

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

Daniel Patru,
Petitioner / Appellant,

vs

City of Wayne,
Respondent / Appellee.

Supreme Court No. 161680
Court of Appeals No. 346894
Lower Court No. 16-001828-TT

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Appellant's Reply to Answer to Leave to Appeal

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Reply

Appellee filed its Answer to Appellant's Leave to Appeal on August 13, 2020. Appellant files this Reply under MCR 7.305(E), within the 21-day deadline.

- ☐ fix the paragraph beginning with "Although the factual situation . . ."
- ☐ one idea per paragraph
- ☐ Review for accuracy: Read the answer, marking all assertions, and then make sure they are addressed in the reply.
- ☐ Write an introduction in the Reply section.
- ☐ Review for structure. Can you make the argument clearer?
- ☐ Review for wording. Are you using the right words?
- ☐ Review for errors. Did you spell everything correct?
- ☐ Check references for accuracy.
- ☐ Send a copy for review to Tim and Delia.
- ☐ Efile it.

I. This Court should hear this case because it represents a common situation

Appellee's counter-statement of the question presented characterizes this case as "garden-variety." This is both right and wrong. It is right because the facts of this case do represent a common, three-step situation:

1. A house is allowed to fall into disrepair.
2. The house sells at a discount compared to similar but well-maintained houses.
3. The house is bought and repaired.

While the house is falling into disrepair, the taxing authority continues to assess the property as if it were in average condition.¹ The owner who is not able or willing to keep the house repaired often also fails to appeal the assessment, so the house's over-assessment is left unchallenged until the house is sold. It then falls on the purchaser to repair the house and appeal the assessment.

Appellant believes that this situation is common; he is counsel to five tax-tribunal cases (18-002532, 18-002570, 18-002661, 18-002662, and 18-002664) that are waiting for the outcome of this case, because they involve this situation and the same issues.

Although the factual situation of this case is common, the approach taken by the tax tribunal is new: it has no support in caselaw and it contradicts the Michigan State Tax Commission (STC) Bulletin No. 7 of 2014 (Mathieu Gast Act).² The bulletin at paragraphs 3 and 4 under the section "General Information" requires that assessors determine the true cash value of repairs by performing before-repair and after-repair appraisals. This allows the assessor to fulfill the statute's requirement to "indicate on the assessment roll" the value added by the repairs. Appellant's Question Presented asks this Court to endorse this approach.

The tax tribunal has come up with several exceptions to the statute which avoid the STC's approach.³ The first exception was that the statute does not apply to properties in substandard condition. This was rejected by the court of appeals in *Patru v City of Wayne*, unpublished per curiam opinion of the Court of Appeals, issued

¹The assessor in this case testified that she uses mass appraisal which "does not account for properties one-by-one", but rather "assumes that properties are in 'average' condition." Second Final Opinion and Judgment (FOJ 2, Tribunal entry 48, issued December 4, 2018), at 4.

²STC Bulletin 7 of 2014 was superceded by STC Bulletin 7 of 2020 because the Mathieu-Gast Statute was amended to include alternative energy systems. Other than being updated to reflect the amended statute, the 2020 bulletin is the essentially same as the 2014 bulletin. (The only additional change is that the 2020 bulletin adds underlining to the third paragraph in the section "Calculating New and Loss for Assessment and Equalization Purposes" but does not change the wording.)

³Neither the tax tribunal nor explicitly acknowledged that they were departing from the STC's guidance but their opinions make it clear that they do. The tax tribunal addresses this in footnote 7 of its Order Denying Reconsideration of 2nd FOJ (MTT Docket Line 51, issued December 14, 2018) where it quotes STC Bulletin 7 of 2014 out of context and then asserts that "STC guidance lacks the force of law." The court of appeals claims that it is in accord with the STC but, as pointed out in Petitioner's Leave to Appeal (filed July 20, 2020), at 17, it also reads the STC's bulletin out of context.

May 8, 2018 (Docket No. 337547) (*Patru I*). On remand, the tribunal found two more exceptions which were then affirmed by the court of appeals in *Patru v City of Wayne*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 346894) (*Patru II*):

1. **The uncapping exception:** Mathieu-Gast does not apply to repairs done after a sale but before tax day (December 31) because the property's taxable value is uncapped for the tax year following a transfer.
2. **The prior assessment exception:** Mathieu-Gast does not apply if the prior year's assessed value supports the contested assessed value.

