Order

Michigan Supreme Court
Lansing, Michigan

October 23, 2024

Elizabeth T. Clement,
Chief Justice

164266-70 & (116)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

DELORES PROCTOR, and all others similarly situated,
Plaintiff-Appellant/
Cross-Appellee,

v

SC: 164266
COA: 349557
Tuscola CC: 18-030544-CZ

SAGINAW COUNTY BOARD OF COMMISSIONERS, TIMOTHY M. NOVAK, BAY COUNTY BOARD OF COMMISSIONERS, RICHARD F. BRZEZINSKI, GRATIOT COUNTY BOARD OF COMMISSIONERS, MICHELLE THOMAS, MIDLAND COUNTY BOARD OF COMMISSIONERS, CATHY LUNSFORD, ISABELLA COUNTY BOARD OF COMMISSIONERS, STEVEN W. PICKENS, TUSCOLA COUNTY BOARD OF COMMISSIONERS, PATRICIA DONOVAN-GRAY, and SHAWNA S. WALRAVEN,
Defendants-Appellees/
Cross-Appellants.

_____/

RONALD MAYNARD, and all others similarly situated,
Plaintiff-Appellant/
Cross-Appellee,

v

SC: 164267
COA: 349633
Newaygo CC: 18-020435-CZ

COUNTY OF BENZIE, MICHELLE L. THOMPSON, COUNTY OF MANISTEE, RUSSELL POMEROY, COUNTY OF WEXFORD, JAYNE E. STANTON, COUNTY OF MISSAUKEE, LORI COX, COUNTY OF MASON, ELISABETH FRAZIER, COUNTY OF LAKE, BRENDA KUTCHINSKI, COUNTY OF OSCEOLA, LORI LEUDEMAN, COUNTY OF OCEANA, MARY LOU PHILLIPS,

COUNTY OF NEWAYGO, HOLLY MOON, and ANDREW KMETZ,
Defendants-Appellees/
Cross-Appellants.

_____/

STEPHEN MORRIS and ROBIN MORRIS, and all others similarly situated,
Plaintiffs-Appellants/
Cross-Appellees,

v

SC: 164268
COA: 349636
Roscommon CC: 18-724294-CZ

COUNTY OF MONTMORENCY, JEAN M. KLEIN, COUNTY OF ALPENA, KIMBERLY LUDLOW, COUNTY OF OSCODA, WILLIAM KENDALL, COUNTY OF ROSCOMMON, REBECCA RAGAN, COUNTY OF ARENAC, DENNIS STAWOWY, COUNTY OF CLARE, JENNY BEEMER-FRITZINGER, COUNTY OF GLADWIN, CHRISTY VAN TIEM, COUNTY OF OGEMAW, and DWIGHT McINTYRE,
Defendants-Appellees/
Cross-Appellants,

and

COUNTY OF ALCONA and CHERYL FRANKS,
Defendants-Appellees.

_____/

LARRY CARLSON and MARY JO CARLSON, and all others similarly situated,
Plaintiffs-Appellants/
Cross-Appellees,

v

SC: 164269
COA: 350394
Berrien CC: 18-000260-CZ

BRET E. WITKOWSKI, COUNTY OF BERRIEN, COUNTY OF CASS, HOPE ANDERSON, COUNTY OF KALAMAZOO, MARY BALKEMA, COUNTY OF ST. JOSEPH, JUDITH RATERING,
Defendants-Appellees/
Cross-Appellants,

and

COUNTY OF VAN BUREN, TRISHA NESBITT, and KAREN MAKAY,
Defendants-Appellees.

_____/

JOANNE SMITH, and all others similarly situated,
Plaintiff-Appellant/
Cross-Appellee,

v

SC: 164270
COA: 350406
Monroe CC: 18-141556-CZ

COUNTY OF WASHTENAW, and CATHERINE McCLARY,
Defendants-Appellees,

and

COUNTY OF HILLSDALE, STEPHENIE KYSER, COUNTY OF LENAWEE, MARILYN J. WOODS, COUNTY OF MONROE, and KAY SISUNG,
Defendants-Appellees/
Cross-Appellants.

_____/

By order of January 30, 2024, the application for leave to appeal the January 6, 2022 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants were held in abeyance pending the decision in *Schafer v Kent Co* (Docket No. 164975). On order of the Court, the case having been decided on July 29, 2024, ___ Mich ___ (2024), the applications are again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part II-B and II-C of the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *Schafer* and *Hathon v State of Michigan*, ___ Mich ___ (July 29, 2024) (Docket No. 165219). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 23, 2024

Clerk

p1016

STATE OF MICHIGAN

COURT OF APPEALS

DELORES PROCTOR, and all others similarly situated,

Plaintiff-Appellant,

v

SAGINAW COUNTY BOARD OF COMMISSIONERS, TIMOTHY M. NOVAK, BAY COUNTY BOARD OF COMMISSIONERS, RICHARD F. BRZEZINSKI, GRATIOT COUNTY BOARD OF COMMISSIONERS, MICHELLE THOMAS, MIDLAND COUNTY BOARD OF COMMISSIONERS, CATHY LUNSFORD, ISABELLA COUNTY BOARD OF COMMISSIONERS, STEVEN W. PICKENS, TUSCOLA COUNTY BOARD OF COMMISSIONERS, PATRICIA DONOVAN-GRAY, and SHAWNA S. WALRAVEN,

Defendants-Appellees.

FOR PUBLICATION
January 6, 2022
9:00 a.m.

No. 349557
Tuscola Circuit Court
LC No. 18-030544-CZ

RONALD MAYNARD, and all others similarly situated,

Plaintiff-Appellant,

v

COUNTY OF BENZIE, MICHELLE L. THOMPSON, COUNTY OF MANISTEE, RUSSELL POMEROY, COUNTY OF WEXFORD, JAYNE E. STANTON, COUNTY OF MISSAUKEE, LORI COX, COUNTY OF MASON, ELISABETH FRAZIER, COUNTY OF LAKE, BRENDA KUTCHINSKI, COUNTY OF

No. 349633
Newaygo Circuit Court
LC No. 18-020435-CZ

OSCEOLA, LORI LEUDEMAN, COUNTY OF OCEANA, MARY LOU PHILLIPS, COUNTY OF NEWAYGO, HOLLY MOON, and ANDREW KMETZ,

Defendants-Appellees.

