STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Richard A. Bandstra, E. Thomas Fitzgerald, Helene N. White)

STELLA SIDUN,

Plaintiff-Appellant,

vs.

Docket No. 131905

WAYNE COUNTY TREASURER

Defendant-Appellee.

APPELLANT STELLA SIDUN'S REPLY BRIEF

*****ORAL ARGUMENT REQUESTED*****

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January 23, 2008

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

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The only question before the Court is whether the Wayne County Treasurer made a constitutionally sufficient attempt to notify Stella Sidun before taking and selling a house she owned. The County does not deny that it knew that Ms. Sidun was one of the two owners of the property and that it had her address in its possession. Nor does it deny that it learned of Ms. Sidun's ownership interest by consulting the deed to the property, which listed both her name *and* her address. Finally, the County does not deny that it had no other address for Ms. Sidun anywhere in its records, and that it had no reason to believe that Ms. Sidun had ever resided at any address other than the one listed on the deed.

At bottom, then, this case boils down to one question: Given that the County had Ms. Sidun's address readily at hand, what justification was there for taking her property without sending a single letter to her at that address? Although the County's brief goes on for more than thirty pages, it ducks that crucial question. The County does not contend explicitly that Ms. Sidun was entitled to no mailed notice at all, but that is effectively its position. The County acknowledges (at 2) that the deed "listed both Helen Krist and Stella Sidun as joint tenants, whose addresses were 3233 Stolzenfeld, Warren Michigan, and 2681 Dorchester, Birmingham, Michigan." Nevertheless, the County suggests (at 4, 21-22) that it was sufficient to send notice only to *Ms. Krist's* address because Ms. Krist, and not Ms. Sidun, had been the taxpayer of record. Without explanation, the County appears to equate the "taxpayer's address of record" (meaning Ms. Krist's address), with the last known address of *both* co-owners. Indeed, the County

defends its actions (at 21) by stating that it mailed notice to the "last known address in its records for both Sidun and Krist, the 3323 Stolzenfeld address." But Stella Sidun never lived at the 3323 Stolzenfeld address, and nothing in the County's records suggested otherwise. To the contrary, the one document that reflected Ms. Sidun's ownership interest made it clear that Ms. Krist lived at the Stolzenfeld address and that Ms. Sidun lived at a different address. (App. 18a). Ms. Sidun's last known address—indeed, her *only known address*—was the one listed on the deed.

Under those circumstances, the County's failure to mail notice to Ms. Sidun was constitutionally flawed from the very start. And because the mailed notices were returned unclaimed, the County's actions were doubly flawed, as the returned letters triggered a constitutional obligation to take additional reasonable steps to attempt to provide notice to Ms. Sidun before taking her property.

I. THE WAYNE COUNTY TREASURER'S POSITION IS AT ODDS WITH MORE THAN FIFTY YEARS OF DUE-PROCESS JURISPRUDENCE.

The County's position in this appeal is not only at odds with recent precedent, but defies more than a half-century of due-process jurisprudence, beginning with *Mullane v Cent Hannover Bank & Trust Co.*, 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950), and *Dow v Michigan*, 396 Mich 192, 240 NW2d 450 (1976). Both *Mullane* and *Dow* involved proceedings with multiple interest-holders, each of whom were held to be entitled to mailed notice at their individual addresses. *Mullane* held that "[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.

Because the party charged with notice in *Mullane* had "on its books the names and addresses" of hundreds of beneficiaries, the Court held that there was "no tenable ground for dispensing with a serious effort to inform them personally of the [proceeding], at least by ordinary mail to the record address." *Id.* The same thing is true here.

In *Dow*, the plaintiffs were Marie Smith, the titleholder, and Carl and Rose Dow, who were installment land contract purchasers; none of them lived on the property. Rose Dow received actual notice of the tax sale, but told neither her husband Carl nor Ms. Smith. For "a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceeding in question," the Court held, notice via means less reliable than mail was inadequate. 396 Mich at 208 (quoting *Schroeder v City of New York*, 371 US 208, 212-213, 83 S Ct 279, 9 L Ed 2d 255 (1962); *see id.* at 211 ("Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice.").

