STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Washtenaw County Circuit Court
Judge Archie C. Brown

DAN KAI TUS and NU CHEN YEN TUS,

Plaintiffs/Counter-Defendants-
Appellants,

Docket 139769

v.

SHIRLEY HURT f/k/a SHIRLEY ROBBINS,

Defendant,

And

STERLING MORTGAGE AND
INVESTMENT COMPANY,

Defendant/Counter-Plaintiff-
Appellee

BRIEF ON APPEAL – APPELLEE

(Oral Argument Requested)

ALLYN SMITH LAW GROUP, P.C.
By: Eden J. Allyn (P54638)
Attorney for Defendant-Appellee
31333 West Thirteen Mile Road
Farmington Hills, Michigan 48334
Telephone: (248) 855-2550
Facsimile: (248) 741-6154

TABLE OF CONTENTS

INDEX OF AUTHORITIES

United States Supreme Court

Michigan Supreme Court

Michigan Court of Appeals

STATEMENT OF JURISDICTION

This matter was heard before the Washtenaw Circuit Court, whereupon it entered a Judgment on September 14, 2007. Defendant filed a timely appeal as of right on October 2, 2007 and Plaintiffs cross-appealed. The Court of Appeals reversed in part and affirmed in part in its June 25, 2009 Order. Plaintiffs filed a timely motion for reconsideration on July 16, 2009, which was denied by the Court of Appeals on August 25, 2009. Plaintiffs sought leave to appeal to this Court on October 6, 2009, which this Court granted on May 7, 2010. Accordingly, jurisdiction is conferred upon this Court by MCR 7.301(A)(7).

STATEMENT OF QUESTIONS INVOLVED

Summary of Material Facts

Sterling Mortgage and Investment Company took a mortgage on property located in Ann Arbor from William Hurt on October 10, 1990. This mortgage was duly recorded in the Washtenaw County Records on October 11, 1990 where it remained a matter of public record until Sterling Mortgage and Investment caused it to be foreclosed on March 30, 2006. In the meantime, on February 28, 2000, William Hurt quit his interest in the Ann Arbor property to himself and his wife Shirley Hurt. Shortly thereafter, on April 24, 2000, William Hurt passed away. Shirley Hurt entered into a contract to sell the Ann Arbor property to Dan Kai Tus and Nu Chen Yen Tus on June 5, 2000. American Title Company of Washtenaw was engaged to examine title, clear all liens to ensure the passage of clear title to Mr. and Mrs. Tus and to issue both the mortgage and owners' title insurance policies. While American Title did make note that the 1990 mortgage granted to Sterling Mortgage remained in the public records, it failed to ensure that it was paid from the proceeds of the sale transaction which was closed on June 28, 2000 – a mere 23 days after the purchase contract was signed.

On January 13, 2006, Mr. Hurt's death unknown to Sterling Mortgage, a breach of mortgage letter was sent via regular and certified mail to the Ann Arbor address. Having received no response, Sterling Mortgage caused the matter to be published in the Washtenaw County Legal News on February 23, March 2, March 9, and March 23, 2006. Furthermore, notice was posted upon the Ann Arbor property on February 28, 2006. Once again, receiving no response to these statutorily required notices, Sterling Mortgage caused the mortgage to be foreclosed on March 30, 2006.

The statutory redemption period was set to expire on September 30, 2006. On August 10, 2006, Mr. and Mrs. Tus filed its Complaint, alleging in pertinent part, that Sterling Mortgage had been paid out of proceeds and failed to discharge its mortgage. Upon receiving Sterling Mortgage's Answer and First Set of Interrogatories requesting documentation of such payoff out of proceeds, Mr. and Mrs. Tus immediately amended their Complaint dramatically changing the basis for their claim to allege that they were told that the mortgage had been paid off. Additionally Mr. and Mrs. Tus requested, and received, an extension of the redemption period until thirty days after the conclusion of litigation.

Ultimately, the trial court recognized that Sterling Mortgage was entitled to foreclose the mortgage and required Mr. and Mrs. Tus to tender the redemption funds. Upon receipt of funds, Sterling Mortgage immediately brought the matter before the trial court indicating that it was filing an appeal of right and requesting instruction on what to do with the funds received. The trial court ordered that the funds be tendered into the court pending the outcome of this appeal. Sterling Mortgage complied with this order. Rather than appealing this prudent order, Mr. and Mr. Tus have seized upon this tender of funds into court escrow and described it as tender of the judgment amount and, therefore, an impediment to Sterling Mortgage having standing to appeal

I. DID STERLING MORTGAGE AND INVESTMENT COMPANY HAVE STANDING TO APPEAL THE JUDGMENT?

This issue was not before the Trial Court.

The Court of Appeals said; "Yes."

Appellee contends the answer is: "Yes."

II. DO THE RULINGS CONTAINED IN BRYDGES v. EMMENDORFER, AND STOKES v. MILLEN ROOFING CO. AFFECT THIS CASE INSOFAR AS RESOLVING DIFFERENCES BETWEEN EQUITY AND LAW?

This issue was not before the Trial Court.

This issue was not before the Court of Appeals

Appellee contends the answer is: "No."

III. DID THE TRIAL COURT ERR BY ENJOINING THE EXPIRATION OF THE STATUTORY REDEMPTION PERIOD FOLLOWING MORTGAGE FORECLOSURE IN THE ABSENCE OF FRAUD, MISTAKE OR ACCIDENT?

Trial Court said: "No."

The Court of Appeals said: "Yes."

Appellee contends that the answer is: "Yes."

IV. DID THE TRIAL COURT ERR IN QUIETING TITLE IN THE NAMES OF APPELLANTS, ALTHOUGH APPELLANTS' INTEREST IN REAL PROPERTY WAS SUBJECT TO A PROPERLY RECORDED, UNDISCHARGED MORTGAGE GRANTED BY THEIR PREDECESSOR IN TITLE, AND WHICH THE TRIAL COURT NOTED HAD LAWFULLY BEEN FORECLOSED?

Trial Court said: "No."

The Court of Appeals said: "Yes."

Appellee contends that the answer is "Yes."

V. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT WOULD BE UNJUSTLY ENRICHED DESPITE ITS RULING THAT APPELLANT WAS LEGALLY ENTITLED TO FORECLOSE THE MORTGAGE GRANTED BY APPELLEES' PREDECESSOR IN TITLE?

Trial Court said: "Yes"

Court of Appeals said: "No."

Appellee contends the answer is: "No."

VI. WAS THE TRIAL COURT IN THE BEST POSITION TO DETERMINE WHETHER APPELLANTS HAD ENGAGED IN SANCTIONABLE MISCONDUCT AND DID IT HAVE THE AUTHORITY TO IMPOSE SANCTIONS UPON APPELLANTS FOR SUCH MISCONDUCT?

Trial Court said: "Yes"

Court of Appeals said: "Yes."

Appellee contends the answer is: "Yes."