STEPHEN MORRIS and ROBIN MORRIS, and all others similarly situated,

Plaintiffs-Appellants,

v

No. 349636
Roscommon Circuit Court
LC No. 18-724294-CZ

COUNTY OF MONTMORENCY, JEAN M. KLEIN, COUNTY OF ALPENA, KIMBERLY LUDLOW, COUNTY OF OSCODA, WILLIAM KENDALL, COUNTY OF ROSCOMMON, REBECCA RAGAN, COUNTY OF ARENAC, DENNIS STAWOWY, COUNTY OF CLARE, JENNY BEEMER-FRITZINGER, COUNTY OF GLADWIN, CHRISTY VAN TIEM, COUNTY OF ALCONA, CHERYL FRANKS, COUNTY OF OGEMAW, and DWIGHT MCINTYRE,

Defendants-Appellees.

LARRY CARLSON and MARY JO CARLSON, and all others similarly situated,

Plaintiffs-Appellants,

v

No. 350394
Berrien Circuit Court
LC No. 18-000260-CZ

BRET E. WITKOWSKI, COUNTY OF BERRIEN, COUNTY OF CASS, HOPE ANDERSON, COUNTY OF KALAMAZOO, MARY BALKEMA, COUNTY OF ST. JOSEPH, JUDITH RATERING, COUNTY OF VAN BUREN, TRISHA NESBITT, and KAREN MAKAY,

Defendants-Appellees.

JOANNE SMITH, and all others similarly situated,

Plaintiff-Appellant,

v

COUNTY OF WASHTENAW, CATHERINE MCCLARY, COUNTY OF HILLSDALE, STEPHENIE KYSER, COUNTY OF LENAWEE, MARILYN J. WOODS, COUNTY OF MONROE, and KAY SISUNG,

Defendants-Appellees.

No. 350406
Monroe Circuit Court
LC No. 18-141556-CZ

Before: STEPHENS, P.J., and LETICA and REDFORD, JJ.

REDFORD, J.

In these consolidated appeals involving the General Property Tax Act (GPTA), MCL 211.1 *et seq*., the named plaintiffs[1] appeal as of right from orders in each case granting summary disposition to defendants under MCR 2.116(C)(7) and (8). For each case, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND

The underlying operative facts in each of these cases are not in dispute. Each named plaintiff failed to pay property taxes on his or her real property and forfeited their properties to their respective county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. Their defaults resulted in the county treasurers in the county where their properties were located to initiate tax foreclosures pursuant to MCL 211.78 *et seq*. The county treasurers foreclosed upon the properties and circuit court judgments of foreclosure were entered. Each plaintiff failed to redeem his or her respective property by the statutory deadline resulting in the vesting of title to the properties in the respective county treasurers. The county treasurers thereafter sold the properties at auction. In accordance with the GPTA, each county retained the proceeds beyond those needed to satisfy outstanding taxes and associated fees or penalties.[2] In

[1] Although parties sought class certification in each case, no court granted such motion.

[2] Defendants, in foreclosing on the properties and retaining "surplus proceeds," acted in accordance with then-existing provisions of the GPTA. Later, in *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 446-448; 952 NW2d 434 (2020), our Supreme Court explained the statutory procedure for distributing tax-foreclosure proceeds under the version of MCL 211.78m that defendants adhered to in these cases:

each case, the named plaintiff or plaintiffs sued the involved county and the involved county's treasurer[3] for the deprivation of such monies but also filed a putative class action against several additional counties and their respective treasurers,[4] in an attempt to obtain relief for purported similarly situated persons. In each case, the lower court granted summary disposition to defendants under MCR 2.116(C)(7)[5] and (8). Later, but before the filing of the briefs in these

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> The foreclosing governmental unit then distributes the proceeds in [the account designated as the 'delinquent tax property sales proceeds for the year that the taxes became delinquent'] in a specific order of priority. The first priority is to reimburse the delinquent tax revolving fund for the full amount of unpaid taxes, interest, and fees owed on the property. This is followed by the annual costs incurred as a result of conducting foreclosure sales and general overhead in conducting the foreclosure proceedings for the year. The statutory scheme for reimbursement is quite exhaustive and even includes costs for maintaining property foreclosed under the GPTA, defending title actions, and administering the foreclosure and the disposition of forfeited property for delinquent taxes.
>
> * * *
>
> But when there are excess proceeds from individual sales, such as the sale of plaintiffs' properties in this case, those proceeds are used to subsidize the costs for *all* foreclosure proceedings and sales for the year of the tax delinquency, as well as any years prior or subsequent to the delinquency. Then, after the required statutory disbursements are made, surplus proceeds may be transferred to the county general fund in cases in which the county is the foreclosing governmental unit. Of particular importance here, the GPTA does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds. Michigan is one of nine states with a statutory scheme that requires the foreclosing governmental unit to disperse [sic] the surplus proceeds to someone other than the former owner.

[3] In some cases, former treasurers were also sued.

[4] In Docket No. 349557, Delores Proctor sued not only Tuscola County and its treasurer but also Bay, Midland, Gratiot, Saginaw, and Isabella counties and their treasurers. In Docket No. 349633, Ronald Maynard sued not only Newaygo County and its treasurer but also Benzie, Manistee, Wexford, Missaukee, Mason, Lake, Osceola, and Oceana counties and their treasurers. In Docket No. 349636, Stephen Morris and Robin Morris sued not only Roscommon County and its treasurer but also Montmorency, Alpena, Oscoda, Alcona, Arenac, Ogemaw, Clare, and Gladwin counties and their treasurers. In Docket No. 350394, Larry Carlson and Mary Jo Carlson sued not only Berrien County and its treasurer but also Cass, Van Buren, Kalamazoo, and St. Joseph counties and their treasurers. In Docket No. 350406, JoAnn Smith sued not only Monroe County and its treasurer but also Washtenaw, Hillsdale, and Lenawee counties and their treasurers.