Both of these exceptions are new. Neither the tax tribunal, nor the court of appeals, nor Appellee cite any caselaw in support. Appellant asks this Court to reject these exceptions and confirm that Mathieu-Gast requires before-repair and after-repair appraisals. The fact that this factual situation is a common one and likely to reoccur makes it important for this Court to hear this case now, while the errors are still in their infancy, rather than after the errors have been entrenched in many cases.

II. Appellee's defense of the uncapping exception is wrong both as a statement of law and as a summary of the argument of the court of appeals

Appellee's Answer to Leave to Appeal (filed August 13, 2020), at 7, defends the uncapping exception by claiming it is required by the text:

As this Court correctly observed in its 2/18/20 Opinion, the text of § 27(2) ***requires*** municipalities to “determine the TCV of the subject property on the basis of its fair market value as of December 31,”if the property was sold earlier that year.

But the plain language of the statute requires nonconsideration “until the property is sold,” that is, there must be a sale *after* the repairs to end nonconsideration. Ending nonconsideration because of a sale earlier that year, *before* the repairs, is a violation of the statute. The court of appeals admits that the words of the statute do

not help it on pages 3-4 of its opinion:

While MCL 211.27(2) does not expressly provide that it does not apply to “normal repairs” performed during a year when ownership of property is transferred (i.e., the taxable value becomes uncapped), the statute must be read in conjunction with other provisions of the General Property Tax Act . . .^[4]

It is unclear what the litigation strategy of Appellee’s counsel is, given the fact they rely on a legal argument which court of appeals admits does not support its case, while not asserting the court of appeals’s own legal argument. Whatever their strategy, this Court is safe to conclude that at this stage (leave for appeal), the legal argument for appellee’s position is shaky.

III. The prior assessment exception violates the plain language of Mathieu-Gast and the tribunal’s duty to make an independent determination

Appellee claims that the fact that the “repairs had no bearing, whatsoever, on respondent’s assessment . . . renders [Appellant’s] arguments moot.” Answer, at 8. But the fact that the repairs had no bearing on the assessment, that the repairs were ignored, is a *flaw* in the opinion, not a winning feature. Mathieu-Gast’s plain language does not permit normal repairs to be ignored. Instead, the value of the repairs must be “indicated on the assessment roll” and the pre-repair value must be used for assessment purposes until the property is sold.

The court of appeals relies on the prior year’s assessed value to avoid Mathieu-Gast, what I have named “the prior assessment exception.” The exception works by

⁴To support the uncapping exception, the court of appeals relies on a provision in the next section of the GPTA, MCL 211.27a(3), which implements Proposal A’s uncapping: “the property’s taxable value for the calendar year following the year of the transfer is the property’s state equalized valuation for the calendar year following the transfer.” *Patru II*, p 4.

As pointed out in the Leave to Appeal, at 18, and more extensively in the Petitioner’s Motion to the Court of Appeals to Reconsider (filed March 8, 2020), at 4-5, the court of appeals errs when it equates true cash value with fair market value “regardless of any ‘normal repairs’ made by petitioner . . .” *Patru II*, p 5. True cash value is defined in MCL 211.27, which includes the Mathieu-Gast Statute, MCL 211.27(2). Thus, as used in the GPTA, the value due to normal repairs is never included in the true cash value until the property is sold.

assuming that the prior year's assessment is correct and then ignoring Mathieu-Gast if the true cash value at issue is the same, adjusted for inflation. Contrary to Appellee's assertion in its Answer, at 8, this violates rather than meets the requirement that the tribunal make an independent determination.

The independent determination requirement was expressed in *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich. App. 379, 389-390 (1998)⁵:

The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances. . . . The Tax Tribunal has a duty to make its own, independent determination of true cash value. . . . The three most common approaches for determining true cash value are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach. However, variations of these approaches and entirely new methods may be useful if found to be accurate and reasonably related to fair market value. [cleaned up]

Thus an independent determination refers to using an appraisal approach that is “accurate and reasonably related to fair market value” such as capitalization-of-income, sales-comparison, or cost-less-depreciation. The prior assessment exception is not such an appraisal approach.⁶ In this case, reliance on the prior year's assessment is particularly unreliable because the assessor did not consider the actual condition of the property but rather she used mass appraisal which “does not account for properties one-by-one”, but rather “*assumes* that properties are in ‘average’ condition.” FOJ 2, at 4 (emphasis added).

