

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM COURT OF APPEALS  
Bandstra, P.J., Fitzgerald and White, J.J.

STELLA SIDUN,

Plaintiff-Appellant,

v

WAYNE COUNTY TREASURER,

Defendant-Appellee.

Supreme Court No. 131905

Court of Appeals No. 264581

Court of Claims No. 04-000240-MT

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**AMICUS BRIEF OF MICHIGAN DEPARTMENT OF TREASURY**

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## QUESTION PRESENTED FOR REVIEW

- I. **Do any increased due process notice requirements announced in *Jones v Flowers* apply retroactively to invalidate an otherwise valid tax foreclosure that was final before *Jones* was decided?**

## INTEREST OF AMICUS

In its Order granting leave to appeal in this matter the Court directed the parties to brief "whether the [Wayne County Treasurer's] efforts to provide notice satisfied due process, in light of *Jones v Flowers*."<sup>1</sup> Decided in 2006, *Jones* held that due process requires the government to take additional steps to provide notice if certified mail notice of a pending tax foreclosure is returned unclaimed. *Jones* suggested sending notice by first class mail or posting the property. The tax foreclosure that resulted in this Court of Claims action became final in March 2003. Retroactive application of *Jones* to this or other tax foreclosures that became final before *Jones* was decided could affect title to thousands of parcels previously foreclosed under Michigan law.

Until the adoption of a new tax foreclosure process in 1999 PA 123 ("Act 123"), the Department of Treasury handled the foreclosure of ad valorem real property taxes in all 83 Michigan counties under the provisions of the General Property Tax Act ("GPTA").<sup>2</sup> Following the 1976 adoption of GPTA § 131e<sup>3</sup> in response to this Court's decision in *Dow v Michigan*<sup>4</sup> and until the adoption of Act 123, § 131e of the GPTA required the Department of Treasury to send notice of the constitutionally-required opportunity for hearing and redemption to all owners of significant property interests in foreclosed property. Pursuant to this Court's directive in *Dow*, those notices were sent by certified mail, but the Department did not send additional notice by first class mail if the certified mail was returned unclaimed or otherwise undeliverable. If the property appeared occupied, GPTA § 131c required service of notice on the occupant or posting of the property, but unoccupied or vacant land was not posted.<sup>5</sup>

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<sup>1</sup> *Sidun v Wayne County Treasurer*, \_\_\_ Mich \_\_\_; 737 NW2d 757 (2007), citing *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006).

<sup>2</sup> 1893 PA 206, MCL 211.1 *et seq.*

<sup>3</sup> MCL 211.131e.

<sup>4</sup> *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

<sup>5</sup> MCL 211.131c (repealed).

Act 123 implemented a new process for foreclosure of ad valorem real property taxes under the GPTA. Under GPTA § 78i, notice of the foreclosure hearings is given by certified mail, personal service on occupants or posting of occupied parcels (posting of unoccupied or vacant parcels is not required), and, if a good address cannot be found for someone entitled to mail notice, publication by name in a local newspaper.<sup>6</sup> Section 78i does not require notice by first class mail.<sup>7</sup> Starting in 2007, in response to *Jones*, in the 13 counties where the State is the foreclosing governmental unit ("FGU") the State's contractor sends first class notices to all parties in addition to the certified mail.<sup>8</sup>

In the 30 years between *Dow* and *Jones*, the State foreclosed several hundred thousand parcels, an unknown number of which involved notices sent to a proper address and returned unclaimed or otherwise undeliverable. A holding that any increased due process requirements set forth in *Jones* apply retroactively would call into question the title to many thousands of tax-foreclosed properties in this State. The potential problem is well illustrated by a 2006 Oakland County Circuit Court action, where plaintiff, relying on *Jones*, asked the court to set aside the 1994 foreclosure of three parcels because the notices to the former owners under § 131e had been returned unclaimed and no further attempts were made to notify the former owners.<sup>9</sup> The Oakland County Circuit Court held *Jones* did not apply retroactively to invalidate the 1994 foreclosure. No appeal was taken from the circuit court decision.

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<sup>6</sup> MCL 211.78i.

