

# In the Supreme Court

Appeal from the Court of Appeals

STELLA SIDUN,  
*Plaintiff-Appellant,*

v.

WAYNE COUNTY TREASURER,  
*Defendant-Appellee.*

Supreme Court No. 131905  
Court of Appeals No. 264581  
Court of Claims No. 04-240-MT

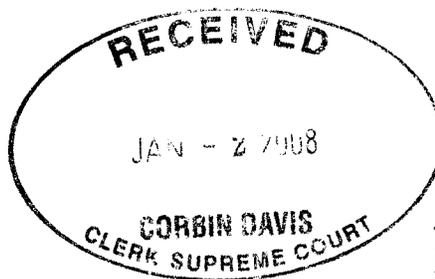
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## BRIEF OF DEFENDANT-APPELLEE WAYNE COUNTY TREASURER

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### ORAL ARGUMENT REQUESTED

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## **STATEMENT OF THE JURISDICTION OF THE SUPREME COURT**

The Court of Claims granted summary disposition of Sidun's challenge to a judgment of forfeiture in favor of the Wayne County Treasurer. (Case No. 04-240-MT, Opinion and Order Denying Plaintiff's Motion for Summary Disposition and Granting Summary Disposition in Favor of Defendant, 8/4/05). Sidun timely appealed to the Court of Appeals on August 16, 2005). The Court of Appeals affirmed the lower court judgment. (Court of Appeals No. 264581, 1/19/06). Sidun sought leave to appeal from this Court, which vacated the judgment of the Court of Appeals and remanded to the Court for reconsideration in light of *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006). The Court of Appeals issued an opinion reiterating its previous conclusion. (Court of Appeals No. 264581, 8/15/06). Sidun again sought leave to appeal.

This Court granted Sidun's application for leave to appeal. (Supreme Court No. 131905, Order, 9/12/07). It has jurisdiction pursuant to MCR 7.301(A)(2).

**COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW**

DOES DUE PROCESS REQUIRE THE WAYNE COUNTY TREASURER TO SEARCH FOR AN ALTERNATIVE ADDRESS FOR A DELINQUENT TAXPAYER WHEN NOTICES OF THE TAX SALE AND RIGHT TO REDEEM WERE SENT TO THE LAST KNOWN ADDRESS OF THE TAXPAYER AS REFLECTED IN COUNTY TAX RECORDS, MULTIPLE NOTICES WERE MAILED TO THE ADDRESS THAT HAD BEEN USED FOR TWENTY YEARS, INCLUDING NOTICES MAILED TO THE OCCUPANT, NOTICE WAS POSTED ON THE PROPERTY WHICH WAS OCCUPIED AND TO WHICH THE TAXPAYER WENT MONTHLY TO COLLECT RENT, AND NOTICES WERE PUBLISHED IN A LOCAL NEWSPAPER?<sup>1</sup>

Plaintiff-Appellant Sidun answers “Yes.”

Defendant-Appellee the Wayne County Treasurer answers “No.”

The Ingham County Circuit Court, acting as Court of Claims, answered “No.”

The Michigan Court of Appeals answers “No.”

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<sup>1</sup> Sidun has also raised entirely new issues in her brief on appeal suggesting in Section IV that she is entitled to seek redress pursuant to 42 USC § 1983 and § 1988. This issue and relief was not pleaded in this case, has not been raised or argued below, and in any event, relief is unavailable under 42 USC § 1983 and § 1988 in these circumstances. The Wayne County Treasurer will not address these questions substantively in its brief because they were not included in the application and are not properly before the Court.

## COUNTERSTATEMENT OF MATERIAL FACTS AND PROCEEDINGS

### A. NATURE OF THE CASE.

Sidun brings this action alleging that the Wayne County Treasurer failed to comply with the notice requirements of Michigan's General Property Tax Act [GPTA] and took her property without due process when the Treasurer failed to take reasonable steps to inform her of forfeiture proceedings on the property. Pursuant to a judgment of foreclosure dated March 10, 2003, the property was foreclosed for taxes owed Wayne County Treasurer. (Apx, p 88b). Sidun moved for summary disposition pursuant to MCR 2.116(C)(10). In its August 4, 2005 order, the court of claims denied Sidun's motion for summary disposition and granted summary disposition in favor of the Wayne County Treasurer. (Apx, pp 157a-165a).

Sidun appealed the summary disposition order in favor of Wayne County. In an unpublished opinion dated January 19, 2006, the Court of Appeals affirmed the circuit court's order. (Apx, pp 166a-171a). Judge White dissented. (*Id.*).

Considering Sidun's application for leave to appeal the January 19, 2006 judgment of the Court of Appeals, the Court in an order dated June 21, 2006, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals for reconsideration in light of *Jones v Flowers*, 647 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006). (Apx, pp 172a-173a). Upon reconsideration, the Court of Appeals on August 15, 2006, adopted its prior holding. (Apx, pp 174a-181a). Judge White concluded that her prior decision was correct and reiterated it. (*Id.*)

On September 12, 2007, the Court granted Sidun's application for leave to appeal the August 15, 2006 judgment of the Court of Appeals. (Apx, p 182a). In its order granting leave, the Court directed the parties to include among the issues to be briefed whether the County's efforts to provide notice satisfied due process in light of *Jones v Flowers*. (*Id.*)

**B. FACTUAL BACKGROUND REGARDING OWNERSHIP OF THE PROPERTY, THE MULTIPLE NOTICES PROVIDED, AND THE FORECLOSURE PROCEEDINGS.**

Before she married, Stella Sidun lived at 2691 Commor, in Hamtramck, Michigan. (Apx, p 72a). The house was a two-family dwelling with the addresses of 2691 and 2693 Commor. (*Id.*) Sidun lived upstairs in the home. (*Id.*) Her parents, Andrew Chwaleba and Helen Chwaleba owned the home. (Apx, p 73a). After Andrew Chwaleba died, Helen Chwaleba became the sole owner of the home. (*Id.*) In 1979, Helen [Chwaleba] Krist quit claimed the Commor property to herself and to Sidun. (Apx, p 75a). Sidun's name was put on the deed. (*Id.*) Sidun is Helen Chwaleba Krist's sole survivor. (*Id.*)

The Hamtramck city assessor recorded Helen Krist as the taxpayer for the property and listed 3233 Stolzenfeld, Warren, Michigan as her current address. The deed, which was recorded on November 14, 1979, listed both Helen Krist and Stella Sidun as joint tenants, whose addresses were 3233 Stolzenfeld, Warren, Michigan and 2681 Dorchester, Birmingham, Michigan.<sup>2</sup> Krist and Sidun were joint tenants with rights of survivorship, not tenants in common.

