STATE OF MICHIGAN

IN THE SUPREME COURT

COUNTY OF LENAWEE,

Plaintiff-Appellant,

vs.

DAVID WAGLEY, BARBARA WAGLEY, BANK OF LENAWEE, and PAVILLION MORTGAGE,

Defendants-Appellees.

Docket No. 147314

Court of Appeals No. 311255

Lenawee County Circuit Court
Case No. 05-001960-CC

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, THE MICHIGAN ASSOCIATION OF COUNTIES, AND THE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT COUNTY OF LENAWEE'S APPLICATION FOR LEAVE TO APPEAL

PETER H. WEBSTER (P48783)
DICKINSON WRIGHT, PLLC
2600 W Big Beaver Road, Suite 300
Troy, Michigan 48084
Phone: (248) 433-7513
Fax: (248) 433-7274
E-mail: pwebster@dickinsonwright.com

Attorneys for Amici Curiae Michigan Municipal League, the Michigan Association of Counties, and the Michigan Townships Association

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STATEMENT OF THE BASIS OF JURISDICTION

Amici Curiae rely upon Plaintiff-Appellant County of Lenawee's statement of this Court's jurisdiction.

STATEMENT OF QUESTION PRESENTED

1. Whether the Court of Appeals erred in awarding the Wagleys interest under MCR 213.65 despite the plain and unambiguous language of MCL 213.65, which precludes such an award in this case, where the Wagleys, not the County of Lenawee, remained in possession of the property following the filing of the Complaint?

Plaintiff-Appellant County of Lenawee's answer:	Yes
Amici Curiae's answer:	Yes
The Court of Appeals answered:	No
Defendants-Appellees would presumably answer:	No
The trial court would presumably answer:	No

I. STATEMENT OF INTEREST OF AMICI CURIAE

This brief is submitted by Amici Curiae Michigan Municipal League, the Michigan Association of Counties, and the Michigan Townships Association (collectively, "Amici Curiae").

Amicus Curiae Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, the majority of which are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the President and Executive Director/CEO of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, City Attorney, Troy, Chair; Clyde J. Robinson, City Attorney, Kalamazoo, Vice Chair; Randall L. Brown, City Attorney, Portage; James O. Branson, III, City Attorney, Midland; Robert J. Jamo, City Attorney, Menominee; Catherine M. Mish, City Attorney, Grand Rapids; James J. Murray, City Attorney, City of Boyne City and Petoskey; Stephen Postema, City Attorney, Ann Arbor; John C. Schrier, City Attorney, Muskegon, Thomas R. Schultz, City Attorney, Farmington and Novi; Eric D. Williams, City Attorney, Big Rapids; and William C. Mathewson, General Counsel, Michigan Municipal League, Fund Administrator.

Amicus Curiae Michigan Association of Counties ("MAC") is a non-partisan, non-profit organization which advances education, communication and cooperation among county government officials in the state of Michigan. MAC is the counties' voice at the State Capitol,

providing legislative support on key issues affecting counties and their affiliate entities. Its membership is comprised of Michigan counties, with an elected Board of Directors representing all regions of the state. MAC's Board of Directors are authorized to represent the member counties in litigation of statewide significance.

This brief amicus curiae is authorized by the MAC Board of Directors, which includes the MAC executive director and the president, officers and directors: Shelly Pinkelman, President and Crawford County Commissioner; Jon Campbell, First Vice President and Allegan County Commissioner; Jerry Doucette, Second Vice President and Alger County Commissioner; Toni Moceri, Macomb County Commissioner; Joseph Palamara, Wayne County Commissioner; Kenneth Borton, Otsego County Commissioner; Don Disselkoen, Ottawa County Commissioner; Michael Hanley, Saginaw County Commissioner; Dan LaFoille, Schoolcraft County Commissioner; Michael Crawford, Antrim County Commissioner; Pat Gardner, Newaygo County Commissioner; Max Thiele, Allegan County Commissioner; Shelley Goodman Taub, Oakland County Commissioner; Matthew Bierlein, Tuscola County Commissioner; Robert Showers, Clinton County Commissioner; and Michael Spisz, Oakland County Commissioner.