STATEMENT OF FACTS

This action pertains to real property commonly known as 2106 Jackson Place, Ann Arbor, Michigan and more specifically as: Lot 26, Fairview Heights Subdivision, as recorded in Liber 3, Page 26 of Plats, Washtenaw County Records. ("Subject Property") *Plaintiffs' Complaint* **(Appellants Apx. pp. 1a-6a)** *and Plaintiffs' First Amended Complaint, Paragraph 5.* **(Appellants Apx. pp. 7a-16a).** William Hurt, a single man, granted a mortgage on the Subject Property to Sterling Mortgage & Investment Co.[1], ("Appellee") on October 10, 1990. ("Mortgage") *Joint Exhibit 3.* **(Appellants Apx. p. 209a).** The Mortgage was recorded on October 11, 1990 in Liber 2444, Page 538, Washtenaw County Records. *Joint Exhibit 3.* **(Appellants Apx. p. 209a)**. Several years later, William Hurt executed a quit claim deed conveying the Subject Property to himself and his new wife, Defendant Shirley Hurt. *Joint Exhibit 6.* **(Appellants Apx. p. 214a)**. Shortly thereafter William Hurt passed away. *Joint Exhibit 7.* **(Appellants Apx. p. 215a)**. On June 28, 2000, Defendant Shirley Hurt sold and conveyed the Subject Property to Appellants via warranty deed. *Joint Exhibit 17.* **(Appellants Apx. p. 230)**. The Mortgage, which secured a debt which had not been satisfied, remained a matter of public record at the time Appellants acquired the Subject Property. **(Appellants Apx. pp. 219a–221a and 231a-233a)** Appellants, therefore, acquired the Subject Property *subject to* the Mortgage. *Joint Exhibit 20* **(Appellants Apx. p. 235a).**

As the debt secured by the Mortgage remained outstanding, and was seriously delinquent, Appellee eventually commenced foreclosure proceedings, and as there was not an overbid by a third-party, the sheriff's deed was issued to Appellee on March 30, 2006. *Joint Exhibit 23.*

[1] Appellants repeatedly refer to Appellee as "Sterling Bank" which is incorrect. It must be made clear that Appellee is Sterling Mortgage & Investment Co., a small Michigan corporation with one stockholder, *not* Sterling Bank and Trust, which is a San Francisco based bank with operations in Southfield, Michigan. Appellee and Sterling Bank are separate and distinct legal entities and have absolutely no relationship.

(Appellants Apx. pp. 238a-243a). Notice was duly provided as evidenced by the Affidavit of Publication and Affidavit of Posting included within the sheriff's deed. **(Appellants Apx. pp. 239a and 240a, respectively)**. Appellants filed an action in the Circuit Court immediately prior to the expiration of the six (6) month statutory redemption period which followed the March 30, 2006 mortgage foreclosure sale. **(Appellants Apx. p. 1a-6a, ¶12)**. Appellants, who initially claimed that the Mortgage had been paid out of the proceeds of the sale transaction from Shirley Hurt to Appellants, made no attempt to exercise redemption to protect their interest. Instead, they continued pursuing the litigation they had commenced and sought an impermissible extension of the redemption period. *Plaintiffs' Ex Parte Motion for Temporary Restraining Order to Motion to Extend Redemption Period, filed September 25, 2006* **(Appellants Apx. pp. 17a-26a)**. The Court granted Appellants the relief they sought without making the requisite finding of fraud, accident or mistake for extending the redemption period, which would offer the only bases for deviating from the period defined by the redemption statute. **(Appellants Apx. pp. 29a-30a)**. Subsequent to receiving Appellee's Answer and First Set of Interrogatories and Request for Production of Documents **(Appellees Apx. pp. 1b-4b and 5b-16b, respectively)**, however, Appellants' filed their First Amended Complaint asserting counts for slander of title, unjust enrichment, promissory estoppel and quiet title. **(Appellants Apx. pp. 7a-16a).** Appellants' First Amended Complaint, which abandoned the initial claim that Appellee had been paid, was now entirely rooted in their invented claim that Appellant spoke to American Title Company of Washtenaw ("American Title") and indicated that the Mortgage had been paid in full and that a discharge would be issued. **(Appellants Apx. pp. 7a-16a, ¶¶6-7, Exhibit A)**. Appellants' attempted to support these allegations with an affidavit of American Title, signed by its president, Greg Ottaviani, and incorporated as the sole exhibit to and support for Plaintiffs'

First Amended Complaint. **(Appellee Apx. pp. 51b-52b)** Defendant filed its Answer to First Amended Complaint denying Appellants changed rationale. **(Appellee Apx. pp. 17b-29b)** Later, Appellants submitted another affidavit, this time of Greg Ottaviani himself, which claimed that the representations outlined in the Affidavit were made by *a representative* of Appellee to *Greg Ottaviani.* **(Appellee Apx. p. 53b-54b).** This was the central disputed fact during the course of this action. No employee or agent of Appellee, however, made any representations of any kind, and certainly not regarding the private financial matters of William Hurt or the status of the Mortgage, to Greg Ottaviani, nor any other person. *Transcript from Bench Trial, August 20, 2007, Pages 147-148, Lines 13-25; 1-12.* **(Appellants Apx. pp. 283a-284a)** Interestingly enough, Appellants no longer claimed that the Mortgage had actually been satisfied. *Plaintiffs' First Amended Complaint.* **(Appellants Apx. pp. 7a-16a).**

On or about September 25, 2006, Appellants filed their Ex Parte Motion for Temporary Restraining Order and Motion to Extend the Redemption Period. **(Appellants Apx. pp. 17a-26a).** The Trial Court, without making the requisite determination that there was even a suggestion of fraud, mistake or accident, granted the motion and enjoined the expiration of the redemption period until after the conclusion of litigation. **(Appellants Apx. pp. 29a-30a).** On or about October 26, 2006, Appellee filed a Motion to Vacate Preliminary Injunction, pointing out that there had been no finding of fraud, mistake or accident. **(Appellee Apx. pp.30b-33b).** The Trial Court denied Appellant's motion, stating that Appellee would not be burdened and Appellants' interest would be preserved by permitting the Order Extending Redemption Period to remain in effect. *Transcript from hearing on Motion to Vacate Preliminary Injunction, Page 15; Line 2-17.* **(Appellee Apx. pp. 34b-50b).** This ruling was improper as it tampered with the redemption statute without even a passing consideration to whether there was fraud, accident or mistake to justify the Trial Court's action. This is particularly glaring in light of the fact that the Trial Court could have required Appellants' to pay the redemption funds into court escrow while the matter was being litigation. Such a solution would have preserved the rights claimed by Appellants, while not unjustifiably altering the redemption period specifically set forth by statute. Thereafter, Appellee filed a Motion for Summary Disposition. **(Appellants Apx. pp. 33a-132a).** The Trial Court granted the motion as to the slander of title claim, but denied as to the counts for unjust enrichment, promissory estoppel and quiet title. **(Appellants Apx. pp. 180a-181a).**

At the conclusion of trial, the Trial Court determined that there was no basis to Appellants' promissory estoppel count. *Transcript from Bench Trial, August 21, 2007, Page 104, Lines 8-23.* **(Appellee Apx. pp. 55b-88b, *specifically 84b*).** The Trial Court then concluded that Appellee was lawfully entitled to foreclose the Mortgage, which was granted well in advance to Appellants' acquiring an interest in the Subject Property and which was a matter of public record. *Transcript from Bench Trial, August 21, 2007, Page 109, Lines 20-25.* **(Appellee Apx. pp. 55b-88b. *specifically 85b*).** Despite this finding, the Trial Court then erroneously quieted title in Appellants' name, subject to partially quieting title (in the form of a money judgment only) in favor of Appellee for the amount stated on the Sheriff's Deed, plus accrued interest. *Transcript from Bench Trial, August 21, 2007, Pages 112-113, Lines 21-25; 1-19.* **(Appellee Apx. pp. 55b-88b, *specifically 86b*).** In fashioning this outcome, the Trial Court erroneously concluded that that Appellee would be unjustly enriched if the sheriff's deed was not vacated. *Transcript from Bench Trial, August 21, 2007, Page 105-106, Lines 13-25 and 1-21 and Page 112, Lines 7-20.* **(Appellee Apx. pp. 55b-88b, *specifically 84b and 86b*).** After this bench trial, Appellants presented a proposed judgment which did not comport to the ruling.