[5] The grants of summary disposition under MCR 2.116(C)(7) involved immunity for certain claims against the individual treasurers.

appeals, our Supreme Court decided *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020), wherein it concluded that a government unit's retention of surplus proceeds after a tax-foreclosure sale amounts to an unconstitutional taking. Later still, in response to *Rafaeli*, the Michigan Legislature amended the GPTA to provide a limited mechanism for persons to obtain surplus proceeds after a tax-foreclosure sale. These appeals involve, among other issues, a consideration of whether *Rafaeli* or the amendments of the GPTA apply to plaintiffs' cases.[6]

II. ANALYSIS

A. QUALIFIED IMMUNITY

Plaintiffs contend that the lower courts erred by concluding that the individual officials sued in their personal capacities were entitled to qualified immunity. We disagree and affirm on this issue.

We review de novo a trial court's decision regarding a motion for summary disposition. *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012). We review de novo the applicability of government immunity. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). As stated in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

The identical complaints in these cases contained claims against the counties and individual government officials for inverse condemnation, taking in violation of the Fifth Amendment of the United States Constitution, unjust enrichment, excessive-fine in violation of the Eighth Amendment of the United States Constitution, and excessive-fine in violation of the state Constitution. Plaintiffs sued the county treasurers in their individual capacities related to their federal Constitutional claims. Plaintiffs asserted their state-law claims for unjust enrichment and

[6] The Court thanks and acknowledges appellants' and appellees' excellent initial briefs and oral arguments in this matter as well as the supplemental briefing following oral arguments, particularly in light of the ongoing federal litigation involving these same issues and attorneys.

excessive fine under the state Constitution against the county treasurers in their "official capacity." The counties alone were sued under the inverse-condemnation claim.[7]

As stated in *Kentucky v Graham*, 473 US 159; 105 S Ct 3099; 87 L Ed 2d 114 (1985):

> As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *It is not a suit against the official personally, for the real party in interest is the entity*. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. [Citation omitted; emphasis added.]

In *Mays v Snyder*, 323 Mich App 1, 89; 916 NW2d 227 (2018), aff'd 506 Mich 157 (2020), this Court similarly explained that official-capacity lawsuits are "nominal only[.]" Plaintiffs admit on appeal that in an official-capacity claim, "the claim is actually against the official's office and thus the government entity itself despite being in the name of an individual."

The question on which plaintiffs focus is whether the claims under the Fifth and Eighth Amendments could be maintained against the individual officials or whether the lower courts could dismiss those claims on qualified immunity grounds. In relation to those claims, plaintiffs invoked 42 USC 1983. In *Harlow v Fitzgerald*, 457 US 800, 817-819; 102 S Ct 2727; 73 L Ed 2d 396 (1982), the United Sates Supreme Court stated:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is

[7] In *Lawson v Bouck*, 747 F Supp 376, 379-380 (WD Mich, 1990), the court considered the circumstances in which an individual would be deemed sued in his or her official capacity and that case is instructive here. In this case, plaintiffs' explicit wording in the complaints indicate that the unjust-enrichment and state-law-excessive-fine claims were asserted against the individual defendants in their official capacities.

> resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. [Citations omitted.]

In *Holeton v City of Livonia*, 328 Mich App 88, 102-103; 935 NW2d 601 (2019), this Court recently explained:

> An official has qualified immunity from suits under 42 USC 1983 when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v Hughes*, 584 US ___, ___; 138 S Ct 1148, 1152; 200 L Ed 2d 449 (2018) (quotation marks and citation omitted). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v Callahan*, 555 US 223, 231; 129 S Ct 808; 172 L Ed 2d 565 (2009) (quotation marks and citation omitted). Before allowing a claim to proceed, courts must determine that the plaintiff has established two elements that defeat qualified immunity:
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> > First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. [*Id*. at 232 (quotation marks and citations omitted).]
>
> The focus of the inquiry is on whether the official had "fair notice that her conduct was unlawful," and, for that reason, the reasonableness of the act must be judged against the backdrop of the law at the time of the conduct. *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citations omitted). The allegations and facts must show that it would have been clear to a reasonable official in the defendant's position that his or her conduct was unlawful under the situation that he or she confronted. *Wood* [*v Moss*], 572 US [744,] 758; 134 S Ct 2056[; 188 L Ed 2d 1039 (2014)]. The Supreme Court of the United States has also repeatedly admonished lower courts "not to define clearly established law at a high level of generality." *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citation omitted). Although there need not be a case directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id*.

"Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v Callahan*, 555 US 223, 232, 243; 129 S Ct 808; 172 L Ed 2d 565 (2009). "A clearly established right is one that is sufficiently clear that every

reasonable official would have understood that what he is doing violates that right." *Mullenix v Luna*, 577 US 7, 11; 136 S Ct 305; 193 L Ed 2d 255 (2015) (quotation marks and citation omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 12 (quotation marks and citation omitted). "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id*. (quotation marks and citation omitted).

At the time of the wrongdoing alleged in the cases at bar, our Supreme Court had not yet issued its decision in *Rafaeli*. Further, at the time, governmental entities and their officials could reasonably rely on *Nelson v City of New York*, 352 US 103; 77 S Ct 195; 1 L Ed 2d 171 (1956), which explained:

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.
>
> It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. [*Id*. at 110-111.[8]]

[8] The *Rafaeli* Court concluded that *Nelson* was not dispositive regarding the question facing the Michigan Supreme Court. The Court stated that in *Nelson*, there had been a statutory path for the plaintiff to obtain surplus proceeds, but the plaintiff had not followed it. *Rafaeli*, 505 Mich at 460. The *Rafaeli* Court explained:

> Read together, [*United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884)] and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest. What [*People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844)] *Lawton* and *Nelson* do not tell us, however, is what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right to the surplus proceeds, but the divested property owner establishes a property right to the surplus proceeds through some other legal source, such as the common law. . . . Michigan's statutory scheme under the GPTA does not recognize a former property owner's statutory right to collect these surplus proceeds. Therefore, we must determine whether

