

**STATE OF MICHIGAN
IN THE COURT OF APPEALS
DETROIT OFFICE**

Daniel Patru,
Petitioner / Appellant,

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

vs

City of Wayne,
Respondent / Appellee.

**Motion and Brief for
Reconsideration**

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Motion

Petitioner moves for reconsideration of this Court's opinion under MCR 7.215(I).

Issues

Did this Court make a palpable errors when it held that:

1. MCL 211.27(2) does not cover repairs by a new owner in the year of a sale,
2. the tribunal properly found that the repairs did not affect the property's value,
3. the tribunal did not violate the law of the case, and
4. the tribunal's rejection of the purchase price was proper?

Facts

Before it was bought by Appellant, the subject house was owned by HUD. MLS Listing (MTT Docket Line 32) (Appendix at 9). The house had been listed on the MLS on and off since April 2013; it's initial asking price was \$29,900, but by the time Appellant bought the house, the asking price was \$32,000, which was the price Appellant paid in August 2015. MLS History (MTT Docket Line 33) (Appendix at 8).

The City of Wayne (Appellee/Respondent) required repairs before it it granted Appellant a certificate of occupancy. List of Repairs (MTT Docket Line 36) (Appendix at 10). "It is undisputed that, when he purchased the property, it was in substandard condition and required numerous repairs to make it livable. Patru completed the required repairs on the property as of December 31, 2015." *Patru v City of Wayne*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket No. 337547), p 1 (Appendix at 37).

I. First Appeal

Appellee assessed the subject property for 2016 at a true cash value of \$50,400. Appellant appealed, arguing that the assessment was the after-repair value as of December 31, 2015. Appellant contended that the repairs were normal repairs under MCL 211.27(2) and that the house must be valued at its before-repair value. “Petitioner claims that under MCL 211.27(2) we should not increase the subject’s true cash value for normal repairs and maintenance until the subject is sold.” *Patru 1*, p 2 (Appendix at 38) (quoting the tribunal’s POJ in the first appeal).

The Tax Tribunal referee ruled that MCL 211.27(2) nonconsideration did not apply because the property was in substandard condition. This Court reversed:

The hearing referee incorrectly interpreted MCL 211.27(2) by concluding that because repairs were done to a property in substandard condition, they did not constitute normal repairs. . . . This was improper . . . Nothing in MCL 211.27(2) provides that the repairs . . . are not normal repairs in the event that they are performed on a substandard property. Thus by reading a requirement into the statute that was not stated by the legislature, the trial erred . . . See *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) (stating that 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 1, p 5 (Appendix at 41).

This court could not fully resolve the case because the tax tribunal had not ruled that the repairs met the specific criteria of MCL 211.27(2). The referee had misunderstood the statute and so had not determined whether Appellant’s testimony about the repairs fell under the statute. Petitioner had submitted a spreadsheet which did list the repairs and their specific MCL 211.27(2) criteria, but the tribunal had refused to consider it because it was submitted after the hearing. So this Court remanded the case back to the tribunal. *Patru 1*, p 5-6 (Appendix at 41–42).

II. Second Appeal

On remand, the tribunal ruled that the repairs were normal, but it again found a reason not to apply MCL 211.27(2) nonconsideration. The tribunal ruled that MCL

211.27(2) did not apply for repairs done in a year of a transfer, even if the repairs were done by the new owner. This Court has now affirmed this interpretation.

Also, contrary to previously undisputed finding, the tribunal ruled that the property's before-repair condition was not substandard, but rather that the repairs "did not affect the assessed [true cash value] of the property . . ." Opinion at 1. This Court has now affirmed this finding also.

Standard of Review

MCL 2.119(F)(3) says:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A palpable error is a clear error "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow Estate v Luckow*, 291 Mich App 417, 426; 805 NW2d 453, 453 (2011) (cleaned up).

"The rule [MCL 2.119(F)(3)] does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled upon; in fact, it allows considerable discretion to correct mistakes." *Macomb County Department of Human Services v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

Argument

I. The exception to MCL 211.27(2) is not supported

This court reviews the Tax Tribunal's statutory interpretation de novo. *Briggs Tax Service, LLC v Detroit Pub. Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010).