Krist and Sidun ordinarily collected the rent from the Commor property by visiting it together. Sidun would pick Krist up and they would go collect the rent. (Apx, p 82a). In addition, Sidun would take her mother wherever she needed to go in order to pay the bills on the Commor property. (*Id.*) For as long as Helen Krist lived on Stolzenfeld, she took care of paying the taxes on the Commor property. (Apx, p 83a). For twenty years, long after Sidun's name was added to the deed on the Commor property, the tax bills continued to be sent to Krist at the Stolzenfeld address in Warren. Eventually, Krist suffered from Alzheimer's and moved out of the Stolzenfeld home. The house was sold. (*Id.*) After that, Stella Sidun, and her husband, Michael Sidun, notified everyone who sent Krist bills that she was no longer living at the

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<sup>2</sup> By this time, Helen Chwaleba had married Leon Krist and had moved into Krist's home located at 3233 Stolzenfeld, Warren, Michigan.

Stolzenfeld address but that she was living at the Siduns' home on Dorchester in Birmingham, Michigan. (Apx, p 84a). Stella Sidun recalled her husband giving such notification in regard to Krist's insurance papers and her water bills. (*Id.*) Stella Sidun then became responsible for collecting the rent on the Commor property. (Apx, p 79a). That occurred at or about the time when Krist moved out of the house on Stolzenfeld and moved in with the Siduns, which took place around 1998.. (*Id.*, 79a-80a). Krist lived with the Siduns for around four years until she died. (*Id.*)

When Krist eventually moved from 3233 Stolzenfeld, neither she nor Sidun notified the Hamtramck city assessor of any change of address. The City of Hamtramck tax bills continued to be mailed to Krist as the taxpayer of record at the 3233 Stolzenfeld address. Krist did not pay the county property taxes for the Hamtramck property for the tax years 2000 and 2001.

Stella Sidun maintained that she never saw any tax bills on the Commor Property from either the City of Hamtramck or from the Wayne County Treasurer. (Apx, p 86a). She never called the City of Hamtramck or the Wayne County Treasurer to ask about a tax bill. She was sure that she would have known a tax bill had one been received. (*Id.*) Stella Sidun never discussed with Michael Sidun whether or not taxes were being paid on the Commor property. (Apx, p 87a). The couple just assumed that the matter was being handled. (*Id.*) She never called the City of Hamtramck or the Wayne County Treasurer to ask where the tax bill was. (Apx, p 88a). Sidun contends that she failed to pay tax bills to Wayne County or to the City of Hamtramck between 2000 and 2003 because she never received notice of them. (*Id.*).

For his part, Michael Sidun candidly stated that he never gave a thought to the issue of the taxes on the Commor property. (Apx, p 108a). Michael Sidun first heard about the tax situation on the Commor property when a tenant called him to notify Mr. Sidun that there was a man at the Commor house claiming to have bought the Commor property and that this man

wanted his rent. (Apx, p 109a). Sidun claimed that it only then dawned on that it was all a matter of taxes. (*Id.*)

The Wayne County Treasurer sent two notices of tax delinquency to Krist, the taxpayer of record at her address of record on Stolzenfeld Street.<sup>3</sup> The notices were sent by certified mail, return receipt requested. The Treasurer did so only after he initiated a title search to identify the owners of the interest in the property who were entitled to notice. The Treasurer determined that the address reasonably calculated to apprise the owners of the pendency of a show cause and a foreclosure hearing was the Stolzenfeld address. The Hamtramck City Assessor had listed that as the taxpayer's address of record and tax statements had been sent there for a period of twenty years. Both letters were returned to the County unclaimed.

On June 14, 2002, the Wayne County Treasurer prepared and filed a petition for foreclosure concerning the Commor Street parcel. The petition set forth the amount of unpaid delinquent taxes, interest, penalties, and fees for the property. The petition sought a judgment in favor of the Wayne County Treasurer for the forfeited unpaid delinquent taxes, interest, fees, and penalties listed against the property. In addition, the petition sought a judgment vesting absolute title to the property in the Wayne County Treasurer without right of redemption, as to parcels of property not redeemed within twenty-one days after entry of a judgment.

On August 15, 2002, a representative of the Wayne County Treasurer visited the property. At that time, notice of the show cause hearing and the judicial foreclosure hearing was posted on the property. (*Id.*) A photograph was taken as evidence of the personal visit to the subject property. (*Id.*) Notice was also sent by mail to the occupant of the property. Further, the

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<sup>3</sup> One of the certified letters was addressed to Stella Sidun at the same Stolzenfeld address.

subject property was listed in the public notice published three times in *The Michigan Citizen* in December, 2002. (*Id.*).

The circuit court set a show cause hearing for January 14, 2003. The court found no reason why the property should not be forfeited to the Wayne County Treasurer and set a date for the judicial forfeiture of the property for February 26, 2003. At that time, the circuit court heard all parties interested in the forfeited properties. It granted the petition of the Wayne County Treasurer.

Subsequent to a hearing on March 10, 2003, the circuit court entered a judgment of foreclosure. (Apx, p 87b). The judgment found that all persons entitled to notice and an opportunity to be heard concerning the foreclosure of the property had been provided the requisite notice and opportunity. (*Id.*) The effect of the judgment was to vest good and marketable fee simple title to the property in the Wayne County Treasurer. The judgment became final and unappealable on March 31, 2003. At that time, all redemption rights to the property were extinguished. The property was eventually sold at a public auction to Mohamed Madrahi for the price of \$52,000. A quit claim deed was issued to Madrahi on December 30, 2003.

**C. THE PROCEDURAL HISTORY AND POSTURE OF THE CASE.**

Sidun filed this suit on December 23, 2004. She sought relief from the judgment of foreclosure, which had extinguished her existing interests in the property. More specifically, Sidun emphasized that the Wayne County Treasurer failed to comply with the notification requirements of the Michigan Constitution's due process clause and of the General Property Tax Act. Sidun insisted that the Treasurer's failure caused her not to receive any notice of foreclosure due to unpaid delinquent taxes. Sidun argued that due process required the Wayne

County Treasurer to take additional measures, such as searching the deed to the property in order to obtain her current address as an owner of the property.

Claiming that there was no genuine issue of material fact that the Wayne County Treasurer failed to comply with the notification requirements of the General Property Tax Act and minimum notice requirements under the due process clause of the Michigan Constitution, Sidun moved for a summary disposition on May 25, 2005. In response, the Wayne County Treasurer maintained that, based upon the facts presented, and viewed together with the relevant case law, he had satisfied the requirements of MCL 211.78 as well as the due process requirements under the clause of the Constitution. (Apx, p 6b).

On July 6, 2005, the court entertained oral arguments on Sidun's motion for summary disposition. (Apx, pp 130a-156a).<sup>4</sup> The trial court questioned Sidun's counsel about the deed, noting that it listed two names, Helen Krist and Stella Sidun, and two addresses, but did not indicate that one address applied to one of them and one address applied to the other. (Apx, p 137a). The trial court also questioned where in the statute the Legislature had required the foreclosing government to send notice to a specific address. (*Id.*, p 138a). The trial court also focused on the posted notice, questioning Sidun's counsel regarding how the Siduns could have visited the property to collect rent over the entire period of time but failed to see the posted notice. (*Id.*, p 140a). Sidun's counsel took the position that the government foreclosing unit was obligated to send a notice to whatever addresses were listed on a deed in the chain of title. (*Id.*, p 145a). Counsel for the Wayne County Treasurer insisted that notice to either joint tenant mailed to the address where the taxpayer receives tax bills was sufficient. (*Id.*, pp 148a-149a).