Moreover, in *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380, 386-387; 863 NW2d 745 (2014), this Court explained a county treasurer's obligation to follow the statutory scheme of MCL 211.78m and use funds only for limited, permitted purposes. Under the existing precedent applicable at the times when the lower courts made their respective decisions in the cases at bar, it cannot be said that any constitutional takings question was beyond debate. *Mullenix*, 577 US at 12. Accordingly, the individual government officers against whom plaintiffs made their allegations were entitled to qualified governmental immunity regarding plaintiffs' claims under the Fifth and Eighth Amendments.[9] Further, the lower courts did not err by ruling early in the cases that the government officials were protected by qualified governmental immunity. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v Forsyth*, 472 US 511, 526; 105 S Ct 2806; 86 L Ed 2d 411 (1985). Plaintiffs' claims of error in this regard, therefore, fail as a matter of law.

B. VIABILITY OF INVERSE-CONDEMNATION AND UNJUST-ENRICHMENT CLAIMS

Plaintiffs contend that the lower courts erred by dismissing their unjust enrichment and inverse-condemnation claims because under the *Rafaeli* Court's interpretation of the Michigan Constitution such claims are viable.[10] We hold that, as explained in *Rafaeli*, in their inverse-condemnation and unjust-enrichment claims, plaintiffs alleged viable claims of violation of their common-law property rights protected under Michigan's Takings Clause to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. We therefore reverse the decision of the trial courts on this issue and remand to them for further proceedings.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spohn*, 296 Mich App at 479. "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

In *Rafaeli*, 505 Mich at 468-489, our Supreme Court discussed *Dean v Mich Dep't of Natural Resources*, 399 Mich 84; 247 NW2d 876 (1976), in analyzing whether Michigan law

> plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law. [*Rafaeli*, 505 Mich at 461-462.]

[9] As for the Eighth Amendment claim, plaintiffs have not established that an Eighth Amendment violation was apparent *at any time* (see part IV of this opinion, *infra*), including at the time the treasurers acted.

[10] "Michigan recognizes the theory of inverse condemnation as a means of enforcing the constitutional ban on uncompensated takings of property." *Bill's Grills, Inc v Mich State Hwy Comm*, 75 Mich App 154; 254 NW2d 824 (1997). Plaintiffs attempt to argue in these appeals that their inverse-condemnation claims are somehow separate from their state unconstitutional-takings claims, but this is not the case.

recognized a former property owner's right to collect under a common-law claim of unjust enrichment the surplus proceeds following a failure to redeem property after a tax foreclosure and sale of the property. The *Rafaeli* Court stated:

> In *Dean*, the plaintiff-property owner failed to pay her property taxes for both the city of Flint and Genesee County in the amount of $230.68 and $146.90, respectively. After the plaintiff failed to appear at the foreclosure hearing, the court issued a judgment authorizing the sale of the plaintiff's property at a tax sale and stating that if the property was sold to the state, the state's title would become absolute unless the plaintiff timely redeemed the property. The state successfully bid on the plaintiff's property, starting the one-year redemption period for the plaintiff. During the redemption period, the plaintiff paid her delinquent city-property taxes in full but mistakenly failed to pay her delinquent county-property taxes. After she failed to timely redeem her property during the redemption period, the State Treasurer deeded the plaintiff's property to the state, which received absolute title to the property and then sold it to a private investor for $10,000. The plaintiff filed an action against the state, alleging, in relevant part, that the state had been unjustly enriched by retaining the $10,000 following the sale of her property. The circuit court granted summary disposition to the defendant, but this Court reversed, holding that the plaintiff could bring her suit for unjust enrichment[.]
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> * * *
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> *Dean* stands for more than just a recognition of the plaintiff's right to bring a claim under unjust enrichment for the surplus proceeds. Inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale. A viable claim for unjust enrichment requires the complaining party to show that the other party retained a benefit from the complaining party. In concluding that the plaintiff in *Dean* stated an actionable claim for unjust enrichment, this Court did not rely on any statutory right that the plaintiff had to collect the surplus proceeds. As is the case here, title to the plaintiff's property in *Dean* had already vested with the state. Without a statutory right, the plaintiff must have had a common-law right to these surplus proceeds. Otherwise, her claim of unjust enrichment would not be actionable because it could not have been said that the state retained a benefit at her expense. In sum, *Dean* supports the proposition that a property owner has a recognized common-law property right to the surplus proceeds from a tax-foreclosure sale.
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> We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. [*Id.* at 468-470 (citations omitted).]
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> * * *
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> Further, the prohibitions against collecting excess taxes, selling more land than needed to collect such taxes, and taking more property than necessary to serve the

> public all underlie a property owner's right to collect the surplus proceeds and were well-established legal principles before 1963. Therefore, we hold that the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963. [*Id.* at 472 (citation omitted).]
>
> * * *
>
> It is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates. Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause. [*Id.* at 473 (citations omitted).]

In the present cases, defendants contend that unjust-enrichment claims lacked viability, but *Rafaeli* plainly indicates otherwise as a common-law right that preexisted our state Constitution and continued to exist after the Constitution's ratification. *Rafaeli* clarified that an unjust-enrichment claim for recovery of the surplus proceeds following a tax-foreclosure sale is a right protected by and enforceable under our Constitution's Takings Clause and the Legislature could not abrogate that right through amendments to the GPTA. *Id.* Our Supreme Court concluded:

> Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting from those sales belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties. [*Id.* at 474-475.]

The concept of unjust enrichment is also important in analyzing defendants' contention that plaintiffs sued the wrong parties and that the state constituted the only proper defendant for an assertion of the GPTA's unconstitutionality and the return of the surplus proceeds. In these cases, the *counties* foreclosed and plaintiffs forfeited their properties to the counties and nominally the counties' treasurers who obtained judgments and later sold the properties at tax sales and the counties retained the surplus proceeds as permitted under the GPTA. We note, too, that in *Rafaeli*, wherein the plaintiffs asserted inverse condemnation and an unconstitutional taking, the named

defendants were the county and its treasurer. Therefore, we reject defendants' argument about the wrong defendants having been sued.