(Appellants Apx. p. 304a and Appellee Apx. pp. 89b-99b). Appellee objected to the proposed judgment and provided an alternate proposed judgment **(Appellee Apx. pp. 89b-99b)**, which the Trial Court adopted. **(Appellants Apx. pp. 317a-321a)**. After the Judgment was entered, Appellants delivered a check to Appellee. Appellee immediately filed a Motion for Instruction. **(Appellee Apx. pp. 100b-109b).** After a hearing on this motion, the Trial Court ordered that the funds be paid into escrow with the Trial Court. **(Appellants Apx. pp. 333a-334a)**.

SUMMARY OF ARGUMENT

In issuing a preliminary injunction, the Trial Court extended the expiration of the statutory redemption period without authority to do so. The Michigan Legislature has propounded specific procedures for foreclosing upon a Mortgage, as well as for exercising redemption once it has been foreclosed. These procedures are beyond the interference of the courts. Even where a court seeks to do equity, such as in this case, the redemption period may not be extended unless the court determines that there has been fraud, accident, or mistake so as to justify the extraordinary deviation from the statutorily defined redemption period. In this case, there was no fraud, accident or mistake and the Trial Court, in fact, did not make such a finding. In fact, the Trial Court did not appear to even consider these as conditions for extending the redemption period. Without such a finding, the Trial Court was not permitted to alter the statutory time period following the proper mortgage foreclosure. The Trial Court therefore, lacked the authority and erroneously granted the extension of the redemption period to the detriment of Appellee.

The Trial Court's finding that title to the Subject Property should by quieted in Appellants' name was also not supported by law or fact. When the Trial Court correctly ruled that the Appellee was within its right to foreclose, it tacitly acknowledged Appellee's superior title. As a result, granting quiet title in Appellants' name was both unsupported by both fact and law, and in contradiction to the Trial Court's ruling with regard to Appellee's right to foreclose the Mortgage which predated Appellants' interest by many years.

Finally, the Trial Court erred in finding that Appellee had been unjustly enriched for two reasons. First, the Michigan Legislature provided for a fifteen (15) year statute of limitations for foreclosure of a mortgage from the *later* of the mortgage due date or the date the last payment was made. Appellee was well within this limitations period when it foreclosed the Mortgage fourteen years and nine months after the date of the last payment, but less than one (1) year after the Mortgage became legally due. The Trial Court's ruling of unjust enrichment stands in stark contrast to its express finding that Appellee was legally entitled to foreclose the Mortgage. Essentially, the Trial Court erroneously held that the doctrine of laches operated to alter the unambiguous statute of limitations proscribed for foreclosure of a defaulted mortgage. The Trial Court's unjust enrichment ruling is simply not borne out by facts or law. Second, Appellants failed to prove Appellee received a benefit *from* Appellants. This is a necessary requirement to the establishment of a claim of unjust enrichment. The Trial Court seems to have dispatched with this requirement without justification, which simply cannot be sustained. The Trial Court's finding that Appellee had been unjustly enriched was in error.

In addition to the substantive basis for this matter, Appellants raise two (2) additional inconsequential issues. First, Appellants challenge Appellee's right to have appealed the ruling of the Trial Court to the Court of Appeal simply because Appellants tendered the funds in the Judgment amount to Appellee, and Appellee sought instruction from the Trial Court and was ordered to pay those funds into escrow with the Trial Court. Appellants do not challenge Appellee's right to seek direction or the Trial Court's ability to provide such instruction, as evidenced by Appellants' failure to appeal that particular Order. Instead, Appellants dispatch with those baseline considerations and move straight to challenging standing because it is most convenient to their position. Appellants' challenge to standing is nothing more than their desire to shackle Appellee – making it choose either accept the funds and forfeit its' right to appeal, or reject the funds without justification in order to preserve appeal. Even a cursory consideration would suggest that Appellants' challenge is untenable.

Second, Appellants challenge the Trial Court's imposition of sanctions upon Appellants subsequent to their filing of a Motion to Strike Affirmative Defenses. The Trial Court was in the best position to observe the lengthy litigation and the many various motions brought before it, including that last, late motion filed by Appellants virtually on the eve of trial. Using its discretion, the Trial Court made its own determination that enough was enough and denied Appellants' needless motion and imposed sanctions. It is not enough that Appellants disagree with the Trial Court in this regard. There was nothing outrageous in the Trial Court's imposition of sanctions, and as such it did not abuse its discretion.

ARGUMENT

I. STERLING MORTGAGE AND INVESTMENT COMPANY HAD STANDING TO APPEAL THE JUDGMENT.

A. Standard of Review

"Whether a party has **standing** is a question of law that we review de novo." Manuel v. Gill, 481 Mich 637, 642; 753 NW2d 48 (2008).

B. Argument

Payment of funds tendered by Appellants into the escrow with the Trial Court did not thwart Appellee's standing to appeal. Appellants have wrongly suggested that Appellant did not have standing to appeal based upon their tender of redemption funds in accordance with the final

Judgment of the Trial Court. Appellee, however, *did not* accept the tender of these funds. Rather, Appellee timely[2] moved the Trial Court for instruction on handling the funds tendered by Appellant *specifically* so as to prevent the impairment of its appellate rights. The Trial Court, mindful that appeal was imminent, ordered that the funds tendered by Appellant, but not accepted by Appellee, be placed into escrow with the Trial Court pending the outcome of the appeal. Essentially, by ordering the funds be tendered into escrow with the Trial Court, it effectively amended the September 12, 2007 Judgment. MCR 2.611(B) and (F). By virtue of Appellee seeking instruction from the Trial Court, and the Trial Court instructing that the funds be placed into court escrow pending the outcome of the appeal, Appellee did not (1) accept the tender, (2) consent to the terms of the Judgment, or (3) waive its right to appeal the Judgment. Appellants' claim that Appellee lacks standing to bring this appeal is simply unfounded and without authority. The outcome of this appeal will provide the direction in which the funds being held by the Trial Court will flow – either back to Appellants or to Appellee, as may be deemed appropriate by the Court's decision. Appellants are not harmed by this prudent course of action, whereas Appellee would suffer the extreme irreparable loss of its rights.