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<sup>4</sup> At that time, counsel for the Wayne County Treasurer offered a supplemental exhibit, which was an affidavit from the department administrator at the Wayne County Treasurer's office, which reflected the record the Treasurer used to establish addresses to which they sent their tax bill. (Tr, 7/6/05, p 2, Apx, p 131a).

On August 4, 2005, the court issued its opinion and order denying Sidun's motion for summary disposition and granting summary disposition in favor of the Wayne County Treasurer pursuant to MCR 2.116(I)(2). In ruling in favor of the Wayne County Treasurer, the court said in pertinent part as follows:

In the case at hand, Plaintiff claims the single letter mailed to her at 3233 Stolzenfeld was not notice pursuant to Due Process requirements. The court rejects this argument and finds Defendant reasonably calculated notice to reach Plaintiff. Specifically, Defendant notified Mrs. Krist three times by mail, return receipt requested, and notified both Mrs. Krist and her daughter, Plaintiff, a fourth time. In addition to mailed notices, Defendant published notice three times in a county paper, posted notice on the Property, and notified the occupants of the Property. At all times throughout the notification process, Plaintiff's husband visited the Property and collected rental checks from the tenants. This Court finds that Plaintiff received adequate notice pursuant to Due Process.

\* \* \*

Pursuant to [MCL] 211.78(f), Defendant sent the June and September notices certified mail, return receipt requested, to Mrs. Krist at the 3233 Stolzenfeld address. The February notice that *Republic Bank* held as not required, Defendant sent to Mrs. Krist though [sic] the same method. Defendant notified the tenants of the Property of the foreclosure by mail. Moreover, Defendant published three notices in the Michigan Citizen, attempting to notify the Property's owners.

In accordance with [MCL] 211.78(i), Defendant performed a county document search and calculated the address where Plaintiff would reasonably receive notice of the hearings. Defendant sent notice to the owners, both Mrs. Krist and her daughter, Plaintiff, a fourth time, at the address obtained from the tax records. Plaintiff contests this notice as negligent because Defendant sent it to Mrs. Krist's last known address and not to Plaintiff's most current address as listed on the deed. However, Defendant also made a personal visit to the Property attempting to serve the occupants with notice of the potential foreclosure. When Defendant could not personally serve the occupants, he posted notice on the Property. Despite the fact that Defendant obtained the names and addresses of the owners entitled to notice, Defendant published three consecutive notices in a county paper where the property was located. Moreover, Plaintiff's husband visited the Property through the notification process and had reasonable opportunity to observe the posted notice as well as hear about the notice from tenants.

\* \* \*

After considering all the court documents, Plaintiff's Motion for Summary Disposition is denied. Alternatively, pursuant to 2.116(i)(2), Motion for Summary Disposition is granted by the Court for Defendant. Plaintiff argues one of the four letters sent to notify her and her mother, Mrs. Krist, did not satisfy the

notification requirements because Defendant did not send the notice to her most recent address. Defendant abided by all requirements of the General Property Tax Act and Due Process when sending the letter in question to an address reasonably calculated to give Plaintiff notice. Defendant sufficiently notified Plaintiff in writing of the Property's tax delinquency and potential foreclosure.

\* \* \*

There remain no genuine issues of material fact, including whether there was notice pursuant to Due Process and the General Property Tax Act requirements. The State of Michigan does not require a search of the deed as Plaintiff suggests. Defendant has abided by all applicable sections of the Act. Plaintiff had ample opportunity to receive notification of the show cause and foreclosure hearings.

(Apx, pp 161a-162a, 163a-164a).

Sidun pursued an appeal from the order granting summary disposition. By way of an unpublished, per curiam opinion, the Court of Appeals affirmed the grant of summary disposition in favor of the Wayne County Treasurer.<sup>5</sup> In its opinion, the Court of Appeals identified the central issue of the appeal as whether the Wayne County Treasurer provided sufficient notice of the tax delinquency and subsequent foreclosure proceedings on the Common property. In resolving that issue in favor of the Wayne County Treasurer, the Court of Appeals recited as follows:

In this case, plaintiff primarily argues MCL 211.78(i)(1) required defendant to search the County Register of Deeds and to provide notice to her at the address provided for her on the quit claim deed. She maintains that defendant's failure to do so deprived her of notice reasonably calculated to apprise her of the pending foreclosure. But whether notice is adequate is governed by state and federal due process standards and not by specific provisions of the GPTA. *Republic Bank, supra*, at 737; MCL 211.78(2). Defendant sent notice to the taxpayer's address as recorded with the Hamtramck City Assessor, and defendant's representative visited the Hamtramck property before the show cause and foreclosure hearings and conspicuously posted notice of the upcoming hearings. Due process only requires that notice that is reasonably calculated to apprise the interested party of notice of the pending proceedings. *Republic Bank, supra*, at 739. Here, where plaintiff and her husband rented out the Hamtramck property on a month-to-month basis and visited the property to collect rent, placing notice on the Hamtramck property itself was reasonably calculated to apprise plaintiff of the

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<sup>5</sup> Judge White dissented.

pending proceedings. The minimal requirements of due process were satisfied and plaintiff is not entitled to monetary damages.

(Apx, pp 169a-170a).

This Court vacated the Court of Appeals decision and remanded for consideration in light of the United States Supreme Court's decision in *Jones v Flowers*, 547 US 220;126 S Ct 1708; 164 L Ed 2d 415 (2006). On remand, the Court of Appeals adopted its prior holding. (Apx, pp 174a-179a). The Court noted that "Jones reiterated that the government need not achieve actual notice, but must provide notice 'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Apx, p 178a). The Court of Appeals also pointed out that *Jones* had expressly recognized posting as a reasonable follow up measure when mailed notice was returned unclaimed. (*Id.*) In the circumstances of this case, the Court of Appeals concluded that the Wayne County Treasurer's efforts were reasonable, "particularly the posting of the notice on the property itself, given that plaintiff's husband routinely visited to property to collect monthly rents...." (*Id.*, pp 178a-179a). Judge White again dissented on the basis that no notice was mailed to the Dorchester address. (*Id.*, pp 180a-181a).

Sidun then sought leave to appeal to this Court. In an order and an amended order, the Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals for reconsideration in light of *Jones v Flowers*, 574 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006). (Apx, pp 172a-173a). On remand, in an opinion dated August 15, 2006, the Court of Appeals adopted its prior holding. Judge White again dissented. (Apx, pp 174a-181a).

On September 12, 2007, the Court granted Sidun's application for leave to appeal the Court of Appeals' August 15, 2006 judgment. The Court instructed the parties to include among

the issues to be briefed whether the defendant's efforts to provide notice satisfied due process in light of *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006).

## SUMMARY OF THE ARGUMENT

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 314; 70 S Ct 652; 94 L Ed 2d 865 (1950); *Republic Bank v Genesee County Treasurer*, 471 Mich 732; 690 NW2d 917 (2005). But the fact that the notice does not reach the intended recipient does not render it unconstitutional. *Dusenbery v United States*, 534 US 161; 122 S Ct 694; 151 L Ed 2d 597 (2002); *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420; 617 NW2d 536 (2000).