This Court previously faulted the Tax Tribunal for violating the rule that "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 1*, p 5 (Appendix at 41), quoting *Mich Ed*, 489 Mich at 218. By reading into MCL 211.27(2) an exception for repairs done in the year of a transfer but after the sale, this Court now makes the same error.

The statute requires nonconsideration “*until* the property is sold.” The word until means that there must be a sale after the repairs for nonconsideration to end. This Court’s refusal to apply nonconsideration where there is no sale after the repairs is a violation of the plain words of the statute.

This Court’s interpretation also perverts the intent of the statute which is to promote repairs. This Court would require that purchasers delay repairs until the year after the sale, to establish the unrepaired value as of December 31. Diligent buyers who start repairs too early are exempted from nonconsideration not by the plain language of the statute itself but via the complex interplay of at least two other statutes in the tax act. It seems odd that this was the legislature’s intent.

This Court’s analysis of the issue is correct up to the proposition that the uncapped taxable value is based on the true cash value of the property in the year after the transfer.¹ But this Court errs when it equates true cash value with fair market value “regardless of any “normal repairs” made by petitioner in [the year of purchase].” Opinion at 5.

True cash value is defined and refined in MCL 211.27², which has eight subsec-

¹The uncapped taxable value is the equalized assessed value (state equalized value). MCL 211.27a(3). The assessed value is one half of the true cash value. MCL 211.27a(1). The true cash value is always calculated as of tax day. “true cash value’ means the usual selling price . . . at the time of assessment,” MCL 211.27(1). “The taxable status of . . . real . . . property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day,” MCL 211.2(2).

²Internally MCL 211.27 may define true cash value in terms of itself. For example, MCL 211.27(2) uses “true cash value for assessment purposes” to distinguish from the “true cash value” that increased due to normal repairs. But outside of MCL 211.27, in the rest of the tax act, there is only one “true cash value” which incorporates all of MCL 211.27. For example, assessed value is defined in MCL 211.27a(1) as 50% of the true cash value. Obviously with respect to MCL 211.27(2) this means the “true cash value for assessment purposes.” But, as it is outside of MCL 211.27, MCL 211.27a(1) uses the term “true cash value.”

tions, which if reproduced here would span five pages. Courts have summarized true cash value as “fair market value,” based on the term “usual selling price” in subsection 1. But this shorthand is used only in cases where a more complex definition is not needed. There is no case, except this Court’s opinion here, that holds that the caselaw-derived term “fair market value” overrides or invalidates an applicable subsection of MCL 211.27. For this case, true cash value should mean “the usual selling price . . . at the time of assessment,” MCL 211.27(1), but not considering the value added by normal repairs, MCL 211.27(2).

Furthermore, MCL 211.27(2), as part of the definition of true cash value, is not dependent on the capped or uncapped status of the taxable value defined in the next section, MCL 211.27a. Rather the effect goes the other way. MCL 211.27(2) always operates to exclude from the true cash value the value of normal repairs no matter if it is used to establish the assessed value of MCL 211.27a(1) or value of additions of MCL 211.27a(2)(b).

Contrary to this Court’s assertion, its interpretation of Mathieu Gast is not supported by the State Tax Commission. On page 6 of its opinion, this Court cites, with its own emphasis, Michigan State Tax Commission (STC) Bulletin No. 7 of 2014 (Mathieu Gast Act), at 3 (Appendix at 45):

The exemption for normal repairs, replacements and maintenance ends in the year after the owner who made the repairs, replacements and maintenance sells the property. *In the year following a sale, the assessed value shall be based on the true cash value of the entire property.* The amount of assessment increase attributable to the value of formerly exempt property returning to the assessment roll is new for equalization purposes.