Ultimately, this is not even a standing issue. Appellants were displeased with the Trial Court's ruling that the funds should be placed in escrow with the Court. In reality, Appellants attempted to forced Appellee to either accept the funds and forfeit its appeal or reject the funds (without justification) in order to appeal. This Court can be certain that Appellants would have pounced on either course of conduct had either by pursued by Appellee. Instead, Appellee acted prudently in seeking direction from the Trial Court eighteen (18) days after the entry of the Judgment. Although Appellants suggest that the escrowing of the funds and claims that this was

---

[2] The Judgment was entered on September 12, 2007. Appellee filed its Motion for Instruction on September 30, 2007.

tantamount to having to post an appeal bond, this simply is not borne out by the facts. It is worth noting, however, that Appellants did not appeal the Trial Court's Order. Had Appellants truly thought that the tender of these funds into escrow with the Trial Court was improper, the natural course of action would have been to appeal the Trial Court's Order. But as the Trial Court clearly acted within its authority pursuant to MCR 2.611(B) and (F), Appellants turn to attack Appellee's standing. It is significant that Appellants do not argue that Appellee did not have the right to seek the guidance of the Trial Court or that the Trial Court did not have authority to order escrow of funds. Ultimately, Appellants advance an argument based solely on the end result that did not comport to their pleasure.

II. THE RULINGS CONTAINED IN BRYDGES v. EMMENDORFER AND STOKES v. MILLEN ROOFING CO. AFFECT THIS CASE INSOFAR AS THEY REINFORCE THE LEGAL PRECEPT THAT EQUITY DOES NOT USURP LAW.

In its Order granting leave to appeal, this Court specifically instructed:

> The parties shall include among the issues to be brief the effect, if any, on the case of *Brydges v. Emmendorfer,* 311 Mich. 274, 279 (1945) (holding that "[t]he statute of limitations does not control the question of laches in equitable actions" and *Stokes v. Millen Roofing Co.,* 466 Mich 660, 671-672 (2002) (concluding that courts should no avoid the application of a statute under the guise of equity because a statutory penalty is excessively punitive or harsh)."

This question, which is aimed at resolving the relationship between law and equity, must be examined prior to closer examination of the case at bar. In the end, this examination will further reinforce the legal concept that equity shall not trump law in the absence of fraud, accident or mistake. Deutsche Bank Trust Company Americas v. Spot Realty, Inc., 269 Mich.App. 607, 616-617; 714 NW2d 409 (2005).

In the matter of Brydges v. Emmendorfer, 311 Mich. 274; 18 NW 822 (1945), the surrounding circumstances under which the defendant had put his farm out of the reach of creditors, and thereby causing his insolvency, provided substance to the finding that his conveyances were made fraudulently for the purpose of hindering, delaying or defrauding his creditors. As a result, the Court refused to condone such wrongful conduct by applying equitable doctrine of laches, indicating that the elapse of time alone was not the end of the inquiry, and so relief was available to the creditors, and by extension the bankruptcy trustee. Id. Furthermore, the court noted that the statute of limitations had not run on the contract claims. Id. at 278. Ultimately, the court, in its ruling, did not suggest that a statute of limitations could be abridged by applying the doctrine of laches. Rather, the court made clear that as the defendant's claims were not barred by the statute of limitations, they would not be barred by the doctrine of laches either. Id. at 279.

Moreover, a delay in availing oneself to a remedy does not, in and of itself, give rise to laches. "Time alone does not constitute laches, but there must have been a change of conditions which would render in inequitable to enforce the claim, or a showing that the defendant was prejudiced by the delay." Collins v. Lamotte, 244 Mich 504, 509; 221 NW 635 (1928). *See also,* Sanders v. Campbell, 231 Mich. 592; 204 NW 767 (1925); Carey v. Lauhoff, 301 Mich. 168; 3 NW2d 667 (1942); and Kutschinski v. Zank, 307 Mich. 260; 11 NW2d 881 (1943).

Whereas in Brydges, the defendant created circumstances to hinder, delay or defraud his creditors, and thus delayed their seeking redress, in this matter Appellee simply did not avail itself to its lawful remedy sooner, although it did so within the limitations period governed by MCL § 600.5803. Appellee was not precluded from availing itself to its lawful remedy, as it was not barred by the statute of limitation governing mortgage foreclosures. MCL § 600.5803. The case at bar is analogous to Brydges insofar as the statute of limitations had not run on Appellee's rights to pursue its lawful remedy. Appellee had 15 years from the date of the last payment or the due date of the mortgage. MCL 600.5803. Appellee was well within this limitation period.

In the matter of Stokes v. Millen Roofing Co., 466 Mich 660; 649 NW 371 (2002), the court determined that the defendant was not entitled to relief under law or equity, since it had committed a misdemeanor in order to acquire an interest in the plaintiff's property, and sought to use that interest as a means to force payment. The court expressly stated that the trial court had acted without authority when it determined that as a court in equity, it could provide for non-legal, equitable remedies as a way to avoid unduly harsh legal doctrines. The Stokes court stated that the trial court was wrong. "Its analysis is invalid because, in this case, equity is invoked to avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive." Id. at 671-672. The court went on to state, "*Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.*" Id. at 672 (emphasis added). Finally, the court specifically indicated that it must refrain from interfering in an clear legislative enactment. "Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted legislative decree." Id. at 672. The court made abundantly clear that it must defer to the Legislature to addressing what it considers to be an overly harsh statute. "If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it…." Stokes *citing Bilt-More Homes, Inc. v. French, 373 Mich. 693, 699; 130 NW2d 907 (1964).*

The Stokes court determined that if it permitted the defendant to disregard the statutes at issue in that case, and instead rely upon equity, it would essentially render the statute meaningless. It stated that the defendant could not granted equitable relief because it would allow it to defeat a statutory requirement to which it had failed to adhere itself. In the instant case, the Trial Court provided the Appellants with equitable relief in order to avoid the consequence of Appellee availing itself to the remedy which had not been barred by the applicable statute of limitations governing the foreclosure of the mortgage. MCL § 600.5803. Moreover, the Trial Court's ruling unjustifiably interfered with the running of the redemption period prescribed in MCL § 600.3240 so as to prevent Appellants from experiencing the harsh consequence. As in Stokes, the Trial Court wrongly wielded its' equitable power to virtually render the redemption statute meaningless. MCL § 600.3240. Also, like the defendant in Stokes, Appellants failed to adhere to their statutory requirement to redeem, and as such must incur the consequence without the wrongful intervention of equity.

Appellants seek to avoid the Appellee's lawful reliance upon its' statutory right to foreclose the mortgage when it did. But Appellee cannot be deprived of its right to avail itself to the foreclosure remedy simply because Appellants say it was unfair to them. Actually, what would be unfair is to deprive Appellee of their rights which have been clearly articulated by the legislature. Appellants' argument, that Appellee was not entitled to rely upon the statute of limitations, would result in the abridgment of Appellee's rights *ex post facto* if it were accepted. Further, it would have a chilling effect on a mortgagee's rights. Although Appellants may not like the result, Appellee's exercise of its rights within the time prescribed by statute was permitted, which makes it legal and *per se* conscionable.