Defendants also contend that any relief proposed by the *Rafaeli* decision is not available to plaintiffs because *Rafaeli*, decided on July 17, 2020, should be given prospective application only, and all the foreclosure proceedings in these cases occurred before July 17, 2020. We disagree.

In *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620-621; 722 NW2d 922 (2006), this Court stated:

> Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [Citations omitted.]

In *Paul*, our Supreme Court overruled prior caselaw in concluding that defects in the shoulder of a highway do not fall within the duty of repair and maintenance set forth in MCL 691.1402(1). *Id*. at 619. The Court stated that the newer "shoulder" decision had been "foreshadowed" but that this newer decision did, in fact, establish a new rule of law requiring consideration of the three factors. *Id*. at 621. It therefore analyzed the three factors to determine whether retroactive application applied. *Id*. at 621-624.

Highly instructive is *Co of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), which bears some similarities to *Rafaeli*. In *Hathcock*, our Supreme Court ruled that although certain condemnations of property for a particular purpose were authorized *by statute*, they were unconstitutional. *Id*. at 451. In making this finding of unconstitutionality, the Court overruled one of its previous decisions. *Id*. at 483. The *Hathcock* Court stated that many government actors had relied on the prior decision, but added:

> Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before [the prior decision] *and which has been mandated by our Constitution since it took effect in 1963*. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.

> Therefore, our decision to overrule [the prior decision] should have retroactive effect, *applying to all pending cases in which a challenge . . . has been raised and preserved*. [*Id*. at 484 (citations omitted; emphases added).]

Rafaeli, like *Hathcock*, involved an action authorized by statute which the Court held unconstitutional. The *Hathcock* Court emphasized that "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Id*. at 484 n 98 (quotation marks, citation, and brackets omitted); see also *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986), disagreed with on other grounds by *McCummings v Hurley Med Ctr*, 433 Mich 404; 446 NW2d 114 (1989). Given the existence of cases such as *Dean* and *United States v Lawton*, 110 US 146, 150; 3 S Ct 545; 28 L Ed 100 (1884) (finding that a taking had occurred in connection with tax-sale proceeds), we do not conclude that our Supreme Court in *Rafaeli* overruled clear and uncontradicted caselaw or specifically announced a new rule that at least had not been previously foreshadowed. We hold that *Rafaeli*, like *Hathcock*, should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved.[11]

Relevant to our review of these matters is 2020 PA 256, which was clearly enacted in response to *Rafaeli*. MCL 211.78t(1), added by this public act, states:

> A claimant may submit a notice of intention to claim an interest in any applicable remaining proceeds from the transfer or sale of foreclosed property under section 78m, subject to the following:
>
> (a) For foreclosed property transferred or sold under section 78m after July 17, 2020, the notice of intention must be submitted pursuant to subsection (2).
>
> (b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:
>
> (*i*) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.
>
> (*ii*) Subject to subparagraph (i), the notice of intention must be submitted pursuant to subsection (6).
>
> * * *
>
> (6) For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under section 78m pursuant to this

[11] A ruling that *Rafaeli* was not establishing a new rule of law *for purposes of a retroactivity analysis*, however, does not mean that the unconstitutionality of the former version of MCL 211.78m was so clear such that individual officials could be held personally liable, as discussed in part II. A of this opinion.

> subsection, the claimant must notify the foreclosing governmental unit using the form prescribed by the department of treasury under subsection (2) in the manner prescribed under subsection (2) by the March 31 at least 180 days after any qualified order. By the following July 1, the foreclosing governmental unit shall provide each claimant seeking remaining proceeds for the property and notifying the foreclosing governmental unit under this subsection with a notice relating to the foreclosed property in the form and manner provided under subsection (3). To claim any applicable remaining proceeds to which the claimant is entitled, the claimant must file a motion with the circuit court in the same proceeding in which a judgement [sic] of foreclosure was effective under section 78k by the following October 1. The motion must be certified[.]
>
> * * *
>
> (11) This section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state. A right to claim remaining proceeds under this section is not transferable except by testate or intestate succession.[12]

The properties at issue in the present case were sold under § 78m "before July 18, 2020," which MCL 211.78t(1)(b)(*i*) now covers specifying a mechanism for claiming the surplus proceeds from a tax sale by former property owners. The statute indicates plaintiffs' claims would not be viable unless our Supreme Court issues a ruling that *Rafaeli* is to be applied retroactively. However, 2020 PA 256 had an effective date of December 22, 2020, and the Legislature did not

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[12] MCL 211.78*l* states:

> (1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property shall not bring an action, including an action for possession or recovery of the property or any interests in the property or of any proceeds from the sale or transfer of the property under this act, or other violation of this act or other law of this state, the state constitution of 1963, or the Constitution of the United States more than 2 years after the judgment of foreclosure of the property is effective under section 78k. Nothing in this section authorizes an action not otherwise authorized under the laws of this state. An action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t.
>
> (2) The right to sue recognized by this section is not transferable except by testate or intestate succession.

In addition, MCL 211.78i now states that notice must include a statement about a person's right to claim surplus proceeds under MCL 211.78t. See, e.g., MCL 211.78i(7)(i).

specify that the new statute had retroactive application. Plaintiffs' lawsuits and claims of appeal were all filed well before the effective date. Further, despite the wording of MCL 211.78t(1)(b)(*i*), this Court is empowered to rule that *Rafaeli* applies to plaintiffs' claims because they were pending on appeal at the time of the *Rafaeli* decision and the enactment of 2020 PA 256. See *Hathcock*, 471 Mich at 484; see also *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006) ("[S]tatutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary.").[13] MCL 211.78t(1)(b)(*i*) sets forth when a claim can be made, but plaintiffs *had already made their claims* before the *Rafaeli* decision and before the enactment of the statute. It would neither be logical nor just for the plaintiffs in *Rafaeli* to be entitled to relief, see *Rafaeli*, 505 Mich at 485, but the present plaintiffs denied relief, even though both sets of plaintiffs raised and preserved the pertinent issue.[14] This result is further buttressed by the detailed analysis and conclusion in *Rafaeli* which our Supreme Court reached by consideration and application of the constitutional rights that existed at the time of the adoption of the 1963 Michigan Constitution.

