511 (emphasis added), citing *Flowers*, 547 US at 230. Here, Appellee cannot demonstrate that Appellant was afforded his constitutionally ***due*** process when he was dispossessed of his real property for the nonpayment of property taxes for the 2017 tax year.

B. Standard of Review

The standard of review is de novo. Mr. Mitchell raises constitutional issues related to the application by the Treasurer of the GPTA. Specifically, Mr. Mitchell contends that his due process rights were

violated by the Treasurer's application GPTA to foreclose upon his property for past due property taxes because the procedures followed by the Treasurer in its implementation of the GPTA's foreclosure provisions and the notices provided were constitutionally deficient. Whether due process has been afforded is a constitutional issue that is reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). Questions of statutory construction are also reviewed de novo. *Grimes v Mich DOT,* 475 Mich 72, 76; 715 NW2d 275 (2006). Finally, questions concerning the constitutionality of a statutory provision are subject to de novo review as well. *Wayne Co Treasurer v Perfecting Church (In re Treasurer of Wayne Foreclosure)*, 478 Mich 1, 15; 732 NW2d 458 (2007); *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

C. Applicable Law

This Court and the Michigan Supreme Court have held that constitutionally mandated due process protections provide that any proceeding under the GPTA that is said to have been conducted without due process may be challenged by the property owner on appeal. This includes appeals of both the foreclosure judgment, as well as of a denial of a post-judgment motion for relief from judgment. *Wayne Co*

Treasurer v Perfecting Church (In re Treasurer of Wayne Foreclosure), 478 Mich 1, 15; 732 NW2d 458 (2007); *Wayne County Treasurer v Westhaven Manor Ltd Dividend Hous Dev Ass'n (In re Wayne County Treasurer Foreclosure of Certain Lands for Unpaid Property Taxes)*, 265 Mich App 285, 293; 698 NW2d 879 (2005).

"When notice is a person's due, process which is a mere gesture is not due process." *Mullane v Central Hanover Bank & Trust,* 339 US 306, 314; 70 S Ct 652, 657; 94 L Ed 865 (1950). To be constitutionally adequate, notice must be "reasonably calculated, ***under all the circumstances***, to apprise interested parties…with due regard for the practicalities and particularities of the case[.]" *Id*. at 314 (emphasis added). The means employed must be "***reasonably certain***" to "***actually inform***" the party, and in choosing the means, one must take account of the "***capacities and circumstances***" of the parties to whom the notice is addressed. *Goldberg v Commissioner of Social Services of New York,* 397 US 254, 268–69; 90 S Ct 1011; 25 L Ed 287 (1970); *Memphis Light, Gas & Water Division v Craft*, 436 US 1, 14, n 15; 98 S Ct 1554; 56 L Ed 2d 30 (1978) (emphasis added). "The opportunity to defend one's property ***before it is finally taken*** is so basic that it hardly bears repeating." *Arnett v Kennedy*, 416 US 134, 180; 94 S Ct

1633; 40 L Ed 2d 15, 48 (1974) (emphasis added). Therefore, ***adequate notice*** of the court proceedings must be furnished. *Mullane* 339 US at 314.

As the Michigan Supreme Court has recently noted of the GPTA, "[e]ven if ***a statutory scheme*** is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" *Sidun v Wayne Co Treasurer*, 481 Mich at 511, citing *Jones v Flowers*, 547 US 220, 230; 126 S Ct 1708; 164 L Ed 2d 415, 428 (2006). The Supreme Court has explained that the "'notice required will ***vary with [the] circumstances and conditions***.'" *Flowers*, 547 US at 227 (citation omitted) (emphasis added). Importantly, and critically relevant to this case, "the government's knowledge that its attempt at notice has failed ***is a "'circumstance and condition' that varies the 'notice required.'"*** *Id.* (citations omitted) (emphasis added). In such a case, the adequacy of the government's subsequent efforts will be evaluated in light of the actions it takes ***after*** it learns that its attempt at notice has failed.

In doing so, the government is "***required to consider unique information about an intended recipient*** regardless of whether a

statutory scheme is reasonably calculated to provide notice in the ordinary case." *Id*. (emphasis added) Thus, even for the forfeiture of property less consequential than someone's residence, it has held "that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate ***when the State knew*** that the property owner was in prison." *Id*. (emphasis added), citing *Robinson v* Hanrahan, 409 US 38, 40; 93 S Ct 30; 344 L Ed 2d 47 (1972). And even where notice of a foreclosure of real property has actually been given by mailing, posting, and publication, the Court has held that the knowledge of the foreclosing governmental entity that ***the property owner was incompetent and without a guardian's protection*** was a failure of the government to provide constitutionally minimum due process. *Id*., citing *Covey v Town of Somers*, 351 US 141; 76 S Ct 724, 100 L Ed 1021 (1956).

More recent jurisprudence in Michigan also supports the conclusion that where a foreclosing governmental unit has an alternative address of the property owner, reasonable notice must include mailing the notice to that address. For example, in *Richardson v Spark Investment LLC, et al*, Unpublished Opinion of the Michigan Court of Appeals, December 19, 2017 (Docket No. 33150), lv denied 501 Mich 1063; 910

NW2d 277 (2018) (App. 151a – 155a), the Court of Appeals held the Treasurer's failure to fully search the land records in the register of deeds office which included the (1) legal description; (2) identity of the proper grantee / owner; *and* (3) ***listed the property owner's proper address*** constituted a violation of the property owner's minimum due process rights *and* a violation of the mandates of the GPTA. The Court reasoned that had the Treasurer *fully searched the land records* in the register of deeds office, it would have discovered the plaintiff's ownership of the property and the correct address to which to send the requisite notices.

The Court noted that pursuant to MCL 211.78i(1), the foreclosing governmental unit "shall initiate a search of records identified in subsection (6) to identify the owners of a property interest in the property who are entitled to notice under this section…." Subsection (2) further provides: "*After conducting the search of records* under subsection (1), the foreclosing governmental unit or its authorized representative *shall determine the address reasonably calculated to apprise those owners of a property interest*…." (emphasis added). The word "shall" is mandatory when used in statutes. Use of the word shall in a statute compels mandatory adherence to the provision's directive.

People v Gaston (In re Forfeiture of Bail Bond), 496 Mich 320, 327; 852 NW2d 747 (2014). "The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive." *Id*., citing and quoting *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006); *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014); and 3 Sutherland, Statutory Construction (7th ed).

As with the mandatory requirement to initiate a search of records, including those in the land title records, the requirement to identify and to determine the address reasonably calculated to apprise those owners of a property interest with notice is also mandatory.

As noted by the Court of Appeals, this mandate was based not only on the plain language of MCL 211.78i, but too on the minimum requirements of due process according to the Michigan Supreme Court's decision in the *Perfecting Church Case*, 478 Mich 1; 732 NW2d 458 (2007) and the United States Supreme Court in the cases of *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006) and *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

The Court reasoned: "[I]t is undisputed that the deed was recorded and did (1) include the legal description of [the Property], (2) identify

that plaintiff was the grantee, and (3) ***list plaintiff's business address***." (App. 154a) (emphasis added). The Court concluded: "[H]ad the Treasurer searched the land records and found the deed, plaintiff would have been identified as the owner of the property ***and the address to which notice should have been sent would have been discovered as well***." *Id*. (emphasis added).