Amicus Curiae Michigan Townships Association ("MTA") is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the state of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the state of Michigan. This brief amicus curiae is authorized by the MTA's Board of Directors.

Because Amici Curiae's members are local governments, the issue of statutory interest on condemnation awards is of great interest to these organizations. The prospect that local government entities could be required to pay unauthorized, excessive, and unpredictable amounts of interest on condemnation awards in cases where the condemning authority does not have a right of possession by court order and where landowner retains possession of the property is not only inconsistent with the plain language of the statute and the intent of the Michigan Legislature, it would greatly expand the potential liability of Amici Curiae's members by requiring them to pay excessive interest costs in cases where it is necessary to acquire property for public projects. For the reasons discussed herein, Amici Curiae urge the Court to grant Plaintiff-Appellant County of Lenawee's (the "County's") Application for Leave to Appeal and peremptorily reverse the lower courts' awards of statutory interest pursuant to MCL 213.65. Because Amici Curiae are associations representing various political subdivisions of the State and this brief is filed on their behalf, Amici Curiae request that this Court accept this amicus curiae brief without a motion for leave. MCR 7.306(D)(2).

II. STATEMENT OF FACTS

Amici Curiae rely upon the statement of facts and material proceedings set forth in Plaintiff-Appellant County of Lenawee's Application for Leave to Appeal.

III. ARGUMENT

A plain reading of MCL 213.65 and its application to the particular facts of this case reveal that the lower courts erred by awarding additional statutory interest on the increased just compensation award, because the Wagleys, *not* the County, remained in possession of the property (which property was not sought by the County but the utility of which the jury ultimately decided was destroyed by the County's acquisition) following the filing of the Complaint.

Interest is only allowable on money judgments under certain circumstances where specifically authorized by statute. *Motyka v Detroit, G H & M R Co*, 260 Mich 396, 398; 244 NW 897 (1932). This is true in condemnation cases. See, e.g., MCL 213.65. Whether interest is authorized by statute is thus a matter of statutory interpretation. The "primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent . . . .'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted. *Id*.

MCL 213.65 provides for the award and computation of interest on a just compensation award as follows:

> (1) The court shall award interest on the judgment amount or part of the amount from the date of the filing of the complaint to the date that payment of the amount or part of the amount is tendered. However, if a portion of the judgment is attributable to damages incurred after the date of the surrender of possession, the court shall award interest on that portion of the judgment from the date the damage is incurred.
>
> (2) Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. ***However, an owner remaining in possession after the date that the complaint is filed waives the interest for the period of the possession.***
>
> (3) If it is determined that a de facto acquisition occurred at a date earlier than the date of filing the complaint, interest award under this section shall be calculated from the earlier date. [MCL 213.65, emphasis added].

The statute clearly and unambiguously provides that "an owner remaining in ***possession*** after the date that the complaint is filed ***waives the interest for the period of the possession***." MCL 213.65(2) (emphasis added).

In this case, the County acquired the possession of the avigation easement on November 21, 2007 and the Wagleys were entitled to interest on that portion as of that date. However, there was no order of possession and the Court had no right of possession over the remainder property. In fact, the Wagleys remained in possession and had the right of possession of the remainder property.

The jury found that the County's acquisition of the avigation easement destroyed the practical value or utility of the Wagley property and determined just compensation to be $470,000. (COA Opinion at 6). "At a July 2, 2012 post-trial hearing, defense counsel sought interest on the $470,000 just compensation award . . . ." (COA Opinion at 18). According to the Court of Appeals, "the trial court seemed to rule that the imposition of the easement on November 21, 2007, amounted to a de facto taking of the entire property because the inability of people to congregate on the land rendered it uninhabitable." (COA Opinion at 19).[1] The Court of Appeals also observed that there is "absolutely no record information regarding whether the Wagleys remained *in residence*." (COA Opinion at 19, emphasis added).