In the end, both Brydges and Stokes reinforce the legal concept equitable precepts may not hold back the operation of a statute of limitation. Morever, neither the Brydges court nor the Stokes court were willing to grant any sort of equitable relief to the defendants as they had engaged in conduct which was dubious or outright wrongful, particularly when statutory enactments unequivocally addressed their respective situations. In this matter, it is Appellants who wish to avoid the application of both the statute of limitations governing mortgage foreclosures and the statute governing the statutory right of redemption by claiming it would be inequitable to permit the statutes to be applied as the legislature intended. Accepting Appellants argument would have a chilling effect upon these statutes. Allowing equity to commandeer the unequivocal statutory rules set forth in MCL § 600.3240 and MCL § 600.5803, would render these statutes virtually unreliable, as merely a trip to a court sitting in equity could render them meaningless. Appellants seek to take clear statutory rules and render them unclear solely for their own benefit. Meanwhile, Appellee conformed its conduct to these statutes, as will those mortgagees who follow this matter. Appellee should not be penalized for following and relying upon these statutory rules, particularly where Appellants have not. Furthermore, it is imperative, for both mortgagors and mortgagees, to have clear rules in place so as to provide assurance of outcome. In the end, therefore, it must remain that equity may not be used to countermand unequivocal legislative enactments absent a showing of fraud, accident or mistake. Deutsche Bank Trust Company Americas v. Spot Realty, Inc., 269 Mich.App. 607, 616-617; 714 NW2d 409 (2005).

III. THE TRIAL COURT ERRED BY ENJOINING THE EXPIRATION OF THE STATUTORY REDEMPTION PERIOD FOLLOWING MORTGAGE FORECLOSURE IN THE ABSENCE OF FRAUD, MISTAKE OR ACCIDENT.

A. Standard of Review

A trial court's granting of a preliminary injunction is reviewed for an abuse of discretion. Campau v. McMath, 185 Mich. App. 724; 463 NW2d 186 (1990) citing Bratton v. DAIIE, 120 Mich. App. 73, 79; 327 NW2d 396 (1982). Given that injunctive relief is an extraordinary remedy, it is well-settled that it is only issued when justice requires and where there is no adequate remedy exists at law. Kernen v. Homestead Development Company, 232 Mich. App. 503, 509; 591 NW2d 369 (1998) quoting Jeffrey v. Clinton Twp., 195 Mich. App. 260, 263-264; 489 NW2d 211 (1992).

B. Mortgages: Recording, Foreclosure and Redemption

i. *Appellants had notice of the Mortgage.*

An initial discussion of the Mortgage is appropriate at this stage of the argument. There is no dispute that the Mortgage was a matter of public records and was not discharged. Appellants, however, first claim that they did not know the Mortgage existed. This claim is both irrelevant and untrue. First, Appellants engaged American Title to investigate the title and issue a title insurance policy. American Title did investigate the title to the Subject Property and did find the Mortgage. As Appellants' agent had actual knowledge of the Mortgage, Appellants themselves are considered to have knowledge.

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

MCL 565.29. The Mortgage is, for purposes of this axiomatic statutory provision, considered a conveyance. Michigan Fire & Marine Ins. Co. v. Hamilton, 284 Mich 417; 279 NW 884 (1938). Even without involving American Title, Appellants had constructive notice of the Mortgage since it was a matter of public record. That Appellants supposedly believed the Subject Property was free of the Mortgage is irrelevant. They were charged with notice. Further, they relied upon the representations of their own agent, not Appellee.

Next Appellants claim that their agent, American Title, contacted Appellee and was informed that the Mortgage was paid off and a discharge would be forthcoming. Again, this is

Appellants' reliance upon their own agent's representations – not Appellee's representations. The fact is, this claimed representation *never occurred*, as made evident by the stark lack of credible documentary support – not a single letter, document, or even handwritten notation. Nothing in American Title's file reflects anything beyond their finding the Mortgage in the first place. American Title certainly noted its handling of the other mortgage which was identified as an encumbrance on the Subject Property, so it makes utterly no sense that it would not notate the outcome with regard to the Mortgage. American Title was aware that the Mortgage was a matter of public record, as reflected in its file. What is remarkably absent from American Title's file is any documentation or notation of a phone call that its' president, Greg Ottaviani, claims to have made on the date of closing. Conveniently, Appellant claims this would have been purged from their file. This suggestion, like Mr. Ottaviani's claimed phone called, was nothing more than an invention plucked out of air. It is beyond implausible to believe that Mr. Ottaviani remembered making a phone call on this one particular closing more than six years after the event where there is nothing in American Title's file which would have supported such a memory. Also, it must be noted that the Trial Court did not make a finding as to Mr. Ottaviani's credibility nor the substance of his testimony. Ultimately, the question comes down to what is reasonable. "If one knows facts which would lead an honest man, using ordinary caution, to make further inquiry, but studiously avoids making such inquiry, he is charged with knowledge which, by ordinary diligence, he readily would have acquired." <u>Smelsey</u>, v. <u>Guarantee Finance Corp.</u>, 310 Mich 674, 683; 17 NW2d 863 (1945). "Knowledge of facts putting person of ordinary prudence on inquiry is equivalent to actual knowledge of facts which a reasonable diligent inquiry would have disclosed." <u>Hudson</u> v. <u>O. & A. Electric Co-operative, Inc.</u>, 332 Mich 713, 716; 52 NW2d 565 (1952). There is no question that Appellants had notice of the Mortgage and failed to ensure that it was cleared from the chain of title of the Subject Property. Neither Appellants nor their agent, American Title, acted reasonably. Consequently, Appellants acquired ownership of the Subject Property *subject to* the Mortgage and the natural consequences that would flow from its default.

ii. Statute of Limitations – Mortgage Foreclosure

As a further preliminary matter, it is necessary to discuss the mortgage foreclosure and redemption. MCL § 600.5803 provides the limitation period within which a party may foreclose a mortgage.

> No person shall bring or maintain any action or proceeding to foreclose a mortgage on real estate unless he commences the action or proceeding *within 15 years after the mortgage becomes due or within 15 years after the last payment was made on the mortgage*. This section limits foreclosure by advertisement and any other entries under the mortgage as well as actions of foreclosure in the courts.

MCL § 600.5803 (*emphasis added*).

Appellants argue that the language of this limitations period grants a court sitting in equity the right to reduce the period within which a mortgagee may pursue such a remedy. This interpretation is not supported by any authority and injects meaning into the statute that simply does not exist. Moreover, it is contrary to long-standing and well reasoned authority which provides that this statute effectively provides for *two* limitations periods.

> The mortgage statute provides two periods of limitations, but in the alternative and not running concurrently, *the latest in point of time to govern.* One runs from the due date of the mortgage, and the other from the date of the last payment. If and when the statute takes effect under the former, the whole debt is barred, both principal and interest.

Hiscock v. Hiscock, 257 Mich. 16, 24; 240 NW 50 (1932). *Emphasis added.* The statute provides that a mortgage debt which has been barred by the limitations period, it may be revived by virtue of a payment made subsequent to it being barred. "When a mortgage debt, after it is barred by the statute of limitations, is revived by payment, the whole of the principal and unpaid interest is restored for the purpose of foreclosure." Id. at 54.