The GPTA, MCL 211.78i further requires the foreclosing entity to notify the property owner by certified mail. Michigan courts have ruled that to fulfill the minimum due process under the GPTA ***requires*** sending this notice to addresses that ***are known and available*** to treasurers seeking to foreclose upon properties with past due taxes. *Wayne County Treasurer v Perfecting Church (In re Treasurer of Wayne County Foreclosure)*, 478 Mich 1, 4; 732 NW2d 458 (2006). Where the treasurer fails to provide notice, under the guise of having formally complied with the GPTA, this creates an unconstitutional taking of property because the GPTA would otherwise insulate such violations of the Due Process Clause of the United States Constitution and of the Michigan Constitution. *Id*. As the Court noted, such a result cannot be condoned.

D. Analysis

Addressing the very circumstances of what actions the government should take upon being notified that its mailings of notice of a tax sale are being returned unclaimed, the Court in *Flowers* held: "[W]hen mailed notice of a tax sale is returned unclaimed, the State ***must take additional reasonable steps to attempt to provide notice to the property owner*** before selling his property, if it is practicable to do so." 547 US at 225 (emphasis added). The Court continued: "What steps are reasonable in response to new information depends upon ***what the new information reveals***." *Id.* at 234 (emphasis added). For example, when certified mail is returned as "unclaimed," it means either that the addressee still lives at that address but was not home when the mail was delivered and did not retrieve it, ***or that the addressee no longer resides at that address***." *Id*. (emphasis added). "[W]hen a certified letter addressed to the owner is returned unclaimed…the sender would ordinarily attempt to resend the letter, if that is practical, especially given that it concerns the ***important and irreversible prospect of losing a house***." *Id*. at 230 (emphasis added).

Quoting Flowers, *supra* at 230, and applying the Court's concluding rational to the facts of this case reveals that "[a]lthough [the Treasurer]

may have made a reasonable calculation of how to reach [Mr. Mitchell], it had good reason to suspect when the notice was returned that [Mr. Mitchell] was '***no better off than if the notice had never been sent***.'" *Id*. (emphasis added). And, in such cases, as the Court concluded, "[d]eciding to take ***no further action is not what someone 'desirous of actually informing'*** [the property owner] would do; such a person ***would take further reasonable steps if any were available***." *Id*. (emphasis added).

Here, further reasonable steps were available. The fact that the Treasurer had knowledge of (1) the fact that Mr. Mitchell was not inhabiting the property being foreclosed upon, and (2) there was another address, and in fact, a physical street address in Wisconsin (as opposed to the post office box address, which was the address to which the Treasurer had sent the notices which were returned undeliverable because they were unable to be forwarded and marked that the addressee had "moved, left no address") (App. 64a – 85a), demonstrates that ***she should have taken further action***, because not doing so, as the Supreme Court has confirmed is "not what someone 'desirous of actually informing'" the property would do; such a person "***would take further reasonable steps***". *Jones*, *supra* at 230; *Sidun*, *supra* at 511.

Here, the Treasurer had knowledge of Mr. Mitchell's home address in Wisconsin and was aware he was not receiving the notices at the Property in Michigan, which was not being occupied by Mr. Mitchell, nor at the post office box in Wisconsin, after the notices sent to that address were returned as undeliverable. ***Yet, the Treasurer failed to send the critical notices to Mr. Mitchell's home address, even though that was the only reasonably certain way to actually inform him of the pending loss of his entire rights to his property.*** *Flowers*, 547 US at 230; *Sidun*, 481 Mich at 511; *Goldberg*, 397 US at 268-269. This is the ***only notice that can be adequate under such circumstances*** because it is the only way (and a reasonable one) to ensure Mr. Mitchell would have an opportunity to defend his property before it was finally taken. *Arnett*, 416 US at 180; *Mullane*, 339 US at 314.

The "'notice required will ***vary with [the] circumstances and conditions***.'" *Flowers*, 547 US at 227 (citation omitted) (emphasis added). The government's knowledge that its attempt at notice has failed ***is a "'circumstance and condition' that varies the 'notice required.'"*** *Id.* (citations omitted) (emphasis added). In such a case, the adequacy of the government's efforts will be evaluated in light of the actions it takes ***after*** it learns that its attempt at notice has failed. Thus,

minimum due process under the GPTA ***requires*** sending this notice to addresses that ***are known and available*** to treasurers seeking to foreclose upon properties with past due taxes. *Perfecting Church*, 478 Mich 1 at 4. In such circumstances, the United States Supreme Court has held, and the Michigan Supreme Court agrees, that "[d]eciding to take no further action ***is not what someone 'desirous of actually informing'*** [the property owner] would do; such a person ***would take further reasonable steps if any were available***." *Flowers*, 547 US at 230; *Sidun*, 481 Mich at 511.

In addition to the post office box address and the address of the cottage on the Property, the Treasurer had Mr. Mitchell's home address where he lives in Wisconsin at **3203 Eau Claire Avenue, Schofield, 54476**. (App. 64a – 85a). At her deposition, the Treasurer testified that Title Check, LLC handled the foreclosure process and that they determined the addresses for mailing of the show cause and foreclosure hearings based on a title search. (App. 18a – 19a). She further testified that Title Check has access to the Treasurer's records, including addresses for property owners ***and*** that the Eau Claire address was in their records. (App. 25a, 33a). Both the Treasurer and Title Check research the public records, recorded documents, and other information

to make sure that the addresses they have on file are correct. (App. 25a, 33a). She also testified she did not know why notice of the show cause and foreclosure hearings were not sent to the Eau Claire address.

However, remarkably, the Treasurer testified that ***after the February 9 judgment of foreclosure was entered***, she and her staff (***not Title Check***) mailed a copy of the judgment of foreclosure and various other documents to Mr. Mitchell's proper home address, the **3203 Eau Claire Avenue** address in Schofield, Wisconsin, because this mailing, which occurred on February 12, 2018, ***was so significant a mailing***. (App. 61a – 62a) However, the tracking reports show that the mailing of the February 12, 2018 notice of the judgment of foreclosure was ***by first class mail only***) (App. 85a) ***Prior to this mailing, nor at any time whatsoever, did she have any communication with Title Check about the "returned" notices related to the show cause or foreclosure hearings***.

The assertions that no one in the Treasurer's office or Title Check had the Eau Claire address prior to February 2018 is incorrect because it is in the mailings tracking reports produced by the Treasurer at least as of December 2017. Further, the Treasurer testified that Title Check had access to the same database as the Treasurer. (App. 25a, 33a). This

means that Title Check had the ability to actually send all the pre-judgment notices (the ones sent to the defunct post office box that Title Check knew was defunct because it was receiving the undeliverable messages back from the post office) to the proper home address of Mr. Mitchell! It had the proper street address because it had access to the Treasurer's database, and the Treasurer had that address because that is where she admitted sending the notice of the judgment! (App. 25a, 33a, 61a – 62a)

So, while the Treasurer was aware that Mr. Mitchell was not inhabiting the cottage on the Property at Iron River, and only sent notices of the show cause and foreclosure hearings (informing Mr. Mitchell that he was at risk of losing his property) to the post office box address (which were all returned as undeliverable) and posted notices at Iron River cottage, and published notices in the local paper, ***before the judgment was entered***, once the judgment ***was entered*** ostensibly forever depriving Mr. Mitchell of his entire rights to the real estate he owned, the Treasurer ***sent notice of the judgment to his proper home address*****!** When the certified mail receipts were returned as undeliverable, notice should have been mailed to the home address that the Treasurer admitted Title Check had.

Title Check submitted an affidavit prior to the hearing on the Treasurer's second motion for summary disposition in which it admitted to making a search of the records on February 6; but by that point all of the pre-judgment notices had been sent (and returned) because they were being sent to the defunct post office box address.