This Court reads the just the second, emphasized, sentence out of its context. The first sentence of paragraph gives the topic: “The exemption . . . ends in the year after *the owner who made the repairs* . . . sells the property.” In this context, the second sentence’s “entire property” means the property with the seller’s repairs considered. The buyer’s repairs are not in the paragraph’s scope.³

³This Court used this out-of-context quote to justify its holding that before-repair and after-repairs

II. The ruling that the repairs did not affect the true cash value is not supported

This Court accepts the Tax Tribunal's factual findings if they are supported by competent, material, and substantial evidence on the whole record. *Briggs*, 485 Mich at 75.

Besides ruling that MCL 211.27(2) did not apply, the tribunal also ruled that the repairs did not affect the property's true cash value. But this is not supported by the record as a whole.

The opinion says: "The tribunal did not credit petitioner's argument that the property was in substandard condition when he purchased it." Opinion at 5. This is not quite a fair characterization; the property's substandard condition is not merely Appellant's argument. Throughout the first trip to this Court until the tribunal's last Final Opinion, all the actors in this case, the parties, the tribunal and this Court relied on the well-established fact that the subject property was in substandard condition before the repairs. This case was first appealed to this Court because "[t]he hearing referee incorrectly interpreted MCL 211.27(2) by concluding that because the repairs were done to a property in substandard condition, they did not constitute normal repairs." *Patru 1*, p 5 (Appendix at 41). "It is undisputed that, when he purchased the property, it was in substandard condition and required numerous repairs to make it livable." *Id.* p 1. The tribunal's reversal of a fact which was foundational to its first ruling was not based on new evidence: neither party ever argued that the house was not in substandard condition before repairs. Therefore this Court should take a careful look at the tribunal's reasoning for this drastic reinterpretation of the evidence.

The tribunal relied on pictures and the prior year's assessed value:

The tribunal found that petitioner's MLS listing for the subject property showed a property in "average" condition, and that petitioner's photographs of the property, before any repairs, showed "a property that is livable and habitable with reasonable marketability and appeal." . . . It is undisputed that the assessed TCV of the property for the 2015 tax year was \$48,000.

appraisals were not required. Opinion at 6. As this passage does not say what this Court thinks it says, the Court's holding on this point is without support.

Opinion at 5. The fact that the photographs show the house as livable and habitable should be considered in light of the city's different opinion. The city had inspected the whole house, not just the parts shown in the marketing pictures, before it sold and refused to issue a certificate of occupancy until repairs were made; "the city required that the repairs be made." *Id.* p 2, quoting the tribunal's first Proposed Opinion. The spreadsheet listing the repairs shows that most of the repairs performed were required by the city. See List of Repairs (Appendix at 10). The fact that the realtor who put the pictures in the MLS had listed the property at \$29,900 and then at \$32,000, well below the market value of a repaired house, and that it took more than two years to sell, also raises doubts that the repairs did not add value.

Regarding the prior year's assessed value, Appellee/Respondent testified at the hearing that "mass appraisal does not account for properties one-by-one. In other words, properties are assessed uniformly and *Respondent assumes properties are in "average" condition.*" Second Final Opinion and Judgment (MTT Docket Line 48) (FOJ), p 4 (Appendix at 21), emphasis added. So the assessed value cannot be evidence of a property's before-repair value, because the assessed value is just the output of a mass appraisal computer program that assumes average condition.

III. The law of the case requires reversal

Under the doctrine of the law of the case, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question will not be differently determined in a subsequent appeal in the same case were the facts remain materially the same. The primary purpose of the law-of-the-case doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. . . . [T]he doctrine is discretionary, rather than mandatory.

Bennett v Bennett, 197 Mich. App. 497, 499-500; 496 N.W.2d 353 (1992).

This Court in this opinion at 5 cites two reasons why this case is not governed by the law of the case. First, this Court had not resolved whether "the repairs were normal repairs within the meaning of MCL 211.27(2)." This was not resolved because the

existing record was insufficient. *Patru 1*, p 5 (Appendix at 41). This Court had ruled, however, that if the Tribunal found that the repairs listed on the spreadsheet had been performed, these would constitute normal repairs and should not be considered as part of the true cash value:

If the testimony provided was an oral recitation of the information included on the spreadsheet, then Patru presented testimony sufficient to establish that at least some of the repairs constituted normal repairs under MCL 211.27(2), and so the increase in TCV attributed to those repairs should not be considered in the property's TCV for assessment purposes until such time as Patru sells the property.