Thus, for over fifty years, it has been well settled that due process requires, at a minimum, mailed notice of a tax sale to the separate last known address of *each and every co-owner* of a property, and not merely notice to the address of the taxpayer. "[T]he requirement that the tax collector take reasonable steps to notify *each* co-owner of delinquent taxes is not a new or novel legal requirement." *Lewis v Succession of Johnson*, 925 So2d 1172, 1178 (La 2006) (emphasis in original); *cf. Goodrich v City of Detroit*, 184 US 432, 438, 22 S Ct 397, 46 L Ed 627 (1902) (holding, in a case arising out of a taking by the Wayne County Treasurer,

that due process requires notice to "each owner" of property to be affected by a proceeding).[1]

In the face of this uniform precedent, the County appears to grudgingly acknowledge that Ms. Sidun, as a property owner, was entitled to notice by mail. But at several points in its brief (at 4, 18-19, 21-22), the County suggests that it could dispense with sending mail to Ms. Sidun's address because it mailed notices to Ms. Krist's address, which was the address to which the tax bills had been sent. The County's argument is unclear, but it seems to be premised on the notion that the County need not consult the deed to the property to discern an address reasonably calculated to reach co-owners who are not taxpayers of record. But again, the County's position runs afoul of longstanding precedent.

This Court has long held that notice of a tax sale must be sent not merely to the taxpayer address, but to each and every owner whose "post office address [is] shown in the last recorded deed." *Wolf v McDonald*, 244 Mich 59, 62, 221 NW 173 (1928) ("It is assumed that the sheriff knew of the [owner]'s address as furnished by the recital in the last recorded deed. It was a source of information which he was bound to seek, and therefore he is charged with what it would show. Having such knowledge, it was his duty to send a notice of the tax sale by registered mail to the [owner] at that address."); *Ottaco, Inc v Kalport Development Co, Inc*, 239

[1] *See, e.g., In re Paxton*, 440 F3d 233, 236 (5th Cir. 2006) (notice of tax sale directed to only one co-owner's address was not reasonably calculated to apprise other co-owners, and so violated their due process rights); *Magee v Amiss*, 502 So2d 568 (La 1987) (same); *Teslovich v Johnson*, 406 A2d 1374, 1378 (Pa 1979) (requiring "separate and individual notice to each named owner of property, regardless of whether that owner holds in common, in joint, or by the entireties").

Mich App 88, 607 NW2d 403 (1999) (same); *see also Bonninghausen v Glann*, 298 Mich 92, 289 NW 463 (1941); *Closser v Abraham*, 283 Mich 272, 279 NW 509 (1938); *Gustin v Bonehead Hunting Club*, 280 Mich 296, 273 NW 575 (1937). The United States Supreme Court has likewise held that notice, at a minimum, must be sent by mail to the last known address of each property owner where that address can be readily ascertained from the deed. *See Walker v City of Hutchinson*, 352 US 112, 77 S Ct 200, 1 L Ed 2d 178 (1956) ("In the present case there seem to be no compelling or even persuasive reasons why [mail or personal] notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."); *Schroeder v City of New York*, 371 US 208, 210, 83 S Ct 279, 9 L Ed 2d 255 (1962) (holding notice of condemnation proceedings inadequate where "the appellant's name and address were readily ascertainable from [the] deed records" and government failed to mail notice to that address). In any event, the question here is not *whether* the County should have checked the deed to see whether the deed listed the names and addresses of additional owners. The fact is that the County *did* check the deed, and so it *knew* of Ms. Sidun's name and address. Under those circumstances, its failure to send mail cannot be excused by suggesting that it was not required to engage in a "title search," and thus could have ignored the deed altogether.

Whether because of bureaucratic ineptitude or indifference, or as a matter of policy, the Wayne County Treasurer has a disturbing pattern of doing precisely what it did here: failing to send tax foreclosure notices to persons whose property

interests are known and whose addresses are in its possession. *See, e.g., Donaldson v Wayne County Treasurer*, 2005 WL 1875581, at *1 (Mich App 2005) **(**"[T]he Wayne County Treasurer had Donaldson's true address in its possession but failed to use it to properly notify her" and hence the "foreclosure was defective as a violation of Donaldson's due process rights."); *Rea v Fivegees Investments, LLC*, 2006 WL 1009398 (Mich App 2006) (holding that tax foreclosure conducted by Wayne County violated owners' due process rights because the government "was aware that plaintiffs were the current owners and had plaintiffs' current address in its possession but never sent notice to them"); *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 732 NW2d 458 (2007) (owner's right to due process was violated where the Wayne County Treasurer mailed notice to the previous owner's address, even though the current owner's address was listed on the deed to the property and was therefore known to the County). These are not efforts "reasonably certain to inform those affected," let alone efforts that "one desirous of actually informing" owners of important property interests would reasonably adopt. *Mullane*, 339 US at 313.

II. THE WAYNE COUNTY TREASURER'S POSITION ALSO CANNOT BE RECONCILED WITH *JONES*.

The County's efforts to notify Ms. Sidun not only fell far short of what due process has required for more than half a century, but also ran afoul of the County's constitutional obligation to follow up when it learned that its attempts at mailed notice had failed. *See Jones v Flowers*, 547 US 220, 70 S Ct 652, 94 L Ed 2d 866 (2006). As *Jones* put it, "[w]e do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he

owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 229.