Thus, "under all the circumstances", the Treasurer was required to apprise Mr. Mitchell of the pending action to afford him an opportunity to present his objections. *Perfecting Church*, 478 Mich at 9; *Richardson* (App. 152a – 155a). Further, had the Treasurer been "desirous of actually informing" Mr. Mitchell, the means employed would have included notices sent to the home address. *Id*.

The Treasurer stated in her motion that she complied with the requirements by sending a notice to "a new address in Schofield, Wisconsin". But, at her deposition she testified that notice to this address ***was only sent after the judgment of foreclosure had already been entered***. Even though she admitted that Title Check, LLC also had this address the entire time it was sending notice of the foreclosure and show cause hearings to the post office box address (which notices were returned undeliverable).

There is no indication in the Treasurer's motion if any ***prior*** notices (prior to the judgment) were sent to this address; whether they were sent by certified mail, as required; or even what such notices were. The averments in the Treasurer's brief, without more, are insufficient to entitle her to summary disposition on this constitutional issue. Given that Mr. Mitchell can demonstrate that Title Check, LLC ***did have the same access as the Treasurer to his proper home address at 3203 Eau Claire Avenue, Schofield, Wisconsin***, and yet, once the notices to the post office box were returned as undeliverable, no efforts were made to send the notices to this address, summary disposition should be denied. The Treasurer did not fulfill her constitutional duties to afford Mr. Mitchell with due process.

It should also be pointed out that the Treasurer admitted to only just having started to attempt to implement the requirements of the GPTA in 2014. County's Second MSD Brief, p. 2. Shortly thereafter, the Treasurer then quickly contracted that function out to Title Check, LLC (again the same company that also has a significant but conflicting economic interest in selling the properties at auction) (App. 2a – 5a and 120a – 150a) Title Check, LLC runs the auctions for foreclosed properties and also handles personal property sales. (App. 120a – 150a)

As the case law concerning implementation of the GPTA shows during the last decade, and contrary to the Treasurer's assertions, merely following the formalities of the GPTA are insufficient ***when the Treasurer has knowledge of an address to which the notices required by the statute should be sent, especially when other notices are returned as undeliverable***. Moreover, contrary to the Treasurer's assertion at page 5 of her brief, "reasonable efforts" were not made, *under all the circumstances*, as required *Perfecting Church*, 478 Mich at 15; *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006) and subsequent Michigan jurisprudence, to provide Mr. Mitchell with sufficient notice because, if the address to which the notice should be sent is known to the notifying party that address is one of the addresses to which the notices must be sent to afford due process to the property owner.

In support of her motion for summary disposition, the Treasurer relied on documents based on "public records" and requested that the Circuit Court take judicial notice of those records, including those that were sent in response to Mr. Mitchell's discovery requests. Treasurer's Second MSD Brief, p. 4. However, none of these documents refuted the fact that the Treasurer did have Mr. Mitchell's address ***at 3203 Eau***

Claire Avenue, Schofield, Wisconsin, ***before the foreclosure and show cause hearings were held***, and during the time Title Check, LLC was sending the notices of those proceedings to the post office box, which notices were being returned as undeliverable. (App. 25a, 33a; App. 64a – 85a) None of these documents supported the Treasurer's motion. In fact, they prove that the efforts made by Title Check, LLC were insufficient. Title Check, LLC obviously had an incentive to do the "minimum" to try and provide notice; if it was receiving undeliverable notices, then of course, it was not going to try and serve the notices properly upon Mr. Mitchell even though the database for the Treasurer contained the proper home address for Mr. Mitchell at least as of December 2017. It is disingenuous, at best, for the Treasurer to rely on Title Check, LLC to comply with the law, when that company has an incentive not to comply with the law and indeed profits from its failure to achieve constitutionally adequate standards in its privatized implementation of the GPTA. The whole scheme that manifested in this case (and surely in many others) should give this Court great pause when its consequences result in the taking of someone's real property; a constitutional right of the highest magnitude.

The fact that the Treasurer sent notices to the post office box in Wisconsin; that the Treasurer visited the Property and posted notices thereon, and also that the treasurer published the notices in the local newspaper for two successive weeks – the "exhibits" and information attached to the Treasurer's motion as supporting summary disposition – did nothing more than show that the Treasurer ostensibly went through the motions for sending notices to property owners per the GPTA. But that is not enough. "[P]rocess which is a mere gesture is not ***due process***." *Mullane*, 339 US at 314.

The Treasurer argued that "[i]f it is established that the defendant complied with the requirements of the GPTA, this establishes as a matter of law that due process has been afforded…" Treasurer's Second MSD Brief, p. 6. But this is not the case. This position is exactly *why* the due process challenges *post*-foreclosure are allowed. As the Michigan Supreme Court has made clear referring to the GPTA, "[e]ven if a statutory scheme is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" *Sidun*, 481 Mich at 511, citing *Flowers*, 547 US at 230. That is, even if the GPTA *was complied* with to the letter, the

Treasurer was required to do more under the circumstances because of the unique information it possessed (1) Mr. Mitchell was not inhabiting the cottage at the Property; (2) the certified mail notices of the foreclosure and show cause hearings were being returned undeliverable; and (3) the Treasurer had Mr. Mitchell's street address at 3203 Eau Claire Ave., in Schofield, Wisconsin during the time that these notices were being sent and returned undeliverable. In such a case, notwithstanding literal compliance with the statutory notice requirements, the State "***must take additional reasonable steps to attempt to provide notice to the property owner***." *Flowers*, 547 US at 225.

The Treasurer stated no grounds for her motion attacking the facial allegations of Mr. Mitchell's complaint. The Treasurer properly quoted Paragraph 13 of Mr. Mitchell's complaint. Treasurer's Second MSD Brief, p. 4. But, in attacking this paragraph, the Treasurer then stated that Mr. Mitchell only asserted that the Treasurer "did not mail the notices required under the GPTA to the Schofield post office box." *Id*., p. 7. This is not accurate. In fact, the Treasurer's argument leaves out *the relevant* factual information alleged in that paragraph, to wit, that the Treasurer "did not mail notices…to [Mr. Mitchell's] ***mailing***

address or any other address reasonabl[y] calculated to advise Plaintiff of the 2017 Tax Foreclosure Action." (App. 90a, Complaint, ¶ 13) This allegation accurately recites the legal requirement applicable to the Treasurer's constitutional obligations to provide notice and thereby satisfy the minimum requirements to afford due process to the property owner. In misquoting paragraph 13, and leaving out this additional language, the Treasurer can say she complied with the GPTA by sending the notice to the post office box address. The only way the Treasurer can argue that summary disposition was justified is by ignoring the additional allegation that she failed to mail the notice to another address reasonably calculated to advise Mr. Mitchell of the 2017 foreclosure action. A motion can be granted under (C)(8) only if *no factual development could justify the plaintiff's claim for relief*. *Spiek v DOT*, 456 Mich 331, 337-39; 572 NW2d 201 (1998). Here, as demonstrated in addressing the Treasurer's motion under MCR 2.116(C)(10), it was clear that further development would reveal the principle allegations of this paragraph, that the Treasurer had the additional information needed to fulfill her proper constitutional obligation and failed to do so.