<sup>7</sup> Notice of a tax delinquency is sent by first class mail early in the process, but only to the taxpayer of record or owner as shown on the records of the county treasurer. MCL 211.78b, .78c. Because these early notices are sent before the expense of obtaining complete titlework is incurred, many interestholders in tax-delinquent property are not statutorily entitled to notice by first class mail.

<sup>8</sup> In 1999 Wayne County and 31 other counties opted, under MCL 211.78(3), to foreclosure their own delinquent taxes, leaving the State to foreclose taxes in 51 counties. In 2004 an additional 48 counties opted to foreclose their own taxes, leaving the State as the FGU in 13 counties.

<sup>9</sup> *B & B Group, LLP v Schimmel*, Oakland County Circuit Court no. 2006-77862-CH.

Because of the harm that could result from the retroactive application of any increased due process requirements to foreclosures that became final before *Jones* was decided, the Department of Treasury asks that any increased due process requirements not be applied retroactively to invalidate an otherwise valid tax foreclosure that became final before *Jones* was decided.

## ARGUMENT

### **I. Any increased due process notice requirements announced in *Jones v Flowers* should not apply retroactively to invalidate an otherwise valid tax foreclosure that was final before *Jones* was decided.**

#### **A. Standard of Review**

Questions of law, including issues of constitutional and statutory construction, are reviewed de novo.<sup>10</sup>

#### **B. Due Process Requirements**

Three decisions of this Court defined due process in the foreclosure of delinquent real property taxes prior to *Jones*; *Dow v Michigan*, *Smith v Cliffs on the Bay Condo Ass'n*,<sup>11</sup> and *Republic Bank v Genesee County Treasurer*.<sup>12</sup>

Persons with interests in lands are entitled to certain due process protection in the tax reversion process as outlined in *Dow*, which defined the necessary due process protection, stating<sup>13</sup>:

[I]t would satisfy constitutional requirements if the state were to adopt a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to "occupant," and (ii) after sale to the state, formal notice to all owners of significant property interests of the constitutionally required opportunity for hearing and redemption. The burden required by the Constitution is manageable.

The Court held that "an elementary and fundamental requirement of due process in the proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an

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<sup>10</sup> *Wayne County Treasurer v Perfecting Church (In re Petition by Treasurer of Wayne County for Foreclosure)*, 478 Mich 1, 6; 732 NW2d 458 (2007).

<sup>11</sup> *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420; 617 NW2d 536 (2000), *cert den* 532 US 1020 (2001).

<sup>12</sup> *Republic Bank v Genesee County Treasurer*, 471 Mich 732; 690 NW2d 917 (2005).

<sup>13</sup> *Dow*, 396 Mich at 212 (footnote omitted).

opportunity to present their objections."<sup>14</sup> The Court determined that notice by mail is adequate if "directed at an address reasonably calculated to reach the person entitled to notice."<sup>15</sup> The Court noted "such would be the efforts one desirous of actually informing another might reasonably employ. 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."<sup>16</sup>

Significantly, *Dow* explicitly stated that the tax reversion process does not require actual notice and that notice reasonably calculated to reach the person entitled to notice satisfies the Court's due process concerns<sup>17</sup>:

*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. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts one desirous of actually informing another might reasonably employ.

The Legislature adopted various amendments to the GPTA to comply with *Dow*, including the addition of § 131e and § 61b,<sup>18</sup> requiring the county treasurer to send pre-sale notice to the taxpayer of record and to the occupant as required by *Dow*.

In *Cliffs on the Bay* this Court upheld the constitutionality of the legislative amendments adopted in response to *Dow*. *Cliffs on the Bay* involved a parcel of property that had reverted to the State for nonpayment of taxes. Notice pursuant to § 131e had been sent to the former owner, Cliffs on the Bay Condominium Association, at the address appearing on the recorded deed by which the Association acquired title to the property. The Association, however, had a new

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<sup>14</sup> *Dow*, 396 Mich at 205-206.

<sup>15</sup> *Dow*, 396 Mich at 211.

<sup>16</sup> *Dow*, 396 Mich at 211 (footnote omitted).

<sup>17</sup> *Dow*, 396 Mich at 211 (emphasis added).