⁵Appellant's Leave to Appeal, at 13-14, cites *Jones & Laughlin Steel Corporation v City of Warren*, 193 Mich App 348; 483 NW2nd 416 (1992) which also lists the same three approaches to valuation at page 353 and also makes it clear that the tribunal violated its duty of independent determination when it “simply accepted respondent's assessment without discussing why the assessment reflected the true cash value of the property.” *Id.* at 355-356.

⁶The assessment is the *result* from a mass-appraisal computer program. A “mass-appraisal cost approach” can be a valid approach, but the record card for the relevant year and all the calculations must be provided. See Stephen Lasher, “STC - Defending your Assessment in a Tax Tribunal Small Claims Hearing”, <https://youtu.be/kPClBCIIW6U?t=315> (viewed August 25, 2020). Here no such documentation for the prior year's assessment was in evidence.

Thus the tribunal's use of a prior assessment exception violated its duty to make an independent determination of the true cash value.

IV. This case satisfies the grounds requirements of MCR 7.305(B)

Appellee asserts at Answer, at 5-6 that this case does not satisfy the grounds requirement of MCR 7.305(B). But as shown above, the court of appeals in this case interprets MCL 211.27(2) in a way that clearly violates the plain language of the statute. The court of appeals in *Patru I* reversed the tribunal for making this mistake citing *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011), "nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Patru II*, p 5. This is a "legal principle of major significance to the state's jurisprudence" which satisfies MCR 7.305(B)(3). This Court may also view this case as conflicting with the court of appeals cases which uphold this principle, so it may take the case on MCR 7.305(B)(5)(b).

Furthermore as shown above, the court of appeals violates the principle that the tribunal must make an independent determination of the true cash value as required by *Jones & Laughlin* and *Great Lakes Div of Nat'l Steel Corp*. This also satisfies MCR 7.305(B)(3) and MCR 7.305(B)(5)(b) as above.

Furthermore to the extent that the interpretation of the Mathieu-Gast Act, a statute more than forty years old and recently amended to include alternative energy, is of significant public interest, this case satisfies MCR 7.305(B)(2).

Finally Appellee asserts that the MTT's assessment would not cause material injustice because the amount in question here is a TCV increase of \$2,400. Answer, at 6. Actually, the TCV in dispute is the difference between the unrepaired house (\$32,000) and the repaired house (\$50,400). The tax on the repaired house would be 57.5% more than on the unrepaired house. Thus the deprivation of the protections of the Mathieu-Gast Act causes Appellant material injustice and as the court of appeals

is clearly erroneous, this Court may take this case under MCR 7.305(B)(5)(a).

V. Appellant has not raised the issue of the law of the case

Appellee discusses the law of the case at Answer, at 7. Although Appellant believes that *Patru II* violated the law of the case expressed in *Patru I*,⁷ he did not make this argument in his Leave to Appeal. Appellant believes that this Court's limited and valuable time would be best spent on laying out the correct application of Mathieu-Gast, rather than simply correcting the outcome in this one case.

Summary

1. This Court should take this case *because* its situation is “garden-variety.” The law in this case is a precedent. And other cases are already waiting on the rule from this case.
2. While the situation is common, the tax tribunal's approach in creating two new exceptions to Mathieu-Gast is new and at odds with the STC. Therefore it is important that this Court clarify the law in this area.
3. Appellee's plain language defense of the uncapping exception is undermined by the court of appeals itself. Furthermore, Appellee has chosen not to defend the court of appeals's own arguments for the uncapping exception.
4. The prior assessment exception violates the plain language of Mathieu-Gast as well as the tribunal's duty to make an independent determination, as laid out in *Jones & Laughlin* and *Great Lakes Div of Nat'l Steel Corp.*
5. This case satisfies the grounds requirement of MCR 7.305(B).

⁷As explained in his Motion to COA for Reconsideration, at 6-7, Appellant believes that *Bennett v Bennett*, 197 Mich. App. 497, 501; 496 N.W.2d 353 (1992) teaches that the law of the case bars even correct arguments if they could have been brought in the first appeal. Here the court in *Patru II* violated the law of the case because it accepted the tribunal's uncapping and prior assessment exceptions even though they could have been presented in the first appeal.

Relief Requested

Therefore, Appellant respectfully asks this Court to grant leave to appeal.

Respectfully Submitted,

/s/ Daniel Patru, P74387

August 28, 2020