Finally, the Treasurer argued that paragraph 13 of Mr. Mitchell's complaint was insufficient because it is preceded by "on information and belief" and does not allege "facts". Second MSD Brief, p. 8. The way the Treasurer puts it, Mr. Mitchell "must allege **facts**, not just things he thinks might have occurred, to support that claim." *Id*. (emphasis in original). This is fundamentally incorrect. Under (C)(8), summary disposition can be granted if "[t]he opposing party has failed to state ***a claim on which relief can be granted***." (emphasis added). If indeed the Treasurer had knowledge of Mr. Mitchell's home address, and did not send the requisite notices to that address, then the Treasurer did not mail the notices to Mr. Mitchell's mailing address or any other address reasonabl[y] calculated to advise Plaintiff of the 2017 Tax Foreclosure." This, the law makes clear, the Treasurer ***was supposed to do*.** A motion under (C)(8) should be granted "only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery." *Lane v Kindercare Learning Ctrs Inc*, 231 Mich App 689, 588 NW2d 715 (1998). Factual development showing that the Treasurer had knowledge of Mr. Mitchell's home address at 3203 Eau Claire Avenue in Schofield, Wisconsin when the notices of the foreclosure and show cause hearings were returned as

undeliverable from the post office box, and that Mr. Mitchell was not residing in the Property being foreclosed upon, would support not only the factual averments in this paragraph, but a claim that the Treasurer may not have satisfied the sufficient constitutional requirements of due process outside of and beyond the minimal statutory requirements of the GPTA.

Indeed, Mr. Mitchell did prove through the Treasurer's deposition that the Treasurer did have the proper home address when the notices of the delinquencies were being sent to the defunct post office box, and further, that they actually sent the judgment to the proper home address because the Treasurer deemed it to be so important. (App. 61a) Yet, none of the notices leading up to that judgment were ever sent to the right address. Moreover, the notice of the judgment was not sent by certified mail.

II. THE SALE OF MR. MITCHELL'S PROPERTY FOR MONIES IN EXCESS OF HIS TAX DELINQUENCY WITHOUT REIMBURSEMENT OF HIS EQUITY VIOLATES THE MICHIGAN AND FEDERAL CONSTITUTIONS BECAUSE IT CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST OR EQUITABLE COMPENSATION.

A. Summary of Argument

Depriving an individual of his or her property (beyond what is necessary to pay the tax debt) is a deprivation of his or her constitutionally protected liberty and property interests. Mr. Mitchell's property has been seized for nonpayment of taxes. If the Treasurer is allowed to take this action (i.e., if Mr. Mitchell's due process rights were not violated as asserted under the first question presented), is the Treasurer entitled to the entire value of the property, regardless of the amount of the debt Mr. Mitchell owes? The Treasurer has either imposed an unlawful penalty on Mr. Mitchell (imposing a "fine" in the form of the equity he has lost in the property as a result of his failure to timely pay his property taxes) or the Treasurer has taken that equity without just compensation. Confiscation of any amounts in excess of the total debt is an unconstitutional deprivation of Mr. Mitchell's property. The Supreme Court of Michigan is currently considering the case of *Rafaeli LLC, et al v Oakland County and Andrew Meisner*, MSC Case No. 156849 to address this very issue. If Mr. Mitchell's

remedy is to seek compensation from the Treasurer because this Court finds that the Treasurer did not violate Mr. Mitchells constitutional rights in the proceedings to foreclose on Mr. Mitchell's property, then this Court should carefully consider the eventual outcome of the Rafaeli case in addressing this issue, and how it should affect Mr. Mitchell's rights going forward.

This case challenges a "gross injustice" in the administration of the GPTA that "calls out for relief." *Rafaeli, LLC v Oakland County*, 2017 Mich App LEXIS 1704, * 13, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, decided October 24, 2017 (Docket No. 330696) (Shapiro, J, concurring) (quoting *Wayside Church v. Van Buren County*, 847 F 3d 812, 823 (6th Cir 2017) (Kethledge, J., dissenting) (likening the Act's collection in cases like this one to "theft")). Under the GPTA, when a county forecloses on a tax delinquent property, it is permitted to retain the entire proceeds of the sale—even where the proceeds exceed taxes, penalties, interests, and costs due, stripping the property owner of the equity they may have built up in the property and providing an unjust windfall to the government. *See* MCL 211.78m.

This result is not merely inequitable, but often tragically harsh. In this case Iron County foreclosed on Mr. Mitchell's home and real property, comprised of 6 contiguous parcels to collect a tax delinquency for only the tax year 2017. Using a third-party, Iron County intends to sell the home at auction and under current law has no obligation to reimburse or otherwise recognize the equity Mr. Mitchell has in his property.

The seizure of this equity will violate the Michigan and federal constitutional mandates that government pay "just compensation." *See* Const 1963, art 10, § 2; US Const amend V. While the government may foreclose property for the purpose of satisfying a tax debt, it must do so subject to the constitutional command to pay "just compensation" for the taking of the excess private equity. This means that a county must pay just compensation for the excess equity taken at foreclosure, or alternatively, take the property subject to the duty to sell it and refund the proceeds that exceed the debt and costs to the former owner. *See, e.g.*, *Bogie v Town of Barnet*, 129 Vt 46; 260 A2d 898 (1970). The GPTA cannot shelter the government from this constitutional violation.

B. Standard of Review

The standard of review is de novo. Mr. Mitchell raises constitutional issues related to the application by the Treasurer of the GPTA. Specifically, Mr. Mitchell contends that his due process rights were violated by the Treasurer's application GPTA to foreclose upon his property for past due property taxes. Whether due process has been afforded is a constitutional issue that is reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). Questions of statutory construction are also reviewed de novo. *Grimes v Mich DOT,* 475 Mich 72, 76; 715 NW2d 275 (2006). Finally, questions concerning the constitutionality of a statutory provision are subject to de novo review as well. *Wayne Co Treasurer v Perfecting Church (In re Treasurer of Wayne Foreclosure)*, 478 Mich 1, 15; 732 NW2d 458 (2007); *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006)

C. Applicable Law

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for a public use without

paying just compensation.[4] US Const amend V. When government action invades a protected property interest, courts focus on the nature of the government action to determine whether the action effects a taking. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central*, 438 US at 124, actions that invade a property interest are subject to a strict, *per se* test. *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 426; 102 S Ct 3164; 73 L Ed 2d 868 (1982). A per se physical taking happens, for example, when government seizes land or money. *Koontz v St Johns River Water Mgmt Dist*, 570 US 595, 613; 133 S Ct 2586; 186 L Ed 2d 697 (2013); *Lucas v SC Coastal Council*, 505 US 1003, 1014; 112 S Ct 2886; 120 L Ed 2d 798 (1992) ("direct appropriation" of property or the "functional equivalent" is a classic taking). An uncompensated physical taking violates the Constitution, regardless of the circumstances of the taking or its economic impact. *Tahoe-Sierra Pres Council Inc v Tahoe Reg'l Planning Agency*, 535 US 302, 322; 122 S Ct 1465; 152 L Ed 2d 517 (2002).

[4] The Fifth Amendment of the federal constitution is applicable to the states through the Fourteenth Amendment. *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed2d 631 (1978).

The government cannot avoid the just compensation mandate by redefining a preexisting private interest as public property. *Webb's Fabulous Pharmacies Inc v Beckwith*, 449 US 155, 164; 101 S Ct 446; 66 L Ed 2d 358 (1980). Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation." *Id.*; *Lucas*, 505 US at 1014 ("[T]he government's power to redefine" property rights is "necessarily constrained" by the Constitution.).