Here, the Mortgage was foreclosed *before* the Mortgage even became legally due. The Mortgage had a due date of October 10, 2005. The date of the last payment on the Mortgage was May 15, 1991. Thus, Appellee had the right, pursuant to MCL 600.5803, to foreclose the mortgage up through October 10, 2020, which is the latter of the tandem limitations provided by the statute. Appellee foreclosed the Mortgage on March 30, 2006. As such, Appellee was unquestionably within the limitations period when it caused the Mortgage to be foreclosed. Appellants' claim that MCL 600.5803 merely sets forth an outer limit but does not provide an unqualified right to 15 years in order for a mortgagee to foreclose is contradicted by the ruling in Hiscock. Id. at 24. Furthermore, Hiscock makes clear that a mortgagee may actually have *longer* than 15 years from the date the mortgage is due in order to foreclose. Id. at 24.

Appellee's right to foreclose the Mortgage was not barred by the statute of limitations set forth in MCL § 600.5803. While Appellants urge the Court to refrain from reading into the statute, the Court would actually be required both read into the statute *and* set aside the ruling in Hiscock to adopt Appellants' argument. Appellants read some phantom right of courts sitting in equity to inject equity into the clear legislative intent of the statute to provide 15 years to foreclose from the later of the mortgage due date or the last payment made. Adopting Appellants' argument would do nothing short of injecting uncertainty into clear language of MCL 600.5803, and which would allow courts to curtail the unequivocal limitation period.

iii. The sheriff's sale is not void.

Appellants have unreasonably delayed the inevitable for four years. Appellants have had ample opportunity to raise all their issues, as well as time to actually do the right thing. In the instant case, the foreclosure sale was held and the sheriff's deed was issued on March 30, 2006. Appellants filed their Complaint in the Washtenaw County Circuit Court in September, 2006, and shortly thereafter the redemption period was effectively tolled by the improper entry of the Order Extending Redemption Period entered by the Trial Court. After a two day trial in August, 2007, the Trial Court rendered its decision resulting in the Judgment. It is from this Judgment that Appellee pursued an appeal to the Court of Appeals. The Court of Appeals issued its Opinion on July 2, 2009. Now, nearly four years after the foreclosure, Appellants claim that there was a defect in the foreclosure proceedings with regard to the redemption period allocated to the foreclosure of the Mortgage. Appellants are clearly grasping at straws as the redemption period would have run many times over while this matter has wound its way up to the Court. Appellants' tardy complaint as to the redemption period is rendered moot for three reasons.

First, not only did Appellants fail plead this issue before the Trial Court, they failed to preserve the issue on appeal. In the case of Steward v. Panek, 251 Mich. App. 546; 652 NW2d 232 (2002), the court found that the plaintiffs were not precluded from raising an issue, which had not been fully briefed, on appeal. In Steward, it was evident from the court's opinion, however, that the issue in question was at least suggested in the lower court proceedings. Id. In this matter, the issue of the redemption period was not a matter of not having been fully briefed. Instead, it was not raised at all and not at any time. "A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal." Napier v. Jacobs, 429 Mich. 222, 227; 417 NW2d 862 (1987). In addition to a raising of the issue for the first time on appeal as a possible lay-in-wait tactic, the Napier court indicated that principals of judicial economy would be abused by such a disregard as the "raise or waive" rule. Id. In this matter, not only did Appellants not raise the issue on appeal, they did not raise it until their Motion for

Reconsideration, which the Court of Appeals properly rejected. Given the fact that the trial on this matter was held nearly a year and a half *after* the sheriff's deed was issued, ant he Appellants could have exercised redemption at any time during that period, it is obvious that manifest injustice would *not* result from adhering to the events and occurrence occurring last decade. Holding otherwise would reward Appellants for their failure to raise the issue at the appropriate time and would be an assault on judicial economy.

It is also significant that Appellants did not reside in the Subject Property. For all intent and purposes, the property was vacant and appeared abandoned. As such, Appellant could have pursued modification of the redemption period to a period of thirty (30) days. MCL § 600.3241a(b). At trial, Appellants confirmed that the property had been vacant for some time and they were resulting elsewhere. In fact, Appellants still do not reside in the Subject Property. Appellees clearly could have acted to modify the redemption period before this action commenced, but did not do so. The fact that Appellee was actually entitled to a *shorter* redemption period of thirty (30) days renders Appellants' especially moot.

Second, Appellants have not been prejudiced by any claimed defect. As previously stated, trial was not commenced until some seventeen (17) months after the sheriff's deed was issued. Appellants had the right at any time during that period to step up and redeem. But, Appellants did not do this, and in fact, their tenacious prosecution of this action indicates that they never would have had an intention to do so. Appellants continue to blame Appellee, without a bit of evidentiary support, for their own failure to ensure that they purchased the Subject Property with clear title. Over and over again, Appellants attempt to paint themselves as the victims and yet they held the key to their own solution. Appellants have sat too long on their claimed rights to challenge the foreclosure proceedings. Appellants were complicit in the consequences.

Third, the claimed defect would render the sheriff's deed *voidable* and not void.

> By holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. *In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property, we see little merit in the rule of law which . . . would automatically nullify the sale without regard to or consideration of the intervening interests of other parties.* We conclude that the trial court correctly held that the notice defect rendered the sale voidable and not void.

Jackson Investment Corp. v. Pittsfield Products, Inc., 162 Mich. App. 750, 756; 413 NW2d 99 (1987) (*emphasis added*).

In Jackson, the court held that the mortgagors had waited much too long. "After examining the equities of the case, the court found plaintiff guilty of laches for waiting until five months of the six-month redemption period had passed before bringing suit to invalidate the sale. Id. However, the trial court found that some measure of relief was appropriate and ordered that the redemption period be extended by forty-three days." Jackson Investment Corp. at 752-3. So clearly, the court was not persuaded to void a sheriff's sale where the mortgagors had waited a mere five months during the redemption period *and* raised it as an issue from the outset of their case. In this case, Appellants waited significantly longer and did not raise the issue until three and a half years after the fact. If the court of appeals was not persuaded by the mortgagors in Jackson Investment Corp., then we would argue that the Court should be similarly unpersuaded by Appellants' argument.

Finally, it is evident that Appellants have suffered no harm by the claimed defect in the publication of six month redemption period as opposed to a twelve month redemption period.

Appellants would not have been in a better position, nor did they lose an opportunity to preserve their interests had publication stated a longer redemption period. In fact, Appellants have made very plain their intent to refrain from redemption at virtually all costs. Furthermore, as stated earlier, the redemption period actually could have been shortened to a period of 30 days, prior to this action having been commenced, which would certainly have rendered the issue moot. Also, as previously addressed, Appellants had ample opportunity prior to trial to amend their complaint to address this issue or even to tender redemption funds. Instead, the only amendment Appellants undertook was to drastically change its rationale for why Appellee should not have been entitled to foreclose the Mortgage. Appellants have stubbornly adhered to their claim that their title company had been told by Appellee that the Mortgage had been paid in full and discharge would be forthcoming, despite there being no real evidentiary support for this claim. Appellants were aware that the Mortgage was a matter of public record (leaving aside their unreasonable claimed "belief" that it was to be discharged prior to their taking title) and they were aware that the Mortgage was later foreclosed. Appellants did nothing at the time of their purchase, at the time of foreclosure, or at any time through trial to pay off the Mortgage and redeem it from foreclosure. Appellants simply and unjustifiably pointed the finger at Appellee, and having become a familiar tune, they once again do the same. In Jackson Investment Corp., the court held that there was sufficient equitable grounds to support the trial court's refusal to invalidate the sale. Id. Likewise, in the instant case, there are more than enough equitable grounds for the Court to refuse to invalidate the sale.