The United States Supreme Court's recent decision in *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006) has refined the application of these general and long-standing principles in the context of certified mail. In a narrow, fact-bound decision, the Court held that when the government timely becomes aware that the mailed notice has been returned unclaimed, it is obligated to take other reasonable steps if practicable to do so. *Id.* The reason for requiring this was two-fold: First, certified mail is uniquely likely to be returned since it requires someone to sign for it in order to be received; and, Second, regular mail or mailing to "occupant" or posting were reasonable steps that appeared practicable to the Court.

The Wayne County Treasurer took reasonable steps to provide notice, including employing all the reasonable alternatives described by the *Jones* Court. Sidun insists that this was insufficient because a quit claim deed identifying both Sidun and Krist as co-owners of the property listed two addresses for them, only one of which was used by the Wayne County Treasurer. But the government is not obligated to conduct a title search or a search of other government records in order to satisfy due process. *Jones, supra.* And the deed to which Sidun points does not specify that one address is the best for reaching her; it merely mentions two addresses, one of which was used for twenty years and was included in the tax assessor's

records. In addition, the Wayne County Treasurer had mail sent to the occupant, which the *Jones* Court recognized was a reasonable method of providing notice. Likewise, the Wayne County Treasurer posted notice on the property, which would have been clearly visible to the tenants occupying the premises and to the Siduns who visited the property at least monthly to collect the rent.

This Court should decline Sidun's invitation to issue a broad decision expanding due process notice requirements even beyond those contemplated in *Jones*. Nothing in *Jones* requires actual notice. Nothing in *Jones* allows analysis based on after-the-fact considerations regarding how notice might have been achieved. Nothing in *Jones* suggests that notice by posting or regular mail sent to "occupant" is insufficient when certified mail sent to the taxpayer at the address of record is unclaimed. Nothing in *Jones* requires a reversal on this record. To the contrary, the judgment in favor of the Wayne County Treasurer should be affirmed.

## ARGUMENT

**DUE PROCESS DOES NOT REQUIRE THE WAYNE COUNTY TREASURER TO SEARCH FOR AN ALTERNATIVE ADDRESS FOR A DELINQUENT TAXPAYER WHEN NOTICES OF THE TAX SALE AND RIGHT TO REDEEM WERE SENT BY REGULAR AND CERTIFIED MAIL TO THE LAST KNOWN ADDRESS OF THE TAXPAYER AS REFLECTED IN COUNTY TAX RECORDS, MULTIPLE NOTICES WERE MAILED TO THE ADDRESS THAT HAD BEEN USED FOR TWENTY YEARS, INCLUDING NOTICES MAILED TO THE OCCUPANT, NOTICE WAS POSTED ON THE PROPERTY WHICH WAS OCCUPIED AND TO WHICH THE TAXPAYER WENT MONTHLY TO COLLECT RENT, AND NOTICES WERE PUBLISHED IN A LOCAL NEWSPAPER.**

**A. STANDARD OF REVIEW.**

This Court reviews de novo questions of constitutional law. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

**B. DUE PROCESS REQUIRES NOTICE REASONABLY CALCULATED AT THE TIME SENT TO INFORM THE RECIPIENT OF AN UPCOMING PROCEEDING.**

Due process generally requires notice reasonably calculated to inform the intended recipients of an upcoming proceeding that could affect the recipient's property interests.

*Mullane v Central Hanover Bank Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 2d 865 (1950).

Under that test, the fact that notice does not actually reach the recipient does not render it constitutionally inadequate. *Dusenbery v United States*, 534 US 161; 122 S Ct 694; 151 L Ed 2d 597 (2002); *Tulsa Professional Collection Services, Inc v Pope*, 486 US 478, 482; 108 S Ct 1916; 100 L Ed 2d 475 (1988); *Mennonite Board of Missions v Adams*, 462 US 791, 795; 103 S Ct 2706; 77 L Ed 2d 180 (1983); *Greene v Lindsay*, 456 US 444, 449-450; 102 S Ct 1874; 72 L Ed 2d 249 (1982). The *Mullane* Court explained that the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it..." 339 US at 315. The "reasonableness and hence the constitutional validity of any chosen method may be

defended on the ground that it is itself reasonably certain to inform those affected.” 339 U.S. at 315.

*Jones v Flowers*, 547 US 220, 225; 126 S Ct 1708; 164 L Ed 2d 415 (2006) held that “when 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.” *Id.* *Jones* does not alter the *Mullane* standard or deviate from *Dusenbery*. It merely clarifies that, when a government has knowledge that the means it selected to give notice did not work, it is obligated to take additional steps, if practicable. The *Jones* Court did not alter the well-settled rule that actual notice is not required. The Court simply, and narrowly, held that other reasonable steps were available, including resending the letter to the same address by regular mail. 547 US at 234. The Court pointed to other reasonable steps, including posting notice on the front door or addressing the mail to “occupant.” *Id.* at 235. In discussing these steps, the *Jones* Court explicitly “disclaim[ed] any ‘new rule’ that is contrary to *Dusenbery* and a significant departure from *Mullane*.” *Id.* at 238. The U.S. Supreme Court has never held, either before or since *Jones*, that actual notice is required in tax foreclosure proceedings. And thus, it is not required here. Nor is there any basis under state law for imposing such a burdensome and unrealistic standard on governments attempting to foreclosure on property for the non-payment of property taxes. See generally, *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976); *Republic Bank v Genesee County Treasurer*, 471 Mich 732; 690 NW2d 917 (2005); and MCL 211.78(2).

**C. DUE PROCESS DOES NOT REQUIRE ACTUAL NOTICE BUT ALLOWS NOTICE BY POSTING AND PUBLICATION IN APPROPRIATE CIRCUMSTANCES.**

Contrary to Sidun’s argument on appeal, the government need not provide actual notice in order to satisfy due process. Notice by mail may be sufficient, even if it is sent to an erroneous or outdated address. Posting and publication are still constitutionally valid methods of providing

notice in appropriate circumstances. See *Mullane*, 339 US at 317-318. See also *Greene v Lindsay*, 456 US 444, 451-452; 102 S Ct 1874; 72 L Ed 2d 249 (1982) (notice by posting may be “a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him”).

The U.S. Supreme Court has repeatedly rejected any approach to evaluating due process that would require “heroic efforts” by the Government. *Dusenbery*, 534 US at 170-171 citing *Mullane*, 339 US at 315. Rather, the Court has taught that the “very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria & Restaurant Workers Union, Local 473 v McElroy*, 367 US 886, 894; 81 S Ct 1743; 6 L Ed 2d 1230 (1961). *Mullane* made this clear when the Court explained that “a construction of the Due Process Clause which would place impossible or impracticable obstacles in the way could not be justified.” 339 US at 314. See also *Walker v City of Hutchinson*, 352 US 113, 115; 77 S Ct 200; 1 L Ed 2d 178 (1956). The *Mullane* Court taught that the “reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” 339 US at 319.