The Court of Appeals properly rejected the trial court's reasoning, but reached the same incorrect result for a different and improper reason. The Court of Appeals began by acknowledging the rule that "interest does not begin to run until the *condemnor* has possession of the property." (COA Opinion at 19, emphasis added, citing *Detroit v Cusmano & Son, Inc*, 184 Mich App 507, 516; 459 NW2d 3 (1989)). However, the Court of Appeals did not faithfully apply this rule. Instead, it concluded that interest should be awarded on the just compensation

[1] MCL 213.65(3) is only implicated where the de facto taking "occurred at a date ***prior to*** the date of filing the complaint." MCL 213.65(3) (emphasis added). In this case, the trial court awarded interest beginning November 21, 2007, which was well after the complaint was filed. Moreover, there was never any determination that a de facto taking occurred, nor did the Wagleys ever invoke MCL 213.71.

award of $470,000 from the date of the November 21, 2007 Judgment because the Judgment, in the Court of Appeals' opinion, "immediately and permanently deprive[d] the Wagleys 'of any possession or use' of the property actually taken – the airspace above the parcel." (COA Opinion at 20). According to the Court, "the Wagleys' right to interest under the statute . . . began to run as of their loss of use and right to possess the air space above the property – November 21, 2007." (COA Opinion at 21).

Contrary to the Court of Appeals' analysis, the statute does not provide that interest shall accrue from the time when the landowner loses the ability to "use and possess" the property. Instead, statutory interest under MCL 213.65 unambiguously turns solely on ***possession*** – where a landowner remains in "***possession***" after the date that the complaint is filed, he waives interest for the period of his possession. MCL 213.65(2) (emphasis added). And in this case, the Court of Appeals erroneously concluded that the November 21, 2007 Judgment put the County in ***possession*** of the remainder of the Wagleys' property, or, stated differently, that it ***dispossessed*** the Wagleys. In fact, the November 21, 2007 Judgment only granted the County a non-exclusive right to trim or cut trees that protrude into the airspace above the easement and certain other non-possessory rights. (See Judgment, generally). The Judgment makes it clear (and it is undisputed) that the County had neither title to nor ***possession*** of either the *house* or *residential lot*, but merely obtained certain air or avigation easement rights. (See COA Opinion at 20, acknowledging that the "the county's taking of the avigation easement did not permanently deprive the Wagley's of the entirety of their property."). Unless and until an order transferring possession was entered, the Wagleys retained possession. "[A] condemning agency cannot take possession over another's property until a court orders the land owner to surrender possession." (COA Opinion at 19-20, citing *In Dep't of Transp v Jorissen*, 146 Mich App 207, 210; 379

NW2d 424 (1985)). "Until that time, the owner of the property retains possession of the property." (COA Opinion at 20, citing *Jorissen, supra* at 213). "And while the property owners retain possession of the land, they 'waive[] their right to interest on the judgment for that period.'" *Id*. Although the Court of Appeals observed that there is "no record information regarding whether the Wagleys remained in residence," (COA Opinion at 19), this observation is of no legal effect.

First, it is not clear what the Court of Appeals intended by its reference to "in residence." The standard under MCL 213.65 does not turn on the word "residence." And in any event, the test under MCL 213.65 pursuant to the Court of Appeals' holding in *Jorissen*, turns on the legal right to possession, not occupancy or physical presence upon the property. (See dissenting opinion at 2, citing Jorissen, supra at 214-215).

In this case, the jury determined that the County's acquisition of the easement destroyed the practical value or utility of the Wagley property and determined "just compensation to be $470,000." (COA Opinion at 6). But the jury's determination that the easement so impaired the value or utility of the Wagleys' property did not automatically dispossess the Wagleys. Instead, although the agency must pay just compensation for the whole parcel under MCL 213.54(1), the statute expressly requires the agency to make an election as to "whether to receive title and ***possession*** of the remainder of the parcel." MCL213.54(1) (emphasis added). The jury's determination that this statutory provision should apply did not, and cannot, transfer possession of the whole parcel to the County.

In erroneously determining that interest should be awarded on the $470,000 just compensation award under MCL 213.65 notwithstanding the Wagleys' continued right of possession of the property during the pendency of the case and the uncontested fact that the

County did ***not*** have possession of the property that was the subject of the just compensation award at any time, the majority cited and relied upon *Dep't of Trans v Pichalski*, 168 Mich App 712; 425 NW2d 145 (1988) and *State Highway Comm v Great Lakes Express Co*, 50 Mich App 170, 183; 213 NW2d 239 (1973). (See COA Opinion at 20-21).