The Takings Clause in Article 10, Section 2, of the 1963 Michigan Constitution offers "substantially similar" protection against government action as the federal Takings Clause. *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 16 (2001). This Court usually looks to federal precedent to determine whether government action effected a taking under the state Takings Clause. *Id*. But the Michigan Takings Clause offers greater protection than its federal counterpart. *AFT Michigan v State*, 497 Mich 197, 213; 866 NW2d 782 (2015). State constitutional and common law history, state law preexisting the state constitutional provision at issue, or "matters of special state interest may compel [this Court] to conclude that the state Constitution offers" broader protections than the federal Constitution. *Id*. at 213, n 6.

D. Analysis

When the Treasurer applied the GPTA to obtain title to Mr. Mitchell's property under the ostensible right to sell it at auction, she effectively exercised rights over the eventual proceeds which are likely to far exceed the outstanding tax debt, thereby invading and unconstitutionally taking a protected property interest. The GPTA does not recognize a former owners' right to the surplus proceeds. But state tax statutes are not the only source from which property rights arise. *Palazzolo v Rhode Island*, 533 US 606, 629-30; 121 S Ct 2448; 150 L Ed 2d 592 (2001). In fact, "the right to the surplus exists independently of such statutory provision." *Farnham v Jones*, 32 Minn 7, 11-12; 19 NW 83 (1884) (considering entitlement to surplus proceeds from tax sales in statute that failed to recognize the right); *McDuffee v Collins*, 117 Ala 487, 491-92; 23 So 45 (1898) (right of former owner to surplus proceeds preexisted the statute). "Property" protected by the Constitution includes those interests recognized by common law, federal or state law, or that arise from custom and practice or other "background principles" of property law. *Palazzolo*, 533 US at 629-30; *see also*. *Horne v Dep't of Agric*, 135 S Ct 2419, 2426-27; 192 L Ed 2d 388 (2015) (Takings Clause protects property interests recognized by

Magna Carta and the Founders); *Nixon v United States*, 978 F2d 1269, 1276 n 18 (DC Cir 1992) ("law or custom may create property rights where none were earlier thought to exist"); *Bott v Comm'n of Nat Res of State of Mich Dep't of Nat Res*, 415 Mich 45, 83-87; 327 NW2d 838 (1982) (Takings Clause protects common law property rights). The right to the surplus arises from these sources.

The Supreme Court has held the Takings Clause protects a diverse array of property interests from government confiscation, including homes, personal property, intangible property, money, interest on money, liens, and mortgages. *Horne*, 135 S Ct at 2426 (personal property); *Koontz*, 570 US at 616 (money and real property); *Phillips v Washington Legal Found*, 524 US 156, 168; 118 S Ct 1925; 141 L Ed 2d 174 (1998) (accrued interest); *Armstrong v United States*, 364 US 40, 48; 80 S Ct 1563; 4 L Ed 2d 1554 (1960) (liens); *Louisville Joint Stock Land Bank v Radford*, 295 US 555, 601-02; 55 S Ct 854; 79 L Ed 1593 (1935) (mortgages). Indeed, the Michigan and federal takings clauses protect "everything over which a person may have exclusive control or dominion" including intangible property like an "identifiable fund of money." *AFT Michigan*, 497 Mich at 217-18 (internal quote marks omitted). The private property interest at issue in this case is

privately generated and owned equity. "Equity" is, by definition, the fair market cash value of the property after deduction of all encumbering debts (like tax debts). *Crane v Commissioner*, 331 US 1, 7; 67 S Ct 1047; 91 L Ed 1301 (1947) ("'[E]quity' is defined as 'the value of a property above the total of the liens.'"); *see also Stephens Indus Inc v McClung*, 789 F2d 386, 392 (6th Cir 1986); *Stewart v Gurley*, 745 F2d 1194, 1195 (9th Cir 1984). Ultimately, "equity" is like money or any other investment. And just like the takings clauses protect money, land, interest, and liens, they protect equity in homes and land. *United States v Lawton*, 110 US 146, 150; 3 S Ct 545; 28 L Ed 100 (1884) (takings clause protects equity realized in the sale of property sold for delinquent taxes); *Koontz*, 570 U.S. at 616 (money and "a right to receive money that is secured by a particular piece of property"); *AFT Michigan*, 497 Mich at 218 (intangible property including identifiable fund of money); *see also Eastern Enterprises v Apfel*, 524 US 498, 529; 118 S Ct 2131; 141 L Ed 2d 451 (1998) (taking where government inflicts retroactive monetary liability on company) (O'Connor, J., announcing decision of Court); *Buckeye Union Fire Ins. Co v State*, 383 Mich 630, 641; 178 NW2d 476 (1970) (Takings Clause was "adopted for the protection of and security to the rights of the

individual as against the government" and protects value, not just title to land).

Equity is realized when property is sold. Thus, logically, common law and statutory law have traditionally treated the surplus proceeds from the sale of foreclosed property as representing the former owner's equity. *Grand Teton Mountain Invs LLC v Beach Props LLC*, 385 SW3d 499, 502 (Mo Ct App 2012) ("[A] foreclosure sale surplus 'retains the character of real estate for purposes of determining who is entitled to receive it . . . . Such surplus represents the owner's equity in the real estate."); Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus."); *McDuffee*, 117 Ala at 491-94 ("surplus proceeds in the hands of the tax collector [after a tax sale] represented the property," and the right to the funds by the proper owner attached at the time of the tax sale, and the tax collector had a "duty to pay the surplus to the party lawfully entitled to receive it [the owner]"); 72 Am Jur 2d State and Local Taxation § 911 (1974) ("Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner."). Thomas M. Cooley, A Treatise on the

Law of Taxation 343 (1876) (noting the belief that a tax debt only authorized the government to take as much property as the taxes owed and author was unaware of any jurisdiction that failed that duty). Consequently, the law has traditionally required the surplus proceeds from property taken to pay a tax to be paid over to the former owner. *Martin v Snowden*, 59 Va 100, 137 (1868), *sub nom Bennett v Hunter*, 76 US 326; 19 L Ed 672 (1869) (discussing common law, English land tax statute, and early colonial laws); 2 William Blackstone, Commentaries on The Laws of England, *452 (If officials seize goods for delinquent taxes, "they are bound, by an implied contract in law, . . . to render back the overplus."). To a lesser degree, even Magna Carta recognized a similar principle by limiting the king's right to seize property to prevent him from taking more than necessary for the debt.[5]

[5] For example, the 26th Clause required that the king could take only so much personal property as required to pay the debt of a deceased crown tenant. Prior to Magna Carta, when someone died owing any form of taxation to the king, the king's officials "were in the habit of seizing everything they could find on his manors, under excuse of securing the interests of their royal master. They attached and sold chattels out of all proportion to the sum actually due. A surplus would often remain in the sheriff's hands, which he refused to disgorge. Magna Carta sought to make such irregularities impossible . . ." William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 322-23 (2d ed. 1914); Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 8 (2015).

Michigan law ordinarily—outside the context of tax sales in which the government is the beneficiary—treats the surplus proceeds from the forced sale of debtors' property as private property to which the debtor is entitled. *See, e.g.*, MCL 600.6044 (surplus due to debtor when executing judgments); *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 91; 878 NW2d 816 (2016) ("No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors.") (internal quotes omitted); *Sinclair v Learned*, 51 Mich 335, 340; 16 NW 672 (1883) ("The sheriff must account to the mortgagor for the [surplus] money [from the foreclosure sale], even though he failed to obtain it . . . ."). MCL 324.8905c (surplus when seizing car to pay misdemeanor littering fine).