This Court’s analysis of due process similarly requires notice “reasonably calculated” to reach the intended recipient, but does not require personal service. *Dow v Michigan*, 396 Mich 192, 212; 240 NW2d 450 (1976) citing *Grannis v Ordean*, 234 US 385; 34 S Ct 799; 58 L Ed 1363 (1914). This Court has expressly rejected the notion that a tax reversion process requires personal service to satisfy the strictures of constitutional due process:

Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice.... If the state exerts reasonable efforts, then failure to effectuate actual

notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period.

*Dow*, 396 Mich at 221. Subsequent to *Dow*, the Legislature enacted 1976 PA 292 and amended the General Property Tax Act to conform it to the due process requirements articulated by this Court in *Dow*. See MCL 211.61b; MCL 211.73c; MCL 131c(1); MCL 211.131e.

This Court upheld the constitutionality of the amended statute in *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420; 617 NW2d 536 (2000). There, consistent with then-prevailing U.S. Supreme Court decisional authority, this Court held that the notice provided under the 1976 PA 292 amendments satisfied due process. *Id.* at 428-429. This Court recognized the legislative dictate to uphold tax sales if the notice satisfies due process, even when the foreclosing governmental unit failed to comply with all of the requirements of the statute. *Id.* at 428-431. See also, *Republic Bank v Genesee County Treasurer*, 471 Mich 732, 741; 690 NW2d 917 (2005).

Since then, the U.S. Supreme Court issued its decision in *Jones*. In a narrow, fact-based decision, the *Jones* Court held that when “mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to provide notice to the property owner before selling his property, if it is reasonable to do so.” *Jones*, 547 US at 225. *Jones* did not hold that personal service was required. The efficacy of notice by posting and notice by publication was expressly recognized in *Jones*. Indeed, these were among the methods that Chief Justice Roberts, writing for the majority, identified as additional reasonable steps to take if the government becomes aware that its notice failed to reach the intended recipient because it employed certified mail, which was returned unclaimed. 547 US at 234. Each of these methods (mailing to the same person at the same address by regular mail, posting on the property, and publication) offer additional protection when certified mail has been returned unclaimed. *Mullane, Dusenbery*, and

*Jones* support the Wayne County Treasurer's position that due process in this case has been satisfied.

**D. NOTICE IN THIS CASE SENT BY CERTIFIED AND REGULAR MAIL TO THE ADDRESS IN THE RECORDS OF THE TAX ASSESSOR FOLLOWED BY NOTICE SENT BY MAIL TO THE OCCUPANT, NOTICE BY POSTING, AND NOTICE BY PUBLICATION WAS REASONABLY CALCULATED TO APPRISE THE PROPERTY OWNER OF THE TAX SALE.**

Sidun urges this Court to reverse the lower courts on the basis of *Jones v Flowers*. (Appellant Stella Sidun's Brief on Appeal, pp 14-24). She insists that the County violated her due process rights because it failed to mail notice to her at the address listed on a deed to the property, but instead provided notice at the address listed in the taxpayer's records for receipt of tax bills. Sidun's argument was correctly rejected by the trial court and Court of Appeals. The Court of Appeals correctly reasoned that *Jones* does not support the existence of a due process violation here. (Court of Appeals Opinion *On Remand*, Apx, pp 174a-179a). To the contrary, the Wayne County Treasurer's conduct fully satisfies the constitutional notice obligations recognized in *Jones*, and in this Court's precedent.

Foreclosure in Michigan is governed by the General Property Tax Act, PA 206 of 1893, as amended, MCL 211.1 *et seq.* The Wayne County Treasurer adhered to the procedures, including the notice provisions, set forth in the statute. Pursuant to MCL 211.78b and MCL 211.78c, the person to whom a tax bill for property returned for delinquent taxes was last sent is entitled to two notices of tax delinquency<sup>6</sup>, which are to be sent by first-class mail, address correction requested, on the June 1 and September 1 immediately succeeding the date that the unpaid taxes were returned to the county treasurer as delinquent under MCL 211.78a. The

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<sup>6</sup> MCL 711.78b and MCL 211.78c require this notice to be sent to either the person to whom the notice was last sent or to the person identified as owner of the property. It also requires notices in various other circumstances not at issue in this appeal. See e.g., MCL 211.78a(4).

Wayne County Treasurer's records for Hamtramck properties, such as the property at issue here, are based exclusively on the assessment records provided by the City of Hamtramck Assessor's Office. (Hamtramck City Assessor's Taxpayer Records, Apx, pp 29b-30b).<sup>7</sup>

The City of Hamtramck Assessor's Office listed Mrs. Helen Krist as the taxpayer of record for the subject property. (*Id.*) Mrs. Krist's address was listed as 3233 Stolzenfeld, Warren, MI 48091. As required by MCL 211.78b and MCL 211.78c, notice of tax delinquency were sent by first-class mail, address correction requested, to Mrs. Helen Krist at 3233 Stolzenfeld, Warren, MI 48091.

MCL 211.78f requires additional notices to be sent no later than the February 1 immediately following the date that unpaid taxes were returned to the county treasurer as delinquent under MCL 211.78a. The county treasurer is obligated to send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, to the person identified as the owner of property returned for delinquent taxes as shown on the current records of the county treasurer and to those persons identified under MCL 211.78e(2). The Wayne County Treasurer sent these notices based on the information of record from the City of Hamtramck, which identified the owner and taxpayer of record as Helen Krist at 3233 Stolzenfeld, Warren, MI 48091. (Notification Packet, Apx, p 78b).

MCL 211.78i(2) calls for additional notice to persons or entities located in a title search of the subject property and who own an interest in the property that is forfeited for the failure to pay delinquent taxes. This additional notice must be provided by certified mail, return receipt requested, with a notice of the show cause hearing and the judicial foreclosure hearing. (*Id.*)

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<sup>7</sup> The Wayne County Treasurer has no authority or duty to unilaterally change the records of the City of Hamtramck or to verify their accuracy.

The Wayne County Treasurer prepared and provided this notice, and sent it by mail on December 18, 2002 to Helen Krist and Stella Sidun at 3233 Stolzenfeld, Warren, MI 48091. (Apx, p 78b). Sidun had been identified as a co-owner in the title search and thus was sent a notice.

As provided for in the statute, the Wayne County Treasurer also arranged for a personal visit to the property on August 15, 2002 during which notice of the show cause hearing and judicial foreclosure hearing was posted on the property. (Apx, p 78b). A photo was taken to evidence the visit and to demonstrate that the notice had been posted. (Apx, p 78b). Notice was also mailed to the occupant of the property. (Apx, p 78b). Finally, the property was listed in a public notice published three times in the Michigan Citizen in December, 2002. (Apx, p 78b). During this time, Sidun and her husband regularly visited the property to collect rent from the tenants. (Dep of Michael Sidun, pp 8-9, Apx, pp 69b-70b).