Id. So on remand, the tribunal should have applied nonconsideration after it found that the repairs as listed on the spreadsheet were normal repairs.

Instead, despite finding that the repairs were normal, the tribunal did not apply nonconsideration because of the second reason: it thought that the transfer of ownership and uncapping created an exception. Opinion at 5. The teaching of *Bennett* is helpful here.

In *Bennett*, the lower court had denied defendant's motion to terminate his child support early. While the case was on appeal, a law was enacted which supported the lower court's decision. The law took effect before the appeals court called the case. The appeals court reversed the lower court, but did not mention the new law. On remand, plaintiff asked the lower court to deny defendant's motion a second time, based on the new law which the appeals court had not addressed. The lower court refused because of the law of the case. Plaintiff appealed.

The appeals court affirmed, reasoning that even though it thought that its first decision was wrong, by substituting its judgment for the prior appeals court panel, it would be doing "the very activity the law-of-the-case doctrine is designed to discourage." *Id.* at 501. If the prior panel was not aware of the new law, the parties were at fault because "ultimately it is the responsibility of the parties to bring to this Court's attention that case law and those statutes that the parties wish the Court to consider in deciding the matter." *Id.*

Thus *Bennett* teaches that the law of the case precludes even correct arguments that could have been brought up in the first appeal. So even if this Court agrees with the tribunal's latest decision, it should still reverse and affirm its earlier ruling. As in *Bennett*, Appellee could have made its arguments (that MCL 211.27(2) does not apply if the repairs are made in the year of a transfer and that the property was in average condition before the repairs) before this Court on the first appeal.

IV. This Court wrongly affirms the tribunal's rejection of the purchase price

When reviewing Tax Tribunal cases, this Court looks for misapplication of the law or adoption of a wrong principle. Factual findings must be supported by competent, material, and substantial evidence on the whole record. Statutory interpretation is reviewed de novo. *Briggs*, 485 Mich at 75; 780 NW2d at 757-758.

This Court mischaracterizes Appellant's complaint about the tribunal's treatment of the subject's sale price. Appellant is not complaining that "the tribunal erred by rejecting his 2015 purchase price of the property as determinative of its TCV." Opinion at 6. Rather, Appellant's brief at 18-19 complains that the tribunal gave the sale price "no weight or credibility," Order Denying Reconsideration (MTT Docket Line 51), p 2 (Appendix at 35), contrary to the teaching of *Jones & Laughlin Steel Corporation v City of Warren*, 193 Mich App 348, 353-354; 483 NW2d 416 (1992): "the price at which an item of property actually sold is most certainly relevant evidence" and "the tribunal's opinion that the evidence 'has little or no bearing' on the property's earlier value suggests that the evidence was rejected out of hand. Such cursory rejection would be erroneous." Appellant just wants the tribunal to consider the sale price and not reject it out of hand.

The opinion at 7 asserts that the tribunal "considered petitioner's evidence of the 2015 purchase price" and also "considered the nature of the sale," but there is no record of such consideration involving the particular facts of this case. The Tribunal gave the

sale price “no weight or credibility” solely because the seller was HUD. This amounts to a per se rule which excludes from consideration the sale price of all HUD-owned homes. This is the kind of cursory rejection that *Jones & Laughlin* forbids. This is especially troubling because the tribunal cites no authority for this rule beyond its bare speculation that: “Because the subject was being sold by a government entity, that entity’s motivation may not have been to receive market value for the property.” Order Denying Reconsideration, p 2 (Appendix at 35).

Relief

Therefore because this Court’s opinion contains palpable errors, Appellant respectfully asks this Court to reconsider or rehear this case.

Respectfully Submitted,

/s/ Daniel Patru, P74387

March 5, 2020