In fact, the Michigan Supreme Court has previously recognized the principle that "the right to receive and control [the surplus proceeds from a tax sale], no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes…." *People ex rel Seaman v Hammond*, 1 Doug 276, 280-81 (1844).

Because the law recognizes equity and its equivalent—surplus proceeds—as a discrete and protected property interest, the government is liable for a per se taking when it seizes that property for public use. *Bott*, 415 Mich at 78 (government action that destroys traditional, common law property rights effect a taking); *Thomas Tool Services, Inc v Town of Croydon*, 145 NH 218; 761 A2d 439 (2000) (taking where state law gives surplus from tax sale to government); *see also Webb's Fabulous Pharmacies*, 449 US at 164; *Brown v Legal Found of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003). The government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt. But to avoid violating the just compensation component of the takings clauses, government must either pay for the equity at the time it takes the property, or it must sell and refund to the former owner the surplus proceeds. *Bogie*, 129 Vt at 46-47. The government is only entitled to collect as much as it is owed; it has no lawful entitlement or claim to anything more. *Cf. Munger v Sanford*, 144 Mich 323, 326; 107 NW 914 (1906) ("This excess did not belong to [the creditor], and it was obviously his duty to pay it.").

Most states already recognize that principle by guaranteeing the surplus proceeds from the sale of tax-indebted property to the former owner.[6] When statutes have attempted to deny former owners the surplus proceeds from such states, many courts—including the supreme courts of New Hampshire, Vermont, and Mississippi—have held that such attempts violate the constitutional just compensation requirement. *Thomas Tool Services*, 145 NH at 220 (violates state constitution's takings clause); *Bogie*, 129 Vt at 55 (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Griffin v. Mixon*, 38 Miss 424, 436-37 (Miss Err & App 1860) (violation of due process and just compensation guarantee); *Coleman through Bunn v DC*, 70 F Supp 3d 58, 80 (DDC. 2014) (takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v DC*, No 13-1456, 2016 WL

[6] *See, e.g.*, Ala Code § 40-10-28; Ark Code § 26-37-209; Conn Gen Stat § 12-157(h); Del Code tit 9 § 879; Fla Stat § 197.522, § 197.582; Ga Code Ann § 48-4-5; Idaho Code § 31-608(2)(b); Kan Stat § 79-2803; Ky Rev Stat § 426.500; Me Rev Stat, 36 § 949; Mo Rev Stat § 140.340; Nev Rev Stat § 361.610.5; Ohio Rev Code § 5723.11; 72 Pa Cons Stat Ann § 1301.19; 72 Pa Cons Stat Ann § 1301.2; SC Code Ann § 12-51-130; SD Code § 10-22-27; Tenn Code Ann § 67-5-2702; Va Code Ann § 58.1-3967; Wash Rev Code Ann § 84.64.080; W Va Code § 11A-3-65; Wis Stat § 75-36(4) (homesteads); Wyo Stat § 39-13-108(d)(4).

10721865 (DDC June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits); *King v Hatfield*, 130 F 564, 579 (CCDW Va 1900). Similarly, the Minnesota and Alabama supreme courts have recognized an inherent right—independent of any statute—to a refund of these surplus profits. *Farnham*, 32 Minn at 11-12; *McDuffee*, 117 Ala at 491; *see also Stierle v Rohmeyer*, 260 NW 647, 652; 218 Wis 149 (1935) (holding government could not constitutionally penalize mortgagee by extinguishing the entire mortgage, because "the legislature . . . had no authority" to do so "without a just compensation").

Many more courts have criticized the idea that government could legitimately confiscate the surplus proceeds from a tax sale, interpreting tax sale statutes to avoid that result. *Lake Cty Auditor v Burks*, 802 NE2d 896, 899-900 (Ind 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause and *Lawton*, 110 US at 150); *Martin*, 59 Va at 142-43 (would violate due process); *Shattuck v Smith*, 6 ND 56; 69 NW 5 (1896) (indicating such a law would likely be unconstitutional); *Syntax, Inc v Hall*, 899 SW2d 189, 191-92 (Tex 1995), *as amended* (June 22, 1995) ("Taxing authorities

are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v Thomas*, 624 P2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus, in part because injustice that would result). Similarly, the U.S. Supreme Court has repeatedly refused to interpret federal law as depriving property owners the surplus value of their property when sold by the United States to satisfy a tax debt. *United States v Taylor*, 104 US 216, 221; 17 Ct Cl 427 (1881); *Bennett*, 76 US at 335-36 ("[I]t is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction."); *Lawton*, 110 US at 147 (relying on *Bennett* and *Taylor*).

A fair reading of U.S. Supreme Court precedent points decidedly toward the finding of a taking in this case. Supreme Court takings cases show that government violates the Fifth Amendment when it confiscates preexisting property interests by redefining private property as public property. In *Webb's Fabulous Pharmacies*, 449 US at 158-59, for instance, the Supreme Court considered whether government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court answered in the affirmative, and in so doing held that the Takings Clause cannot be avoided by the

expedient of converting private funds into public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. To the same effect is *Phillips*, 524 US at 167 ("at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests"); see also *Stop the Beach Renourishment Inc v Florida Dep't of Envtl Prot*, 560 US 702, 713; 130 S Ct 2592; 177 L Ed 2d 184 (2010) (states effect a taking when they re-characterize traditionally private property as public property).

Yet, that is exactly what the GPTA purports to do. It purports to convert any surplus equity in tax-indebted properties to "public" property at the time of foreclosure, merely because the County takes title to the property. The Takings Clause will not permit such a state-authored transformation of a private interest to public property. *Webb's Fabulous Pharmacies*, 449 US at 164 (Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation.

This Takings Clause protection doesn't simply disappear because the property owner owes the government money. In *Armstrong*, 364

US at 41, a shipbuilder contracted by the United States defaulted on a contract to build ships, and the United States took title to the unfinished boats and materials, pursuant to its contractual and common law rights. *Id*. Material suppliers claimed the United States had unconstitutionally taken their liens on some of the materials when the government took the shipbuilders' unfinished boats and supplies, and refused to compensate the suppliers. *Id*. The Supreme Court agreed, holding that property rights in liens do not simply disappear when the government takes title. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id*. "This was not because their property vanished into thin air. It was because the government for its own advantage destroyed the value of the liens." *Id*. The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id*. at 49.

Armstrong confirms that Michigan counties' sleight-of-hand, transferring the equity in private homes and land into public funds through the tax-sale process is an unconstitutional taking. As in *Armstrong*, the County here, "for its own advantage," destroyed the private value of the equity when it took the entire value of homes and

land in which it had a limited interest. *See id*. at 48. More accurately, it changed that value from a private interest into a public one. This transformation of a private interest to public property is a taking. The County thus has the "constitutional obligation to pay just compensation" or to return the private property it takes. *See id*. at 49.

Ultimately, the scheme at issue here violates the "fairness and justice" principles at the heart of the takings clauses. *Armstrong*, 364 US at 49 (The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Justice is the government collecting only what it was owed. Fairness is the return of any excess equity monies to those who have had their properties taken and sold. Neither exists here. *Wayside Church*, 847 F 3d at 823 (Kethledge, J., dissenting) (the GPTA is causing "gross injustice" that looks like "theft" and raises serious takings implications); *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (ED Mich. June 4, 2015) ("a manifest injustice that should find redress under the law"); *Freed v Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (ED Mich. Nov. 7, 2018) (calling it "unconscionable"). Indeed, this Court has previously recognized that it is wrong for government to use

the GPTA to "unjustly to enrich [it]self at the expense of another." *See Spoon-Shacket Co, Inc v Cty of Oakland*, 356 Mich 151, 156; 97 NW2d 25 (1959); *Dean v Mich Dep't of Natural Res*, 399 Mich 84, 87; 247 NW2d 876 (1976) (allowing claim against government for unjust enrichment, where homeowner owed $146.90 in taxes, but government sold property for $10,000 and kept surplus equity).