C. <u>Argument</u>

i. *<u>Redemption may not be altered except in the most extraordinary circumstances – circumstances which do not apply in this matter.</u>*

The procedure and requirements for foreclosing a mortgage by advertisement have been specifically articulated by the Michigan Legislature. MCL 600.3201 *et seq.* The Michigan Legislature also expressly delineated the handling of post-foreclosure issues, such as the manner of redemption, the amount necessary for exercising redemption, and the time period allotted for exercising redemption. MCL 600.3240. Leaving aside that Appellants had many prior opportunities to address the Mortgage preceding their interest in the chain of title and ignored them, such as at the time they acquired title or at any time during the publication and posting phase of the foreclosure process, Appellants simply needed to exercise redemption in order to negate the impact of the sheriff's deed. MCL 600.3240(8). Appellants did not do so, but instead ran to the courthouse and managed to secure an extension of the redemption period, extraordinary relief to which they were not entitled, and which the Trial Court had no authority to grant. Extending the statutory redemption period is beyond the range of judicial intervention. <u>Cameron v. Adams</u>, 31 Mich 426, 1875 WL 3655 (1875) cited in <u>Heimerdinger</u> v. <u>Heimerdinger</u>, 299 Mich 149, 155; 299 NW 844 (1941).

The time period for exercising redemption of property which has been foreclosed is statutorily defined, MCL 600.3240, and in the absence of fraud, mistake, or accident shown by the plaintiff the redemption period cannot be extended through the institution of a preliminary injunction or any other court action.

> Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy, and is familiar and elementary.

Cameron v. Adams, 31 Mich 426; 1875 WL 3655 (1875) *cited* in Heimerdinger v. Heimerdinger, 299 Mich. 149, 155; 299 NW 844 (1941).

It has been concluded that "[t]he right to redeem from a foreclosure at law is a legal right, created by the statute, and can neither be enlarged nor abridged by the courts." Wood v. Button, 205 Mich. 692, 703 (1919), cited in Heimerdinger v. Heimerdinger, 299 Mich. 149, 155 (1941). Appellants contend that where there is a foreclosure of a mortgage, a court sitting in equity must look at the totality of the circumstances. The statutory scheme governing foreclosures by advertisement do not provide for such an examination. MCL § 600.3201 *et seq.* A court of equity has no authority to examine anything beyond the threshold question of whether there has been fraud, accident or mistake, or even some extraordinarily unusual circumstances. Gordon Grossman Bldg Co. v. Elliott, 382 Mich 596, 603; 171 NW2d 441 (1969). The statutory right of redemption set forth in MCL § 600.3240 can "neither be enlarged nor abridged by the courts." Gordon Grossman Bldg. Co. at 603. The threshold question was never raised nor answered in this matter, and even if it were, there were no such unusual circumstances.

Nevertheless, the Trial Court unjustifiably and without authority interfered with the legislative enactment contained in MCL § 600.3240. The error is particularly glaring in light of the fact that the Trial Court correctly found that Appellee lawfully foreclosed the Mortgage, having *not* determined that the Mortgage was paid off or even represented as having been paid off. The redemption provisions as set forth in MCL § 600.3240, which controls the time for redemption, should have remained unaltered. Since MCL 600.3240 controls the time for redemption, no action can be utilized to elongate the time period enunciated by the statute. This well-settled principle has been oft-repeated. "[E]quity cannot be used to avoid the dictates of a statute absent fraud, accident, or mistake." Deutsche Bank Trust Company Americas v. Spot Realty, Inc., 269 Mich App 607, 616-617; 714 NW2d 409 (2005), (*citing* Burkhardt v. Bailey, 260 Mich App 636, 659; 680 NW2d 453 (2004), *citing* Stokes v. Millen Roofing Co., 466 Mich 660, 671-672; 649 NW2d 371 (2002), and Freeman v. Wozniak, 241 Mich App 633, 637-638; 617 NW2d 46 (2000)). In Deutsche Bank, the plaintiff asserted it was, as a matter of equity, entitled to an enlargement of the statutory redemption period. The court refused stating "[w]hen a statute 'specifies the requirements for redemption, [there is] no room for equitable considerations absent fraud, accident, or mistake.'" Id. at 618. The court in Senters v. Ottawa Savings Bank, 443 Mich 45, 55; 503 NW2d 639 (1993), agreed that there is no room for equitable consideration within MCL § 600.3240 without a finding of fraud, mistake, or accident. Id. at 55.

Federal courts in Michigan have also concluded that a court would exceed its authority by extending the redemption period subsequent to foreclosure. The court in In re Young, 48 BR 678 (ED Mich ND 1985) reiterated the well-settled legal position that, absent a showing of fraud, accident, erroneous conduct, or mistake, the period for redemption cannot be extended. Id. at 681. The court further noted that it did not have the authority to "create substantive rights which do not exist under state law." Id. at 680.

In the instant matter, the Appellants never demonstrated, nor even claimed, fraud, mistake, or accident in the foreclosure of the Mortgage, and the Trial Court improperly dispatched with the requirement of requiring such a showing or making such a finding when it enjoined the expiration of the redemption period while the litigation remained pending. In the absence some actual articulation of fraud, mistake or accident, the Trial Court improperly enjoined the expiration of the redemption period. The Trial Court did not cite any finding, or suspicion of fraud, mistake or accident in the instant case, giving rise to the error made by the Trial Court in extending the redemption period.

Moreover, unlike the mortgagors in Grossman, Appellants were never ready, willing or interested in redeeming. To the contrary, Appellants persistently advanced arguments, regardless that they were untenable, so as to finagle out of their obligation. Appellants attempt to explain for the Trial Court why it extended the redemption period. But it is not the place of Appellants to do so, and is, in essence, nothing more than them attempting to bootstrap their argument with the result reached by the Trial Court. Appellants suggest that this is nothing more than an argument of semantics, but they are wrong. Call what the Trial Court did an extension of the redemption period or a preliminary injunction and the result is still the same - wrong and without legal authority.

There is absolutely no question that, as mortgagee of the unsatisfied Mortgage, Appellee was within its rights when it foreclosed the Mortgage in full compliance with the requirements set forth in MCL 600.3201 *et seq.*, and the Trial Court so acknowledged this fact. Although Appellee (who was the resulting Sheriff's Deed grantee) complied with the statutory requirements for conducting a foreclosure by advertisement, the Trial Court unjustly intervened and permitted Appellants to circumnavigate their obligation to comply with the statutory requirement for redemption. In so doing, the Trial Court provided the Appellants the means for avoiding their legal obligation to comply with the foreclosure and redemption statutes as Appellee was required to do, to the detriment of Appellee. The Trial Court lacked the authority to extend the redemption period, as there was no showing, nor a finding, of fraud, accident or mistake.

This erroneous decision of the Trial Court was all the more unnecessary as the Trial Court could have simply required Appellants to pay the redemption funds into court escrow pending the outcome of the litigation Appellants had commenced. In addition to this being a more reasonable approach, it would have avoided any issue with the Trial Court improperly tampering with the redemption statute, it would not have imposed an undue hardship upon Appellant, and it would have protected Appellants' interests as well. The extension of the redemption period granted by the Trial Court was clear error as there is a notable absence of a finding of fraud, accident, or mistake, and particularly when a more reasonable solution was available which would not have resulted in the Trial Court interfering with the specifically articulated redemption statute.