This lengthy list of notices, including certified and regular mail sent to both Krist and Sidun, notice by posting on property occupied by tenants and visited regularly by the Siduns, and notice by publication more than satisfies due process even under *Jones's* more rigorous standard. Both the trial court and Court of Appeals held that the notice provided in this case satisfied the requirements of due process. The trial court opined:

[The court] finds Defendant reasonably calculated notice to reach Plaintiff. Specifically, Defendant notified Mrs. Krist three times by mail, return receipt requested, and notified both Mrs. Krist and her daughter, Plaintiff, a fourth time. In addition to mailed notices, Defendant published notice three times in a county paper, posted notice on the Property, and notified the occupants of the Property. At all times throughout the notification process, Plaintiff's husband visited the Property and collected rental checks from the tenants. This Court finds that Plaintiff received notice pursuant to Due Process.

(Apx, pp 161a-162a).

This Court also rejected Sidun's allegation that the County failed to abide by the provisions of the General Property Tax Act:

In accordance with [MCL] 211.78(i), Defendant performed a county document search and calculated the address where Plaintiff would reasonably receive notice of the hearings. Defendant sent notice to the owners, both Mrs. Krist and her daughter, Plaintiff, a fourth time, at the address obtained from the tax records. Plaintiff contests this notice as negligent because Defendant sent it to Mrs. Krist's last known address and not to Plaintiff's most current address as listed on the deed. However, Defendant also made a personal visit to the Property attempting to serve the occupants with notice of the potential foreclosure. When Defendant could not personally serve the occupants, he posted notice on the Property. Despite the fact that Defendant obtained the names and addresses of the owners entitled to notice, Defendant published three consecutive notices in a county paper where the property was located. Moreover, Plaintiff's husband visited the Property through the notification process and had reasonable opportunity to observe the posted notice as well as hear about the notice from tenants.

(*Id.*, pp 7-8; Apx, pp 161a-162a).

The Court concluded:

Defendant abided by all requirements of the General Property Tax Act and Due Process when sending the letter in question to an address reasonably calculated to give Plaintiff notice. Defendant sufficiently notified Plaintiff in writing of the Property's tax delinquency and potential foreclosure.

\* \* \*

There remain no genuine issues of material fact, including whether there was notice pursuant to Due Process and the General Property Tax Act requirements. The State of Michigan does not require a search of the deed as Plaintiff suggests. Defendant has abided by all applicable sections of the Act. Plaintiff had ample opportunity to receive notification of the show cause and foreclosure hearings.

(*Id.*, p 8; Apx, pp 163a-164a).

The Court of Appeals upheld this judgment, not once but twice, explaining:

In this case, plaintiff primarily argues MCL 211.78(i)(1) required defendant to search the County Register of Deeds and to provide notice to her at the address provided for her on the quit claim deed. She maintains that defendant's failure to do so deprived her of notice reasonably calculated to apprise her of the pending foreclosure. But whether notice is adequate is governed by state and federal due process standards and not by specific provisions of the GPTA. *Republic Bank, supra*, at 737; MCL 211.78(2). Defendant sent notice to the taxpayer's address as recorded with the Hamtramck City Assessor, and defendant's representative visited the Hamtramck property before the show cause and foreclosure hearings and conspicuously posted notice of the upcoming hearings. Due process only requires that notice that is reasonably calculated to apprise the interested party of notice of the pending proceedings. *Republic Bank, supra*, at 739. Here, where

plaintiff and her husband rented out the Hamtramck property on a month-to-month basis and visited the property to collect rent, placing notice on the Hamtramck property itself was reasonably calculated to apprise plaintiff of the pending proceedings. The minimal requirements of due process were satisfied and plaintiff is not entitled to monetary damages.

(Apx, pp 169a-170a).

Sidun argues that this was error because the notice was returned to the Wayne County Treasurer, and because notice was not also mailed to the second of two addresses listed on a quit claim deed. (Appellant Stella Sidun's Brief on Appeal, pp 5-8). Sidun insists that the Wayne County Treasurer failed to provide notice at Sidun's "last known address." And Sidun asserts that, because she did not receive notice, due process was not satisfied. (*Id.*)

Sidun's arguments are factually and legally flawed. Sidun is wrong to suggest that, even looking at the quit claim deed, the Wayne County Treasurer would have known that she resided only at the Birmingham address and that it was her "last known address." To the contrary, the Wayne County Treasurer provided multiple notices to the last known address in its records for both Sidun and Krist, the 3323 Stolzenfeld address. Nothing in the tax records revealed any change in address. Although the Siduns took care of other bills, including the water bills, they failed to apprise the Wayne County Treasurer's office of any new address to which tax bills should be sent. (Dep of Michael Sidun, pp 13-14, Apx, pp 74b-75b). Sidun has not shown, or raised a fact question regarding, whether the Wayne County Treasurer gave notice to the correct address. To the contrary, the record is clear that the notices were sent to the address listed in the tax assessor's records, and that additional notices were sent to the occupant, and posted on the property. Sidun is also wrong to suggest that the multiple notices sent here do not satisfy due process.

The Wayne County Treasurer sent three notices of tax delinquency to the taxpayer of record at her address of record. (Notification Packet, Apx, pp 78b-86b). The Treasurer initiated

a title search to identify owners of a property interest in the property who were entitled to notice and determined the address reasonably calculated to apprise those owners of the pendency of the show cause and foreclosure hearings—the Stolzenfeld address listed by the Hamtramck City Assessor’s office, which was the taxpayer’s address of record, and where tax bills had been sent for twenty years. (Apx, p 28b). The Wayne County Treasurer also sent notice by certified mail to both owners at the Stolzenfeld address. (Notification Packet, Apx, pp 78b-86b). He also caused an authorized representative to make a personal visit to the property. (*Id.*) The Wayne County Treasurer also caused an attempt to be made to personally serve a notice on the occupant of the property, and when unable to do so, to post notice on the property in a highly visible place. (*Id.*) The Wayne County Treasurer also published the notice in the newspapers. (*Id.*)

To the extent that *Jones* changed the law, the change was incremental and slight. *Jones* did not abandon the long-standing due process jurisprudence, which accepts notice “reasonably calculated” under the circumstances to advise the intended recipient of the pending foreclosure. See e.g. *In re Application of the County Collector For Judgment*, 867 NE2d 941, 950-954 (Ill, 2007). *Jones* merely required the government to take additional reasonable steps if it became aware that its notice was ineffective. In this case, Sidun argues that the return of the certified mail notice should have told the Wayne County Treasurer that the notice failed to reach the intended recipient. But even if the Wayne County Treasurer can be charged with taking additional reasonable steps as contemplated in *Jones*, the record reflects that he did so here. Thus, Sidun’s challenge to the foreclosure was properly rejected.

The Wayne County Treasurer mailed notices by regular mail to the property owner and mailed notices by regular mail to the occupant, two of the steps that the *Jones* Court discussed as sufficient to satisfy due process when certified mail is returned unclaimed. The *Jones* Court explained that certified mail “might make actual notice less likely in some cases—the letter

cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time.” *Jones*, 547 US at 235. In addition, the *Jones* Court reasoned that regular mail could increase the chances that the owner might receive actual notice because “[e]ven occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner’s new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.” *Id.* That potential was certainly strong here since the occupant was paying rent to Sidun, and saw Sidun or her husband regularly to pay it. The occupant could readily have scrawled Sidun’s address on the mail and returned it to the post office marked “not at this address,” with the new address provided. The occupant could also easily have put the notice aside to give to the Siduns when they came to collect the rent. The fact that this was not done and Sidun did not get actual notice does not alter the reasonableness of the notice provided.