It has been said that "the spirit of the tax law . . . is to levy and collect taxes, not to appropriate lands." *Hartman v Edwards*, 260 Mich 281, 286; 244 NW 474 (1932). This Court should revive that spirit by enforcing the state and federal Takings Clause to protect property owners like Mr. Mitchell and their right to their equity or the surplus proceeds from the sale of their real property.

As the foregoing demonstrates, federal takings law favors Mr. Mitchell in this case. But even if that were not true, this Court has an independent duty to protect property rights recognized in the Michigan constitution. As previously noted, the Takings Clause in Article 10, Section 2, of the 1963 Michigan Constitution offers even greater protection than its federal counterpart. *AFT Michigan*, 497 Mich at 217. Interpretations of Michigan's Constitution must reflect the "distinct" will of its citizens to "ensure that [Michigan] citizens are receiving the

measure of the protections that they created." *People v Tanner*, 496 Mich 199, 221-23 n 15; 853 NW2d 653 (2014) (emphasis omitted). The Court's "responsibility in giving meaning to the Michigan Constitution must invariably focus upon its particular language and history, and the specific intentions of its ratifiers, and not those of the federal Constitution." *Id.* at 222 n.16. (emphasis omitted).

Michigan's Takings Clause was "adopted for the protection of and security to the rights of the individual as against the government." *Bott*, 415 Mich at 82 n 43 (quoting *Pearsall v Eaton County Supervisors,* 74 Mich 558, 561; 42 NW 77 (1889). Its purpose was to ensure that "the [government's] power to appropriate in any case must be justified and limited by the necessity." *Peterman v State Dep't of Nat Res*, 446 Mich 177, 187; 521 NW2d 499 (1994) (quoting Justice Cooley).[7] Moreover,

[7] Justice Cooley also described the power of eminent domain by distinguishing it from the taxing power: "Taxation [also] takes property from the citizen for public use, but it does so under general rules of apportionment and uniformity, so that each citizen is supposed to contribute his fair share to the expenses of government, and be compensated for doing so in the benefits which the government brings him. [But under eminent domain] 'something exceptional' is taken. 'The case, therefore, is not one in which there can be and apportionment of the burden as between the citizen whose property is taken, and the body of the community, and compensation to him of a pecuniary nature must therefore be made.'" Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 333-34 (Little, Brown & Co. 1880). What has happened in these cases is "something

the protection is broad and extends to "cases where the value [of property] is destroyed by the action of the government." *Bott*, 415 Mich at 82 n 43 (quoting *Pearsall*, 74 Mich at 561). The destruction of common law property rights triggers the protection of the Michigan Takings Clause. *Id.* at 78-79.

The GPTA's needless confiscation of home and land equity violates all of these purposes. It takes property that greatly exceeds what the foreclosing governmental unit needs to satisfy its debt. It nullifies otherwise recognized property rights. Michigan's Takings Clause is supposed to ensure that "those whose property is seized will receive fair treatment" and that government officials consider "the loss inflicted on private parties" property. *Bott*, 415 Mich at 84-85. But the Act accomplishes the opposite. It has created a perverse incentive for counties to foreclose desirable properties to boost their budgets. And counties have been unable to resist the temptation. *See* Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget.*, Bridge Magazine, June 6, 2017, http://www.bridgemi.com/detroit-

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exceptional" and not a "uniform apportionment" by which they are contributing a fair share in return for the benefits government has provided.

journalism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget.

This Court should declare an end to this uniquely predatory practice pursuant to an interpretation of the state's Takings Clause regardless of the Court's interpretation of the federal Takings Clause. As the Treasurer has already asserted that title to Mr. Mitchell's property has passed to the foreclosing governmental unit, and if this Court disagrees with Mr. Mitchell's first argument concerning the due process violations of his rights sufficient to reinstate his property rights subject to his being allowed to satisfy the tax delinquency, then it must either await the Rafaeli decision or hold, independently, that the Treasurer only has the right to the tax debt and any reasonable costs associated with its collection.

III. THE CIRCUIT COURT ERRED IN DISMISSING MR. MITCHELL'S CONVERSION CLAIMS BECAUSE SUCH A CLAIM SEEKS REMEDIES FOR EQUITABLE REIMBURSEMENT AND NOT TRADITIONAL TORT REMEDIES OTHERWISE BARRED BY THE IMMUNITY PROVISIONS OF THE GTLA.

A. Summary of Argument

Mr. Mitchell's statutory conversion claim under MCL 600.2919 seeks to recoup the value of his lost personal property that was upon and in the Property. As such, The Treasurer's governmental immunity defense is misplaced. The Governmental *Tort* Liability Act (GTLA), MCL 691.1401 et seq., immunizes the governmental entity and governmental employees from *tort* liability, only, not compensatory claims based in the statutory conversion allowed under MCL 600.2919.

The GPTA also allows monetary damages to be imposed, evidencing recognition that as against governmental entities and the officials that exercise authority over the foreclosure of properties with unpaid taxes, such claims are legislatively outside of the defense of immunity. Moreover, recent Michigan jurisprudence suggests that the government may be liable for causes of action which are not seeking to impose traditional *tort* liability against the governmental entity or governmental official.

In fact, the Michigan Supreme Court has recently held that equitable claims seeking compensation for wrongful retention of property (in the form of refunds) and unjust enrichment are *not* subject to the immunity defense.

B. Standard of Review

This Court will review *de novo* a trial court's ruling on a summary disposition motion filed by a governmental entity under MCR 2.116(C)(7). *Plunkett v DOT*, 286 Mich App 168, 174; 779 NW2d 263 (2009). Questions of statutory construction are also reviewed de novo. *Grimes v Mich DOT,* 475 Mich 72, 76; 715 NW2d 275 (2006).

C. Applicable Law

While the Treasurer, as an elected constitutional officer, is entitled to absolute immunity under Michigan's Governmental Tort Liability Act, MCL 691.1401 et seq., that immunity is only from *tort liability*. See MCL 691.1405(7). While not addressing MCL 691.1405(7), the Michigan Supreme Court has confirmed that the GTLA only provides immunity from *tort liability*. *In re Bradley's Estate*, 494 Mich 367, 384-389; 835 NW2d 545 (2013) (holding that "where the wrong alleged is premised on the breach of a contractual duty, then no *tort* has occurred, and the GTLA is inapplicable.") (emphasis added), accord *Hecht v*

Nat'l Heritage Academies, Inc, 499 Mich 586, 626; 886 NW2d 135 (2016) ("in using term liability along with the term 'tort' it becomes apparent that the Legislature intended 'tort liability' to encompass legal responsibility arising from a tort" only).

In a subsequent case, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 324 n 3; 869 NW2d 635 (2015), oral argument on application granted, 501 Mich 1086 (2018), case submitted April 10, 2019 and affirmed on July 18, 2019, *Wright v Genesee County*, 504 Mich 410; 934 NW2d 805 (2019), the Michigan Court of Appeals allowed claims to proceed in equity for unjust enrichment and disgorgement of funds to proceed against the governmental entity on the basis that under *Bradley's Estate*, such claims are not subject to governmental immunity under the GTLA.