Plaintiffs also cite *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich ___, ___; 953 NW2d 402, 403 (2021), in which our Supreme Court stated:

> On order of the Court, the application for leave to appeal the December 19, 2019 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Oakland Circuit Court for reconsideration of the defendants' motions for summary disposition in light of *Rafaeli* . . . . In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should now be reviewed by this Court.

Plaintiffs contend that if our Supreme Court intended that *Rafaeli* be prospective only in application, it would never have issued this order in *Jackson*. We agree that our Supreme Court has indicated its intent that *Rafaeli* be applied to cases in which the parties are similarly situated to the named plaintiffs' claims in these cases.

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[13] "An exception to the general rule presuming retroactive [sic] application only is a statute that is remedial or procedural in nature and whose retroactive application will not deny vested rights." *Nortley v Hurst*, 321 Mich App 566, 571; 908 NW2d 919 (2017). Applying MCL 211.78t(1)(b)(*i*) to deny plaintiffs an avenue for relief under *Rafaeli* would be denying them existing rights.

[14] This result is further supported by *Buhl v City of Oak Park*, __ Mich __; __ NW2d __ (2021) (Docket No. 160355, rel'd June 9, 2021), in which the Supreme Court ruled an amendment to the governmental tort liability act which allowed governmental entities to plead the open-and-obvious doctrine in defense of claims, MCL 691.1402a(5), could "only be applied to causes of action that accrued after the effective date of the amendment."

C. AVAILABLE REMEDIES AND FEDERAL TAKINGS CLAIMS

Plaintiffs contend that they are entitled to more relief than that set forth in *Rafaeli* on state-law grounds and on Fifth Amendment grounds.[15] We disagree with plaintiffs' contention that they are entitled to any recovery beyond the surplus proceeds from the tax-foreclosure sale but we agree that plaintiffs are entitled to post-tax sale interest on such surplus proceeds.

Plaintiffs argue that, under the state Constitution, more is due to plaintiffs than merely the difference between the foreclosure-sale price and the delinquent taxes (plus interest, costs, and penalty fees, etc.). Plaintiffs claim that they are entitled to recover their loss of equity that resulted from the properties forfeitures and sales for less than market value. The *Rafaeli* Court, however, already considered this issue and ruled to the contrary:

> Defendants submit that if plaintiffs have, in fact, pleaded a viable takings claim, then the amount of compensation due could be more than the surplus proceeds from the tax-foreclosure sale. Plaintiffs make this point in their postargument briefing, arguing that a full remedy for an unconstitutional taking requires property owners to be put in as good of position had their properties not been taken at all. That is, while the surplus proceeds from a tax-foreclosure sale are some evidence of the value of the property and compensation due, plaintiffs contend that it may be less than just compensation and may instead constitute the fair market value of their properties.
>
> We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all. First, this would run contrary to the general principle that just compensation is measured by the value of the property taken. In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties. Second, plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full. If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.
>
> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less. [*Rafaeli*, 505 Mich at 482-484 (citation omitted).]

Plaintiffs contend that they had viable federal takings claims and that these federal claims allowed for greater relief than that allowed by *Rafaeli*. The *Rafaeli* Court stated, in summarizing its holding, that it was operating under the state Constitution. See *id*. at 437 ("We hold that

[15] For this part of our opinion and for part IV of the opinion, the standard of review is the same as that set forth in part II.

defendants' retention of . . . surplus proceeds is an unconstitutional taking without just compensation under Article 10, § 2 of our 1963 Constitution."). However, the Court noted that it had also asked the parties to brief a takings claim under the federal Constitution. *Id*. at 441. The Court then cited to the takings clauses of both the state and federal Constitutions. *Id*. at 453.[16] The Court stated:

> *While we draw on authority discussing and interpreting both clauses*, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain. [*Id*. at 454 (emphasis added).]

The Court went on to address some federal cases, *id*. at 457-461, 476 n 112, and it again noted that the state takings clause had been interpreted as offering broader protection than the federal takings clause, *id*. at 477. Reading *Rafaeli* as a whole, it is apparent that our Supreme Court concluded that any federal claim would provide no greater relief than that provided by the state-Constitution-based relief set forth in *Rafaeli* itself. Also, *Freed v Thomas*, ___ F Supp 3d ___, ___; 2021 WL 942077, 3-4 (ED Mich, 2021), is instructive because the federal court, analyzing a Fifth Amendment takings claim, rejected the same argument being made by the current plaintiffs and stated that the relief available consisted of that specified in *Rafaeli*.[17] Moreover, in *Phillips v Washington Legal Foundation*, 524 US 156, 164; 118 S Ct 1925; 141 L Ed 2d 174 (1998), the United States Supreme Court explained, "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." (Quotation marks and citation omitted.) The *Rafaeli* Court found a property interest in "surplus proceeds," which it defined as "any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property." *Rafaeli*, 505 Mich at 482-484. Accordingly, *Rafaeli* clarified the extent of the property interest for Fifth Amendment purposes in cases such as the cases at bar.

We note, however, that the *Freed* court did state that interest from the date of the foreclosure sale would also be due. *Id*. at ___; 2021 WL 942077 at 4, 8. *Rafaeli* remained silent regarding the issue of interest from the date of the foreclosure sale. See, e.g., *Rafaeli*, 505 Mich at 484. The *Rafaeli* Court, however, stated that "*once the sale produces a surplus*, the former owner may make a claim for the surplus proceeds," *id*. at 477 (emphasis added). A reasonable implication from this latter statement is that a claimant would be due interest from the date of the

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[16] The Fifth Amendment provides, in part, "[N]or shall private property be taken for public use, without just compensation." US Const, Am V. Const 1963, art 10, § 2, states, in part, that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

[17] Decisions of lower federal courts are not binding on this Court, even for purposes of federal law, although they may be viewed as persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

sale. Also, in *Knick v Twp of Scott, Pennsylvania*, ___ US ___, ___; 139 S Ct 2162, 2170; 204 L Ed 2d 558 (2019), the United States Supreme Court stated that, under the Fifth Amendment, interest is due from the time of a taking. *Knick* makes clear that, to the extent that plaintiffs' claims arise under the Fifth Amendment, interest would be due from the time that the counties obtained the surplus proceeds.