The Court of Appeals cited *State Highway Comm v Great Lakes Express Co*, 50 Mich App 170, 183; 213 NW2d 239 (1973) as authority for its holding that interest began to run as of the Wagleys' "loss of use and right to possess the airspace above the property." (COA Opinion at 21). A landowner's "use" does not factor into the analysis because the term "use" is not found in the relevant provisions of the statute. In any event, not only did that case pre-date the enactment of the UCPA by more than a decade, the landowner in that case voluntarily entered into a possession and use agreement which gave the plaintiff the immediate right to possession ***more than a year before*** the filing of the petition for condemnation. *Id*. at 173, 183. Thus, even if MCL 213.65 had been enacted at the time, the provision that is at issue in this case would not have been applicable. Here, unlike in *Great Lakes Express Co*, the Wagleys did not voluntarily transfer possession to the County – to the contrary, the County still has not taken possession of the property that was the subject of the just compensation award.

Dep't of Trans v Pichalski, 168 Mich App 712 (1988) – which the Court of Appeals relied upon in upholding the award of interest under MCL 213.65 – actually supports the County's argument against an award of statutory interest. The Court of Appeals found *Pichalski* "instructive" because "the *Pichalski* Court approved an approach by which the property was divided and interest was awarded when only a portion, rather than the entirety, of the property was taken. The current case is more akin to *Pichalski* than *Jorissen* in that the County did not take the entirety of the Wagleys' property . . . ." (COA Opinion at 20). In *Pichalski*, the plaintiff

initially sought to acquire only the front sixty feet of three separate 180 foot parcels of property, identified as parcels C-1111, C-1112, and C-1113. *Pichalski*, 168 Mich App at 715. Unlike in this case, the defendant did not argue that the acquisition of the front 60 feet destroyed the practical value or utility of the remainder. However, as to parcels C-1111 and C-1112, although the original good faith offer applied only to the front 60 feet of the parcels, the parties later agreed to a total rather than a partial taking of the parcels and revised their appraisals accordingly. *Id*. at 717. When the issue of interest was raised later, the plaintiff claimed that the owners of parcels C-1111 and C-1112 were not entitled to interest on their awards as to the 120 foot sections because they remained in possession of those sections. *Id*. at 718. The owners of those parcels surrendered possession of the 60 foot sections on September 26, 2012. *Id*. at 724. But they had not yet surrendered possession of the 120 foot sections at the time the court considered the issue of statutory interest under MCL 213.65. *Id*. The *Pichalski* court affirmed the trial court's refusal to award interest as to the 120 foot sections because the owners of those parcels had not surrendered possession of those sections. *Id*.

The Court of Appeals cited *Pichalski* for its holding that interest should be awarded on the just compensation award, which reflected the jury's finding that the acquisition of the avigation easement destroyed the value or utility of the remainder, even though the Court of Appeals acknowledged that the County never took possession of the remainder. Here, although the County had possession of the avigation easement from November 21, 2007, that order ***did not transfer possession of the remainder*** of the property to the County and, in fact, the County ***still does not have possession of the remainder***. The Court of Appeals acknowledged that "interest does not begin to run until the condemnor has possession of the property." (COA Opinion at 19). Contrary to the Court of Appeals' analysis, *Pichalski* instructs that interest

should ***not*** be awarded on the remainder where the Wagleys, not the County, remain in legal possession of the same.

While these critical points were overlooked by the majority, the dissenting Judge properly summarized the issue and reached the correct result:

> Although the final judgment indicated that the jury had determined "that the practical value or utility of the remainder of the Subject Property has been destroyed by the taking [of the easement],"[2] this is not the equivalent of a deprivation of possession and use during the pendency of these proceedings, thus rendering unavailing defendants' assertion of entitlement to interest pursuant to MCL 213.65. Such an outcome is consistent with the intent and purpose underlying the concept of just compensation. "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense."

(Kelley, J., dissenting) (internal citations omitted). This Court should adopt the legally sound and persuasive reasoning of the dissenting Judge.