In *Bradley's Estate*, the Court noted that there is a two-step approach to considering whether a particular claim falls outside the immunity provisions of the GTLA. First, the Court said the reviewing court should focus on whether the wrong alleged is premises on the breach of a contractual duty. If so, no tort has been alleged and the GTLA is inapplicable. *In re Bradley's Estate*, 494 Mich at 389. However, the Court also said that even if the wrong is not initially premised on breach

of a contractual duty, but rather premised on some other civil wrong, i.e., some other breach of a legal duty, then the court must further consider the *nature of the liability* that the plaintiff seeks to impose to determine whether the immunity provisions of the GTLA will apply to bar the claims. *Id*. Only tort liability based on noncontractual civil wrongs are subject to immunity. *Id*.

Genesee Co Drain Comm'r v Genesee Co, 309 Mich App 317; 869 NW2d 635 (2015), is illustrative of this point. There, the Court of Appeals allowed claims of unjust enrichment and damages for disgorgement of funds to proceed despite the defendant's claim of immunity. The plaintiff, county drain commissioner, sought recoupment of insurance premiums that had been paid to Blue Cross Blue Shield but which had been paid back to the County in refunds. After taking and keeping the refunds, the County refused to pay them back to the plaintiff, or to reimburse him for their value. After conducting the analysis required in *Bradley*, *supra*, the Court of Appeals concluded that the nature of the liability sought to be imposed was compensatory and equitable in nature, because the commissioner sought return of the monies his entity was entitled to and which he had previously paid to the insurance company. The Court did dismiss the

common-law intentional tort claim of conversion. However, the plaintiff did not seek compensatory damages for statutory conversion, as in this case. On appeal in the case of *Wright v Genesee County*, 504 Mich 410; 934 NW2d 805 (2019), the Supreme Court affirmed, holding that a cause of action seeking restitution for the loss of property does not sound in tort. Therefore, the Supreme Court has now held that such claims *are not barred* by the GTLA.

D. Analysis

Bradley's Estate, *supra*, *Hecht*, *supra*, and, finally, and most recently, *Wright*, clearly recognize that there are theories of equity seeking economic compensation for claims that do not fit the definition of *pure tort liability*. These theories survive summary disposition sought on the basis of governmental immunity. Indeed, the GTLA itself provides immunity only as to *all tort liability*. The doctrine of *conversion* is based on the equitable principle that by taking personal property one has received the economic value of the property of another and has concomitantly removed that value from the rightful owner.

Indeed, as the Court most recently noted, it is not the nomination of the claim but the remedies sought. *Wright*, *supra*; *Bradley's Estate*, *supra*. The remedy sought in a statutory conversion claim is for purely

economic damages not tort damages. Consistent with the GTLA generally, and the other specific *tort* exceptions therein, MCL 691.1405(7), the provision entitling elected officials to absolute immunity, also only applies to *tort liability*. Thus, a claim sounding in equitable principles seeking to recoup the value of property wrongfully taken would not be precluded from being considered by the Treasurer's statutory immunity. See *Wright*, *supra*.

The claim for statutory conversion explicitly applies to provide compensation for the taking of personal property from the rightful owner who is the occupier of real property. Unlike the common law tort of conversion, it is a distinct *statutory remedy* designed to compensate for the value of the lost property. The statutory claim under MCL 600.2919 can survive the immunity provisions of the GTLA because the nature of liability sought to be imposed is compensatory and based on the unjust enrichment to the Treasurer. *Bradley's Estate*, *supra*. In other words, while a common law tort claim of conversion *might* be subject to the GTLA's broad immunity from *"all tort liability*", a statutory claim for conversion recognizes only the economic damages of such a claim. As such, it is without the clearly limited parameters of the GTLA's broad immunity for *all tort liability*, *only*.

Moreover, as an additional exemplar of statutory provisions allowing for compensatory claims against the government, despite the GTLA, the GPTA also allows an action for compensation against the government entity charged with its enforcement. MCL 211.78l. Obviously, if the Legislature specifically recognizes liability and further provides that compensation may be paid as a result of the actions of the Treasurer, acting for and on behalf of the foreclosing governmental unit, then the Legislature may carve out an exception the immunity from suit and liability in the GTLA's otherwise broad grant of immunity. Statutes may provide additional, different, or broader means of imposing liability upon a governmental entity. See, e.g., *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449, 463; 890 NW2d 680 (2016) (holding that the procedural and remedial provisions applicable to counties and county road commissions are those provided for in MCL 224.21, not the remedies in the GTLA, MCL 691.1402(1)).

Mr. Mitchell's statutory conversion claim under MCL 600.2919 sought to recoup the value of Mr. Mitchell's lost personal property that was upon and in his real property. As such, the Treasurer's governmental immunity defense to Mr. Mitchell's conversion claim is misplaced, as the Governmental *Tort* Liability Act (GTLA), MCL

691.1401 et seq. immunizes the governmental entity and governmental employees from *tort* liability, only, not compensatory claims based in the statutory conversion allowed under MCL 600.2919

Mr. Mitchell respectfully contends in this appeal that recent case law in Michigan trends towards recognizing his claim for compensation for the wrongful conversion of his personal property notwithstanding governmental immunity from *tort* liability provided in the GTLA. Therefore, the trial court erred in granting summary disposition on grounds of immunity from liability.

Therefore, the Treasurer was not entitled to summary disposition on Mr. Mitchell conversion claims on immunity grounds and the Circuit Court erred in this regard as well.

CONCLUSION AND RELIEF REQUESTED

Mr. Mitchell seeks a declaration from this Court that the 2017 tax foreclosure action commenced by the Treasurer did not comport with minimum, constitutionally required notice and due process under the GPTA, and State of Michigan Constitution and the United States Constitution. Therefore, Mr. Mitchell respectfully requests this Court to declare that the subsequent conveyance of the Property to the Treasurer was null and void, and the Treasurer holds no right, title or interest in the Property.

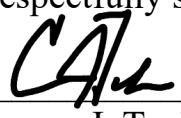
Mr. Mitchell also seeks a declaration that he is the sole, fee simple owner of the Property, and that he be allowed to pay any delinquent taxes owing and due upon said finding.

Mr. Mitchell also respectfully requests that in the event the Court holds that Mr. Mitchell's property was taken by the Treasurer after adequate procedural and substantive due process protections were afforded to him under the GPTA, this Court hold that the Treasurer is entitled only to a recoupment of the delinquent taxes and any costs and fees associated with collecting those delinquent taxes (excluding litigation costs and fees) and that the retention of any other value or equity in the subject property is an unconstitutional taking of Mr.

Mitchell's property in violation of the Constitution of the state of Michigan and/or the United States Constitution and that upon a sale of said property by the Treasurer, Mr. Mitchell will be entitled to a reimbursement of that equity. In the alternative, Mr. Mitchell requests that this Court hold his appeal in abeyance pending the outcome of the Rafaeli matter currently pending in the Michigan Supreme Court concerning this constitutional issue.

Mr. Mitchell also requests the Court to hold, as a matter of law, that the Treasurer is not entitled to immunity from the statutory conversion claims lodged by Mr. Mitchell, as such claims are not *tort* claims and do not seek to impose *tort* liability as against the Treasurer, and that, as such, under Michigan law, Mr. Mitchell may pursue his conversion claims as against the Treasurer in this action.

Respectfully submitted,



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Date: January 17, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 14728 words (as identified by the Microsoft Word "word count" function) and was prepared using the proportional font typeface Times New Roman set at 14-point.