In *Fox v City of Saginaw*, ___ F Supp 3d ___, ___; 2021 WL 120855, 13 (ED Mich, 2021), the federal district court noted that a Fifth Amendment takings claim involving civil actions for the deprivation of rights must be made solely through 42 USC 1983.[18] Plaintiffs have conceded as much in the present appeal. The parties spend considerable time discussing whether plaintiffs satisfied the requirements for bringing a § 1983 claim as specified in *Monell v Dep't of Social Servs of City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In *Monell*, *id.* at 690, the United States Supreme Court stated:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Defendants contend that the counties, in foreclosing on plaintiffs' properties, were simply following a law adopted by the Michigan Legislature, that no county policy was at issue, and that, therefore, no § 1983/Fifth Amendment claim was available for plaintiffs against the named defendants. In *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 10-11, the federal district court

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[18] 42 USC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [42 USC 1983.]

rejected this same argument, stating that the county officials had a policy or practice of acting as the foreclosing governmental units, even though they were not required to do so.

MCL 211.78 states, in part:

> (3) Not later than December 1, 1999, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and the county executive, if any, may elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g. At any time during December 2004, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, may do either of the following:
>
> (a) Elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (b) Rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (4) Beginning January 1, 2009 through March 1, 2009, the county board of commissioners of a county in which is located an eligible city, as that term is defined in section 89d, may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (5) The county board of commissioners of a county that has elected to have property forfeited under section 78g foreclosed by this state under this act may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g. A county board of commissioners shall forward a copy of the resolution and any concurrence to the department of treasury not later than November 30 in the year in which the resolution is adopted. A county that rescinds its prior election under this subsection shall act as the foreclosing governmental unit under this act for all property forfeited to the county treasurer under section 78g after February 1 in the year immediately following the year in which the resolution is adopted.
>
> (6) The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963.

* * *

(8) As used in this section and sections 78a through 1554 for purposes of the collection of taxes returned as delinquent:

(a) "Foreclosing governmental unit" means 1 of the following:

(*i*) The treasurer of a county.

(*ii*) This state if the county has elected under subsection (3) to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(b) "Forfeited" or "forfeiture" means a foreclosing governmental unit may seek a judgment of foreclosure under section 78k5 if the property is not redeemed as provided under this act, but does not acquire a right to possession or any other interest in the property.

From this statutory language, it can be deduced that the counties made the decision to act or had the custom of acting as the foreclosing governmental units.[19] We find that the reasoning of *Fox* is persuasive and that plaintiffs stated valid federal takings claims. Accordingly, interest should be added to any judgments if they prevail. *Knick*, ___ US at ___; 139 S Ct at 2170.

D. EXCESSIVE FINES

Plaintiffs claim that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution and that the trial courts' orders must be reversed accordingly. We disagree.

The Eighth Amendment of the United States Constitution prohibits "excessive fines[.]"[20] In *Ingraham v Wright*, 430 US 651, 664; 97 S Ct 1401; 51 L Ed 2d 711 (1977), the United States Supreme Court explained:

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government*. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to

[19] Also, plaintiffs pleaded as much in the complaints and provided certain opt-in documents. Defendants claim that, in light of the language of the GPTA, the counties had no discretion regarding what to do with the surplus proceeds. This is true, but the counties did have discretion regarding whether to act as the foreclosing governmental units.

[20] This provision is applicable to the states. See *Timbs v Indiana*, ___ US ___, ___; 139 S Ct 682, 687; 203 L Ed 2d 11 (2019).

> this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools. [Emphasis added.]

In *Austin v United States*, 509 US 602; 113 S Ct 2801; 125 L Ed 2d 488 (1993), the United States Supreme Court applied the excessive fines language of the Eighth Amendment to a criminal forfeiture of property related to the commission of a criminal offense. *Id*. at 620, 622. The application of the excessive fines language of the Eighth Amendment to a forfeiture of money in *United States v Bajakajian*, 524 US 321; 118 S Ct 2028; 141 L Ed 2d 314 (1998), superseded on other grounds by statute as recognized in *United States v Del Toro-Barboza*, 673 F3d 1136, 1154 (CA 9, 2012), also rested on the fact that the person in question committed a criminal offense. See *id*. at 328, 332.

The Michigan Constitution states that "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16. In *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 258-260; 654 NW2d 646 (2002), this Court noted that the state excessive fines clause applied to forfeitures associated with criminal activity. In *Rafaeli*, 505 Mich at 449, our Supreme Court, in distinguishing a case in which a forfeiture occurred in connection with criminal activity, stated, "the GPTA is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes."

In the cases at bar, the deprivation of property did not result from criminal activity. Plaintiffs have provided no legal basis for applying either the state Constitution or United States Constitution excessive fines clauses to a nonpunitive taking associated with noncriminal activity. The lower courts, therefore, did not err by dismissing plaintiffs' claims based on the excessive fines clauses

E. CLASS ACTIONS

Some of the lower courts concluded that plaintiffs' lawsuits were not properly structured and that claims against nonforum counties needed to be dismissed. Plaintiffs argue that their lawsuits were procedurally sound and that the lower courts erred by not certifying the cases as class actions.[21] We disagree.

[21] In Docket No. 350406, plaintiff moved for a stay of the class certification deadline but withdrew the motion without prejudice and the lower court extended the deadline until after it decided defendants' motion for summary disposition. The lower court granted Monroe County and its treasurer's motion for summary disposition and dismissed all other defendants without prejudice. In Docket Nos. 349557 and 349633, plaintiffs moved for a stay of the class certification deadline and the lower court did not address or decide the motion or the class certification issue. In Docket No. 349636, the lower courts concluded that a class action was not available to allow the joinder of the "additional" counties and their treasurers. In Docket No. 350394, the lower court concluded

> We review de novo the proper interpretation and application of a court rule. We review for clear error the trial court's factual findings regarding class certification, and review for an abuse of discretion the trial court's discretionary decisions. A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. [*Duskin v Dep't of Human Servs*, 304 Mich App 645, 651; 848 NW2d 455 (2014)(citations omitted).]