The Wayne County Treasurer also provided notice mailed to the occupant and posted notice on the property. These steps also were identified by the *Jones* Court as ones that “would increase the likelihood that the owner would be notified that he was about to lose his property.” 457 US at 235. According to the Court, “[o]ccupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as ‘occupant’) might be opened and read.” *Id.* The Court reasoned that “[i]n either case, there is a significant change the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy.” *Id.* These steps, which the *Jones* Court identified, were taken in this case. Sidun’s contention that she did not receive actual notice does not alter the due process inquiry, which looks at whether the governmental entity has taken steps *Jones* identified as reasonably calculated to give notice under the circumstances. The Wayne County Treasurer’s efforts at notice included the steps reasonably calculated to give notice under the circumstances.

**E. THE PROPERTY OWNER’S AFTER-THE-FACT CONTENTIONS THAT ADDITIONAL NOTICE COULD EASILY HAVE BEEN PROVIDED ARE IRRELEVANT AND WITHOUT MERIT.**

The question of whether a method of notice is “reasonably calculated” to reach the intended recipient must be answered from the perspective of the party giving the notice, and at the time it faces the obligation to provide the notice. *Graham v O’Connor*, 490 US 386, 396; 109 S Ct 1865; 104 L Ed 2d 443 (1989). This conclusion flows from the *Mullane* standard, which focuses not on what can be determined with the benefit of hindsight, but rather on what means a party seeking to give notice “might reasonably adopt to accomplish it” before the attempt was made. 339 US at 315. The inquiry is not to be conducted with the “20/20 vision of hindsight.” *Graham*, 490 US at 396.

Looking backward, it will always be possible for an intended recipient of notice to pinpoint exactly how the government could have assured that he would have received actual notice. As this Court said in *Smith v Cliffs on the Bay Condo Ass’n*, 463 Mich 420; 617 NW2d 536 (2000), “No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that some thing more could have been done.” *Id.* This Court correctly recognized that embracing a rule that allows for such after-the-fact arguments “will make the process of tax sales completely unpredictable, destroying the government’s ability to recoup unpaid taxes by foreclosing and reselling.” *Id.* But the *Mullane* Court “reasonably calculated” standard measures efforts to provide notice ex ante, from the government’s standpoint at the time the notice is provided, and not ex post, from the intended recipient’s perspective after his actual whereabouts have been established. The fact that hindsight shows some other means of notice would have been more successful is not constitutionally significant.

The *Jones* Court emphasized that its ruling did not alter the rule that analysis under *Mullane* is *ex ante*, not *ex post*. The *Jones* Court explicitly rejected such a reading, explaining that its holding was more limited. *Jones* merely said, “[I]f a feature of the State’s chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure.” *Id.* at 231. Likewise, the Court analogized, it “would not be inconsistent with the approach that the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered.” *Id.* Thus, *Jones* does not alter the basic analytical framework for evaluating the adequacy of notice.

Sidun insists that the Wayne County Treasurer’s efforts were insufficient to satisfy due process because the Wayne County Treasurer did not send notice to an alternate address that was included on a quit claim deed, which could have been uncovered in the title search. But this additional step is not required as a matter of constitutional or statutory law. *Jones* expressly held, consistent with this Court’s earlier decisions in *Cliffs on the Bay, supra* and *Republic Bank, supra* that the governmental foreclosing unit need not consult other government records or a local phone book. *Jones*, 547 US at 235-236. No such requirement exists as a matter of constitutional law, and Sidun has pointed to no authority in support of this assertion. State law does contemplate a search of other records in specified circumstances, MCL 78i(2), but the search is required only if the government is unable to determine an address reasonably calculated to inform a person with an interest in the forfeited property or if the government discovers a deficiency in notice. Moreover, the Legislature explicitly offered language to ensure that the extra steps provided for in the statute to give notice would not invalidate any proceeding if the steps taken satisfy due process as a matter of constitutional law:

The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded minimum due process required under the state constitution of 1963 and the constitution of the United States.

MCL 78i(10). Thus, even if *Jones* altered the constitutional requirements for minimum due process under the federal constitution or if this Court chooses to alter the constitutional requirements for minimum due process under the state constitution to keep it in line with the federal constitution, the Wayne County Treasurer's steps to provide notice were sufficient as a matter of constitutional law. *Jones* did not require a title search as a matter of due process so any failure to provide notice to addresses uncovered in such a search does not retroactively raise the standard for due process.

Sidun predicates her attack on the Wayne County Treasurer's notice on her claim that a title search would have, and did, reveal a second address that would have given her actual notice. There are several problems with this approach. First, no precedent thus far, from this Court of the United States Supreme Court, has required a foreclosing governmental unit to conduct a title search and provide notice at any and all alternative addresses found on deeds or other instruments filed with the register of deeds. Imposing such a requirement would create enormous burdens for the government, which is not now obligated to conduct full-scale title searches, but is merely obligated under the statute to examine title to ascertain persons with an interest in property who are entitled to notice. If records reveal conflicting or alternative addresses, the government will be forced to send even more multiple notices or to take extraordinary steps to resolve whether one or another address is the more current.

Sidun repeatedly characterizes her address on the quit claim deed as the "last known address" but she fails to explain how the Wayne County Treasurer would have known this. The quit claim deed was dated 1979, and tax bills were successfully sent to the first address listed on

the deed for more than twenty years, including many years after the deed was filed in the register of deeds. In addition, the quit claim deed, as the trial court observed, did not identify one of the two addresses listed as belonging to Sidun and the other as the address of Krist. (Tr, pp 7-8, Apx, pp 136a-137a). It merely included two addresses. One of the addresses, the first in the deed was listed on the taxpayer's records, and had been used for twenty years. Thus, even studying the deed, there is no basis for concluding that the Dorchester address was Sidun's or that it was the last known address or that it was a better address.

Equally important, and fatal to Sidun's argument, the Supreme Court and this Court have never allowed such hindsight arguments to alter the analysis. Sidun urges the Court to upset a foreclosure based on after-the-fact evidence that she resided at Dorchester, that her mother had Alzheimers and eventually moved out of the Stolzenfeld address, and that she could have received actual notice after that point if notice had been sent to her at her home in Birmingham. None of this information was available to the Wayne County Treasurer at the time he sent the notices at issue here. This Court has repeatedly rejected these kinds of arguments. See e.g., *Cliffs on the Bay*, at 431.<sup>8</sup> The Supreme Court has also rejected them. *Jones*, 547 US at 235-236, 238. The lower courts correctly applied these precedents to conclude that the notice provided by the Wayne County Treasurer satisfies minimal due process standards. As a result, the judgment below should be affirmed.

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<sup>8</sup> While a narrow aspect of the *Cliffs on the Bay* notice-analysis has been refined by *Jones*, it remains good law for other points. It has not been expressly overruled or vacated, and much of its discussion is consistent with *Jones*.