MCL 213.65 is clear in its prohibition against an award of interest where the landowner has remained in possession of the property. The statute implicitly recognizes that it is inequitable to allow an owner to remain in possession of the property (and to have the legal right to enjoy all of the attendant benefits of possession) ***and*** collect interest, ***in addition to*** the award of just compensation. As even the Court of Appeals acknowledged, the intent underlying the UCPA is to "place the owner of the property in as good a position as was occupied before the taking."

[2] MCL 213.54(1) provides:

> If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

(COA Opinion at 19, citing *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 815; 402 NW2d 505 (1986)). Permitting a landowner to have both the use of his property ***and*** the use of the money found to be its equivalent results in a windfall to the landowner and underscores the inequity of interest awards. Recognizing this fact, MCL 213.65, and other statutes like it, clearly substitute the right of possession for interest on the just compensation award.

Further troubling is the Court of Appeals' unprecedented and unsupported declaration that "[p]rovisions within the UCPA provide for damages beyond a property owner's actual loss, such as an award of statutory interest, to compensate for the inconvenience experienced on the public's behalf." (COA Opinion at 19). First, this statement is completely unnecessary to come to a resolution of the pending issue and will likely be referenced in condemnation matters to great mischief and injustice. Moreover, there is ***no authority*** under the UCPA (or elsewhere for that matter) that permits a property owner to receive any amount of "damages" beyond his actual loss to compensate for "inconvenience" or other vague, subjective, and unquantifiable intangibles. Not only is there no authority for this declaration, it is clearly contrary to the settled principle that neither the public nor the property owner should be enriched at the other's expense. See *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

The inherent inequity in permitting a landowner to receive statutory interest *in addition to* the award of just compensation where he remains in possession of the property and consequently retains the legal right to enjoy all of the attendant benefits of possession is only heightened by MCL 213.66(3),[3] which permits a landowner to receive attorney fees based upon an award of

[3] MCL 213.66(3) provides:

interest under MCL 213.65. Pursuant to MCL 213.66(3), a landowner may petition for attorney fees of up to 1/3 of the difference between the good faith offer and the "ultimate award." MCL 213.66(3). For the purposes of determining the "ultimate award," interest is included. *J Cusmano & Son, Inc*, 184 Mich App at 515-516 ("This Court has held that the term 'ultimate award,' as used in the attorney fee provision . . . includes interest on the judgment . . . ."; "Defense counsel is entitled to not only one-third of the difference between the original offer and the mediation award, but is also entitled to one-third of the interest which defendant will receive."). The practical effect is that for every $3 of interest awarded, it may cost the condemning authority an additional $1 in attorney fees. The statutory language evidences that the Michigan Legislature intended to permit landowners to collect attorney fees in certain, limited circumstances. But the Michigan Legislature also clearly intended ***not*** to permit landowners who remain in possession of the property following the filing of the complaint to collect interest ***at all***. MCL 213.65(2). The lower courts' award of statutory interest in this case is not only in violation of the plain language of the statute, the erroneous award of interest will have even further reaching implications because it will cause the condemning authority to face an unexpected and unlawful additional burden. This point underscores the importance of this Court's review of the lower courts' opinions, and the appropriateness of an order of peremptory reversal.

> If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court. If the agency or owner is ordered to pay attorney fees as sanctions under MCR 2.403 or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.

IV. CONCLUSION

For the foregoing reasons, Amici Curiae Michigan Municipal League, The Michigan Association of Counties, and The Michigan Townships Association urge this Court to grant the County's Application for Leave to Appeal and peremptorily reverse the lower courts' awards of statutory interest pursuant to MCL 213.65. The lower courts' opinions in this case disregard the language of the statute that precludes an award of interest where the landowner remained in possession after the date that the complaint was filed.

Respectfully submitted:

DICKINSON WRIGHT, PLLC

By:_____

Peter H. Webster (P48783)
2600 W Big Beaver Road, Suite 300
Troy, Michigan 48084
Phone: (248) 433-7513
Fax: (248) 433-7274
E-mail: pwebster@dickinsonwright.com

Attorneys for Amici Curiae Michigan Municipal League, the Michigan Association of Counties, and the Michigan Townships Association

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