<sup>18</sup> MCL 211.61b (repealed).

mailing address. There was no evidence in the trial record indicating the township, county or State had been informed of the Association's new address. The notice was returned by the Postal Service undeliverable. No further attempt was made at notice under § 131e and the property was not redeemed.

The Court of Appeals held the State's attempts at notification insufficient for due process purposes, holding that due process required the Department of Treasury to re-mail notice of the hearing to the current address for the corporation as registered with the Corporation and Securities Bureau.<sup>19</sup> This Court reversed, holding that notice mailed to the address on the deed was sufficient for due process purposes. The Court held that due process does not require the government to search for a different mailing address. The Court cited with favor *Keiser v Young*,<sup>20</sup> where the New York Supreme Court, Appellate Division, rejected a property owner's contention that because certified mail notices were returned unclaimed, the county was required to take additional steps to achieve notice.<sup>21</sup>

Under the new foreclosure process adopted by Act 123 notice is required, by GPTA § 78i(1) and (2) to be sent certified mail to “the address reasonably calculated to apprise . . . owners of a property interest” of the pendency of the administrative and the judicial foreclosure hearings.<sup>22</sup>

This Court upheld the constitutionality of the new foreclosure process in *Republic Bank*, which involved a mortgage on a parcel foreclosed for delinquent taxes under the process adopted in Act 123. D & N Bank (“D & N”) held a mortgage on the property. The mortgage listed D & N’s address as its headquarters in Hancock, Michigan. D & N merged with Republic Bank

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<sup>19</sup> *Smith v Cliffs on the Bay Condo Ass'n*, 226 Mich App 245; 573 NW2d 296 (1997).

<sup>20</sup> *Keiser v Young*, 181 AD2d 170; 585 NYS2d 880 (1992).

<sup>21</sup> *Cliffs on the Bay*, 463 Mich at 429, n 7.

<sup>22</sup> MCL 211.78i(1), (2).

("Republic"), which had its headquarters in Lansing. 1999 taxes were unpaid. Republic paid subsequent years' taxes by checks showing its Lansing address. Notice of the forfeiture and the foreclosure hearing was sent by certified mail to D & N's Hancock address and was delivered and signed for. Republic did not pay the delinquent 1999 taxes and the property was foreclosed. Republic sued, claiming failure to send notice to its Lansing address deprived it of due process. The Court of Claims and the Court of Appeals found the service constitutionally deficient.<sup>23</sup> This Court reversed, holding notice to the address on the mortgage was sufficient.

Against the backdrop of these decisions, the issue before the United States Supreme Court in *Jones* was whether the government is required to take additional steps at providing notice when certified mail notice is returned unclaimed. The Court reiterated the same general due process requirements recognized by this Court in *Dow* and *Cliffs on the Bay*<sup>24</sup>:

Due process does not require that a property owner receive actual notice before the government may take his property. Rather, we have stated that due process requires the government to 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."

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In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment."

The *Jones* Court concluded that certified mail returned unclaimed informs the government that the addressee has very likely not received notice and knowing the notice was not delivered, due process requires "additional reasonable steps" at giving notice.<sup>25</sup> The Court suggested that posting the property (as was done in this case), sending notice to the same

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<sup>23</sup> *Republic Bank v Genesee County Treasurer*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2004 (Docket No. 251072).

<sup>24</sup> *Jones*, 126 S Ct at 1713-1714 (citations omitted), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314, 315; 70 S Ct 652; 94 L Ed 865 (1950).

<sup>25</sup> *Jones*, 126 S Ct at 1718.

addressee by first class mail, or sending first class mail addressed to "occupant" were reasonable means of attempting notice on the intended addressee.

Addressing the possibility that the addressee may no longer reside at the address to which the notice was sent, the Court specifically declined to impose a requirement that the government seek a more current address. Rather, the Court suggested that posting the property, sending notice to the same addressee by first class mail, or sending first class mail addressed to "occupant" were reasonable means of getting notice to the intended addressee even if he or she no longer resided at the property.<sup>26</sup> The requirement of additional attempts at notification, never required by this Court and not previously addressed by the United States Supreme Court, is problematic with respect to the hundreds of thousands of parcel foreclosed by the State or county treasurers since the 1976 *Dow* decision.