Plaintiffs claim entitlement to certification of their cases as class actions as a matter of law. We review questions of law—including questions of standing—de novo. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011); *Palo Group Foster Care, Inc v Mich Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998).

The parties spend time discussing jurisdiction, venue, and joinder, but the dispositive question, as acknowledged by plaintiffs, is whether class actions were appropriate. They concede, for example, that the class-action court rule, and not the general rules for joinder, govern this issue. In *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398, 399-400; 309 NW2d 615 (1981),[22] this Court stated:

> In August, 1975, plaintiff, a member of defendant Dearborn Indoor Racquet Club, filed the instant class action suit in Wayne County Circuit Court on behalf of himself and all males similarly situated. Defendants are the Dearborn Indoor Racquet Club, five other tennis clubs in the Wayne County area, the Michigan Indoor Tennis Association and Edward C. Roney, Jr., its president. Suit against all defendants is based on the differential price charged for male and female memberships. In the case of the Dearborn Club the membership charge was $85 for males and $65 for females. Similar, though not identical, differential charges were made by the other five named defendant clubs.

The Court ruled that the plaintiff could maintain a class action against the Dearborn Indoor Racquet Club but not against the other defendants, stating that "one may not sue in a class action a defendant whom one could not sue individually." *Id*. at 406-407; see also *Magid v Oak Park Racquet Club Assoc, Ltd*, 84 Mich App 522, 531; 269 NW2d 661 (1978) ("[P]laintiffs may not sue in a class action a defendant whom they could not individually sue."). In *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999), this Court similarly stated that a "plaintiff who cannot

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that the plaintiffs had no standing to pursue claims against Van Buren County or its officials because those defendants had not harmed the named plaintiff and the claims were speculative. The court also concluded that the juridical-link doctrine (discussed in this opinion) was a federal doctrine and not applicable in Michigan courts. It concluded that the Van Buren defendants' motion for a change of venue was moot. Contrary to plaintiffs' suggestion, the lower courts were not relying on the venue rules in dismissing the "additional" counties and their treasurers.

[22] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

maintain the cause of action as an individual is not qualified to represent the proposed class." These cases stand for the proposition that the individual plaintiff who seeks to represent a class must in fact have standing to sue each of the named defendants.

Michigan law does not allow plaintiffs to bring class actions in the manner of the present cases. Plaintiffs contend that this Court should adopt the "juridical-link doctrine" to overcome the barrier to standing discussed in *Tucich* and *Magid*. This federal doctrine allows for dispensation of the traditional standing requirements in class actions in cases wherein a uniform policy is being applied consistently by state-actor defendants and is the sole basis for liability. See *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 3-6; see also *Payton v Co of Kane*, 308 F3d 673, 678-682 (CA 7, 2002) (discussing the doctrine but declining to apply it directly and instead remanding the case for further development). The court in *Fox* applied the doctrine to allow for a class action opining that the counties' actions under the GPTA were juridically linked. *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 6. The present cases, however, were brought in Michigan courts, so Michigan procedural rules apply.

Further, the Michigan Legislature has now adopted a specific procedure for a person to claim surplus proceeds under the GPTA. The Legislature has expressed its clear intent as to how claims for surplus proceeds must be made. As discussed in this opinion, we have concluded that the named plaintiffs, because their cases were pending on appeal at the time of the Supreme Court's *Rafaeli* decision and because their claims were made before the enactment of 2020 PA 256 and its effective date, should be allowed to pursue their claims. As noted, we relied in large part on *Hathcock*, 471 Mich at 484, wherein the Court applied its decision to "all pending cases in which a challenge . . . has been raised and preserved." (Citations omitted.) We decline to conclude that the unnamed putative class members "raised and preserved" claims to the surplus proceeds, given that the lower courts never granted class certification. Such unnamed persons and their still-to-be-made claims should be subject, instead, to the requirements of 2020 PA 256, MCL 211.78t.[23]

III. CONCLUSION

Therefore, in each case, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

We specifically conclude as follows:

[23] Plaintiffs have not argued in these appeals that class certification should go forward for counties involved with the named plaintiffs. They state only that "[r]eversal is minimally required for each plaintiff individually against each county/treasurer even if this Court declines to approve the juridical link doctrine." The putative plaintiffs had no pending claims such that the rule from *Hathcock* should be applied. As discussed in this opinion, any federal claim ultimately derives from *Rafaeli*'s conclusion that surplus proceeds after a foreclosure sale constitute a constitutionally protected property interest. Accordingly, it cannot be said that the putative class members have a federal claim in the absence of an application of *Rafaeli*.

A. The individual officials sued in their personal capacities were entitled to qualified immunity and therefore we affirm all trial court decisions related to these claims.

B. Plaintiffs have alleged in their inverse-condemnation and unjust-enrichment claims, potentially viable claims of violation of their common-law property rights protected under Michigan's Takings Clause which if successful could allow them to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and therefore, we reverse all trial court decisions related to these claims.

C. Plaintiffs' claims that they are entitled to recovery beyond the surplus proceeds from the tax-foreclosure sale is unsupported by the law and therefore we affirm the trial courts' decisions to dismiss these claims. As to plaintiffs' claims that they are entitled to post-tax sale interest on any amounts that represent an inverse condemnation of their property, we agree these claims are potentially viable and we reverse the trial courts' decisions to dismiss those portions of the claims.

D. Plaintiffs' claims that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution are without merit and therefore we affirm the trial courts' decisions in this regard.

E. Plaintiffs' argument that their purported class action claims were sound and should have been certified by the trial courts is without merit and therefore we affirm the trial courts' decisions in this regard.

We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Cynthia Diane Stephens
/s/ Anica Letica