**F. IF THIS COURT NEEDS TO REACH THE ISSUE BECAUSE IT CONCLUDES THAT *JONES V FLOWERS* WAS UNSATISFIED, THEN IT SHOULD HOLD THAT THE DUE PROCESS REQUIREMENTS AS ANNOUNCED IN *JONES V FLOWERS* SHOULD NOT BE APPLIED RETROACTIVELY TO CASES NO LONGER OPEN ON DIRECT REVIEW.**

If this Court concludes that due process as defined in *Jones* has not been satisfied, it should nevertheless affirm the judgment because *Jones* marked a change in the law not foreshadowed by prior opinions and applying to cases no longer open on direct review would unsettle title to numerous properties now in the hands of purchasers for value. The Wayne County Treasurer adopts the analysis included in the amicus brief of the Michigan Department of Treasury on the question of retroactive application of *Jones*. The foreclosure at issue in this action was initiated in 2000 and became final in 2003. Opening up cases involving foreclosure years after the judgment has been final would unsettle numerous properties that have long since been sold. Trying to unwind those sales would create enormous difficulties for foreclosing governments and for private property owners, who may have invested large sums of money in renovating the properties and putting them to productive use. See *In Re Petition by Treasurer of Wayne County For Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007) (holding that circuit court retains jurisdiction to alter judgment of foreclosure if court later finds notice failed to satisfy due process). This Court has generally applied its decisions only to pending cases in which the issue has been raised and preserved. See e.g., *Stein v Southeastern Michigan Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989); *DeVillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 and 587 n 57; 702 NW2d 539 (2005). It should apply its holding here no more broadly given the impact on settled property rights that would otherwise occur. See also *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

**G. SIDUN'S BELATEDLY-RAISED ARGUMENTS REGARDING 42 USC SECTIONS 1983 AND 1988 ARE NOT PROPERLY BEFORE THIS COURT BECAUSE THEY WERE NEVER RAISED OR RULED ON BY THE TRIAL COURT, AND IN ANY EVENT, ARE NOT A PROPER BASIS FOR RELIEF IN AN ACTION TO SET ASIDE A FORECLOSURE JUDGMENT UNDER MCL 211.78.**

In her application for leave to appeal, Sidun challenged the Court of Appeals order affirming the trial court's ruling that the foreclosure was valid under the General Property Tax Act and due process under Michigan's Constitution. (Plaintiff/Appellant's Application for Leave and/or Request for Peremptory Reversal, p v). Nowhere in her briefing or oral argument before the trial court did Sidun mention 42 USC § 1983 and § 1988. (Plaintiff's Motion for Summary Disposition, Apx, pp 2a-14a; Tr, pp 130a-156a). Nowhere in the lower court record is there any ruling on a theory or count presented to the court under 42 USC § 1983 and § 1988. This Court has repeatedly taught that a litigant is bound by the theories presented below. *Gross v General Motors Corp*, 448 Mich 147, 161 n 8; 528 NW2d 707 (1995). Sidun presented a claim under the due process clause and under the General Property Tax Act in the courts below. Her complaint never mentioned 42 USC § 1983 and § 1988. (Verified Complaint, 12/23/04). She is limited to those theories before this Court.

In her discussion of the order appealed from and the relief sought in this Court, Sidun did not inject any claims under 42 USC § 1983 and § 1988. (Plaintiff/Appellant's Application for Leave and/or Request for Peremptory Reversal, p v). In her statement of the questions presented for review, Sidun raised no issue relating to relief under 42 USC § 1983 and § 1988. (*Id.*, p vi). She characterized this appeal as one involving "legal principals [sic] of major significant to this state's jurisprudence" and cited Michigan precedent with the sole exception of mentioning *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), in her discussion of due process. (*Id.*, pp iii, 17). That single citation to *Mathews* occurred as part of a citation to a Michigan decision, *In Re Brock*, 442 Mich 101; 499 NW2d 752 (1993), which in turn had cited

Mathews. (*Id.*, p 17). In the relief clause of her application for leave, Sidun made no mention of 42 USC § 1983 or § 1988:

Accordingly, Plaintiff/Appellant respectfully requests the court either grant her leave to appeal, or in the alternative, summarily reverse the January 19, 2006, order of the court of appeals affirming the Denial of Plaintiff's Motion for Summary Disposition and Granting of Summary Disposition by the Court Pursuant to MCR 2.116(i)(2).

(*Id.*, p 20). More specifically, Sidun urged the Court to grant summary judgment in her favor in the amount of \$82,933.55 asserting that this was the value of the property. (*Id.*) Nowhere did Sidun raise federal claims or seek relief under any federal statutes, including 42 USC § 1983 and § 1988. Nor did Sidun ever move to amend her complaint.

Perhaps Sidun believes that she is entitled to raise entirely new theories because this Court struck down a money judgment as a remedy for a foreclosure effectuated without providing constitutionality adequate notice. *In Re Petition By Treasurer of Wayne County For Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007). In doing so, this Court rejected that relief but instead affirmed the order of the Wayne County Circuit Court "that restored the church's title to the property in question." (*Id.*, p 463). Sidun's case, like that of the property owner in *In Re Petition By Treasurer of Wayne County For Foreclosure*, is based on a claim that the notice was constitutionally insufficient. If she prevails, despite the Wayne County Treasurer's arguments in support of the rulings and judgment of the Court of Appeals and the trial court, she is entitled to restoration of the property, not money damages. And in any event, she is not entitled to damages under 42 USC § 1983 and § 1988 because she failed to raise this theory below, failed to include a request for such relief in her application for leave's discussion of the order appealed from and the relief sought, or in her application's relief clause, and she ought not be able to inject new and disparate issues into the proceedings after leave has been granted. See generally, *Gross, supra*.

See also MCR 7.302(G)(4) (“Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal”).

## **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to MCR 7.214(E)(2) defendant hereby requests that this Court docket this appeal for oral argument.

Oral argument will afford defendant's counsel the opportunity to address any questions that the Court may have concerning any complexities of the lower court record and the specifics of the parties' respective positions on appeal. Counsels' participation in oral argument will enable them to succinctly place their positions before this Court. It is defendant's belief that oral argument is necessary and will benefit all involved and that the decisional process will be significantly aided by this Court's allowance of oral argument.

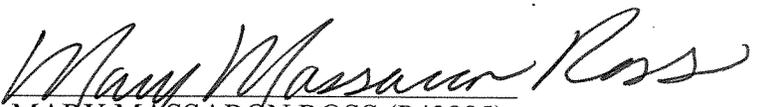
See generally, Chief Judge Merritt's comments in *Judges on judging: The decision making process in the federal courts of appeals*, 51 Ohio St L J 1385, 1386 (1990), wherein he stated, "At its core, the adversary process is oral argument."

**RELIEF**

WHEREFORE, the Defendant-Appellee Wayne County Treasurer respectfully requests that this Court affirm the judgment in its favor and grant it such other relief as is appropriate in law and equity.

Respectfully submitted,

PLUNKETT COONEY

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