### **C. Analysis**

The 2006 *Jones* analysis should not apply to this matter where the judgment of foreclosure was entered, and the redemption period expired, in March 2003. In 2000 this Court, in *Cliffs on the Bay, supra*, held that the State had no duty to attempt further notification if notice sent to the correct address was not deliverable. The United States Supreme Court denied leave in *Cliffs on the Bay* in 2001, before this foreclosure action was filed and before notice was given pursuant to GPTA § 78i. At most, a decision is given full retrospective application only to cases still open on direct review<sup>27</sup>:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect *in all cases still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

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<sup>26</sup> *Jones*, 126 S Ct at 1719.

<sup>27</sup> *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1992) (emphasis added).

Or, as stated by this Court<sup>28</sup>:

Typically, our decisions are given retroactive effect, "applying to pending cases in which a challenge . . . has been raised and preserved." Prospective application is a departure from this usual rule and is appropriate only in "exigent circumstances."

Thus, at best, *Jones* only applies to pending cases where there is no final order.

Moreover, when a judicial decision overrules prior caselaw, retrospective application turns on (1) the effect of retroactivity on the administration of justice, (2) the extent of reliance on the old rule, and (3) the purpose to be served by the new rule.<sup>29</sup> Many thousands of purchasers of foreclosed property have relied on *Cliffs on the Bay's* holding that foreclosing governmental units need not undertake additional methods of notice if notice mailed to the correct address is undeliverable. Retrospective application of *Jones* would severely hamper the administration of justice where it would call into question prior foreclosure judgments involving tens of thousands of parcels each year under the GPTA. Finally, prospective application of *Jones* serves the purpose of providing adequate notice in the foreclosure of delinquent property taxes. In response to *Jones*, the State has adopted an additional step in the tax foreclosure process, sending notices of the forfeiture and pending foreclosure hearings by first class mail to interestholders in unredeemed property, in addition to the certified mail notices. It would be entirely unworkable to require refiling of prior foreclosure actions to provide additional notice, not required when the foreclosures occurred, where the foreclosed properties have already been sold. Thus, *Jones* should apply only to foreclosure actions brought subsequent to the issuance of the decision in April 2006.

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<sup>28</sup> *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004).

<sup>29</sup> *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). See also *Tebo v Havlik*, 418 Mich 350, 360-361; 343 NW2d 181 (1984); *Placek v Sterling Heights*, 405 Mich 638, 665; 275 NW2d 511 (1979)

## CONCLUSION

In *Smith v Cliffs on the Bay Condo Ass'n* this Court held that due process does not require additional attempts at providing notice if certified mail notice sent to the proper address is returned undeliverable. The Court cited with favor a New York decision rejecting the argument that because certified mail notices were returned unclaimed, the government was required to take additional steps to achieve notice. In *Jones v Flowers* the United States Supreme Court held that certified mail returned unclaimed informs the government that the addressee has very likely not received notice and knowing the notice was not delivered, due process requires additional reasonable steps at giving notice. The Court suggested first class mail and posting the property as such reasonable steps.

In the 30 years between this Court's *Dow* decision requiring certified mail notice of the tax foreclosure and the Supreme Court's *Jones* decision requiring additional attempts at notice if the certified mail notice is returned unclaimed, the State foreclosed hundreds of thousands of properties. It was not the State's practice prior to *Jones* to respond to the return of undelivered certified mail notices with a first class mailing, although if the property appeared occupied, occupants were served or the property posted. During the 30 years since *Dow*, unknown thousands of parcels have likely been foreclosed without first class mailings or other additional reasonable attempts at notice in response to unclaimed or undeliverable certified mail notices.

The instant foreclosure action was initiated in 2002 and became final in 2003. If the standards set forth in *Jones* apply retroactively to invalidate this foreclosure, it will call into question the title to thousands of parcels of property that were properly foreclosed and the foreclosures final before *Jones* was decided. *Jones* should not apply to invalidate otherwise valid foreclosures that became final before *Jones* was decided in 2006.

**RELIEF SOUGHT**

The Department of Treasury asks that the Court hold that any additional due process notice requirements arising out of *Jones v Flowers* do not apply retroactively to invalidate an otherwise valid tax foreclosure that was final before *Jones* was decided.

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