In casually dismissing *Jones* as a "narrow, fact-based decision" (Br. at 16), the County ignores the Court's holding, the constitutional principles that animate that holding, and the Court's resolution of the issue that had split the lower courts. *Jones* held "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so." *Id.* at 220. The steps taken must, in accord with *Mullane*, be the steps that "one desirous of actually informing the absentee might reasonable adopt." *Id.* at 229. Would a reasonable government official who *really* wanted to let Ms. Sidun know that her house was about to be sold have decided not to mail a letter to her last known address? And when the mail sent to Ms. Krist's address was returned undelivered, would such an official have decided once again not to send a letter to Ms. Sidun's address? Throughout the County's brief, these questions are never answered. To quote Chief Justice Roberts, where the government is exerting such "extraordinary power against a property owner—taking and selling a house he owns," it is "not too much to insist" that it do a bit more to notify the owner. *Id.* at 239.

III. THE ADEQUACY OF NOTICE MUST BE ASSESSED *EX ANTE*, FROM THE PERSPECTIVE OF THE GOVERNMENT AT THE TIME OF THE TAKING.

The County's misunderstanding of *Jones* is revealed most clearly when it asserts that due process requires only that the notice be reasonably calculated to reach each owner "*at the time sent*." (Br. at 13) (emphasis added). To the contrary,

a basic principle of due process, reaffirmed by *Jones v Flowers*, is that notice is measured *ex ante*—that is, from the perspective of the party charged with notice *at the time of the taking*. *See Jones*, 547 US at 231 ("[T]he constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*."). That is why information that comes to the government's attention *after* notice has been sent but *before* the taking must be taken into account. In other words, "[i]f a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure." *Id.*

Elsewhere in its brief (at 24), the County appears to recognize the *ex ante* principle when it correctly states that due process does not assess the constitutionality of notice procedures "with the benefit of hindsight." But, paradoxically, the County nevertheless attempts (at 9, 23) to defend its resort to posting on the basis of facts—such as the fact that the Siduns had in the past collected rent in person at the property—that came to the County's attention only *after* the taking. In any event, as explained in our opening brief (at 17-23), steps such as publication or posting cannot excuse the failure to send notice to Ms. Sidun at her last known address. Because the County had "on its books the names and addresses" of both property owners, there was "no tenable ground for dispensing with a serious effort to inform them personally of the [proceeding], at least by ordinary mail to the record address." *Mullane*, 339 US at 318.

IV. THE *AMICUS* BRIEF'S RETROACTIVITY ARGUMENT IS MERITLESS.

The *amicus* Michigan Department of Treasury and the Wayne County Treasurer argue that this Court should "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" (*Amicus* Br. at 11), and, on that basis, "should affirm the judgment" in this case. (Wayne Br. at 28). That argument is fatally flawed. First, the argument rests on a flawed characterization of *Jones v Flowers*—a case in which the U.S. Supreme Court itself expressly "disclaim[ed] any new rule." *Jones*, 547 U.S. at 238.

Second, the argument rests on a flawed characterization of this case. The tax sale here was not "otherwise valid" but for *Jones*. As explained above, Wayne County's actions in this case contravene due-process principles that predate *Jones* by more than fifty years. Nor is this case "final" in any relevant sense, because Ms. Sidun's case is still open on direct review in this Court.

Third, the argument flies in the face of the U.S. Supreme Court's retroactivity jurisprudence, which holds that the "Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper v Va Dep't of Transportation*, 509 US 86, 90, 113 S Ct 2510, 125 L Ed 2d 74 (1993) (holding that *Davis v Mich Dep't of Treasury*, 489 U.S. 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989)—a decision striking down as unconstitutional a policy of the Michigan Department of Treasury—applied retroactively). Such a rule "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and a*s to all events, regardless of*

whether such events predate or postdate our announcement of the rule." *Id.* at 97 (emphasis added). Although the *amicus* brief relies on Michigan retroactivity doctrine, the U.S. Supreme Court has explained that, as to rules of federal law, the Supremacy Clause "does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Id.* at 100. In any event, as this Court noted in a recent decision holding Wayne County's taking of private property unconstitutional, "[t]here is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *County of Wayne v Hathcock*, 471 Mich 445, 484 n 98, 684 NW2d 765 (2004).

CONCLUSION

Because the County deprived Ms. Sidun of her property without due process, this Court should reverse the Court of Appeals' decision and remand for proceedings concerning relief, including relief under 42 USC 1983 and 1988.

Dated January 23, 2008 Respectfully submitted,

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