Ultimately, the Trial Court correctly determined that the foreclosure of the unsatisfied Mortgage was lawful and valid. The foreclosure was, therefore, subject to the redemption period set forth in MCL § 600.3240. Given the foregoing argument, the Trial Court obviously did not have the authority to extend the redemption period. Therefore, the extension of the redemption period was prohibited and resulted in a reversible error. This error was all the more unnecessary as Appellants had the means of protecting themselves. Appellants were able to redeem the property and continue their lawsuit, or the Trial Court could have enjoined Appellee from doing anything with regard to the Subject Property while the lawsuit remained pending. What the Trial Court was not permitted to do was extend the redemption period. Appellants could also have pursued a claim with their own title insurance agent, American Title, for its' error committed in overlooking the necessity to pay off and clear the Mortgage from the outset.

ii. *<u>The impermissible tolling of the redemption period was not harmless error.</u>*

As discussed in the preceding section, the Trial Court did not have authority to extend the redemption period of the valid foreclosure of the Mortgage, and its ruling to do so was not harmless error as Appellants suggest. Appellants acknowledge that the Trial Court was required to follow the clear and plain meaning of MCL § 600.3240 and that a court may not act *even in* *equity* to avoid the application of the statute unless there are some very unusual circumstances.[3] Appellants' claim that the foreclosure was invalid, and thus the redemption period stated in MCL § 600.3240 was not implicated, does not have a bit of support.

The Trial Court entered an order which extended the expiration of the redemption period. This was not tantamount to issuing a preliminary injunction. Extending the redemption period directly impaired Appellee's rights with regard to the Subject Property. This was not the only option. The Trial Court could have avoided the harm to Appellee, while providing Appellants with two options: (1) redeem the foreclosure and continue prosecuting their action; or (2) prosecute the action with a preliminary injunction with regard to the Subject Property and not the redemption period while the lawsuit remained pending. Either avenue would have yielded protection for Appellants while not further harming Appellee. By impermissibly extending the redemption period, the Trial Court essentially deprived Appellee of the redemption funds to which it was entitled or the title to the Subject Property upon the proper expiration of the redemption period. The Trial Court's decision had real financial consequences and did not amount to harmless error. Moreover, refraining from the wrongful extension of redemption ultimately would have prevented Appellants from loss of the Subject Property, for which they now claim as a basis for a nonsensical unjust enrichment claim. *See*, Section V of this Brief. The Trial Court's unconventional and impermissible extension of the redemption period had real consequences, and was entirely about the Trial Court improperly tampering with a statute as opposed to preserving the parties' respective rights. This is not merely an argument of semantics. This is a point of contention which had real consequences both as to the parties' respective rights in the Subject Property and as to the inviolability of MCL § 600.3240.

---

[3] Appellees' Brief, Page 10-11, *citing* Stokes v. Millen Roofing Co., 466 Mich. 660,671; 649 NW2d 371 (2002).

iii. MCL § 600.5801 has no impact upon the operation of MCL § 600.3240.

Appellants next contend that commencement of their quiet title action, filed within the time prescribed by MCL § 600.5801, operated to impair MCL § 600.3240. This position also lacks merit. Returning to the axiomatic position noted by Appellants themselves, a court must follow the clear and plain meaning of a statute. Gordon Grossman Bldg. Co. at 603. Appellants' argument is nonsensical since their ability to maintain a quiet title action was never impaired. The time within which Appellants were required to bring their *quiet title action* was controlled by MCL § 600.5801, but this provision has absolutely no bearing upon the redemption period from the foreclosure sale as set forth in MCL § 600.3240. Appellant cites no authority for their own opinion that MCL § 600.5801 should operate to toll MCL § 600.3240. Appellants' suggestion that MCL § 600.5801 should somehow affect the expiration of the redemption period stated in MCL § 600.3240, but they are wrong as their contention is without legal support and inconsistent with the plain language of each statutory provision. MCL § 600.3240 provides that a sheriff's deed issued subsequent to a sheriff's sale foreclosing a mortgage may be defeated by the exercise of redemption as set forth in the statute. Redemption is either exercised, or it is not. Appellants claim that MCL § 600.5801(4) controls the question, but this is simply nonsensical. Appellants further claim that the trial court was justified in extending the redemption period given the "unusual circumstances" of this case. Once again, Appellants suggestion is unfounded.

First, any unusual circumstances relate to their factual inventions for purposes of helping them maintain this action, rather than anything real. Second, the Trial Court, in extending the redemption period, did not make a clear finding that there was fraud, irregularity, accident, or mistake. In fact, the Trial Court made no such finding at all. "Courts of equity, . . . as well as law, must apply legislative enactments in accordance with the plain intent and language used by the legislature." G S Sanborn Co v Alston, 153 Mich 456, 461; 116 NW 1099 (1908). Courts of equity are not permitted to interfere where there is a statute dictating the requirements for relief by a party are applicable to the circumstances. Id.

iv. *Appellants bear responsibility for the consequences they experienced due to the foreclosure.*

Finally, it cannot be overly emphasized that Appellants did not *reasonably* believe that the Mortgage had been paid off. There was nothing reasonable whatsoever about this unsubstantiated position. The Mortgage was a matter of public record which directly demonstrates how *unreasonable* it was for Appellants to believe that the Mortgage was paid off. Moreover, Appellants' claim that Appellee led them to believe the Mortgage was paid off and casting Appellee as a wrongdoer is simply not borne out by the facts, evidence, law or even the ruling by the Trial Court.

Appellants could have ensured that the Mortgage was paid off out of closing, costing them nothing as it would have reduced the proceeds Defendant Shirley Hurt would have yielded from selling the Subject Property. A title company typically escrows a few hundred dollars for a final water bill when a property is sold. Why would Appellant's title company *not* hold back funds from the proceeds of the sale, instead of paying them to Defendant Shirley Hurt, and hold them in escrow until such time as it received a discharge of the Mortgage? The answer is obvious: American Title made a mistake.

<u>IV.</u> THE TRIAL COURT ERRED IN QUIETING TITLE IN THE NAMES OF APPELLANTS, ALTHOUGH APPELLANTS' INTEREST IN REAL PROPERTY WAS SUBJECT TO A PROPERLY RECORDED, UNDISCHARGED MORTGAGE GRANTED BY THEIR PREDECESSOR IN TITLE, AND WHICH THE TRIAL COURT NOTED HAD LAWFULLY BEEN FORECLOSED.

A. <u>Standard of Review</u>

Rulings in equity, such as a suit to quiet title or to remove cloud on title, are reviewed *de novo.* <u>McFerren</u> v. <u>B & B Investment Group</u>, 253 Mich. App. 517; 655 NW2d 779 (2003). The factual findings are reviewed for clear error. <u>Id.</u>

B. <u>Argument</u>

An action to quiet title or remove a cloud on a title is one in equity. <u>McFerren v. B & B Inv. Group</u>, 253 Mich. App. 517; 655 NW2d 682 (2002). It is well established that a plaintiff in a quiet title action must prove a prima facie case of title; the defendant then has the burden of proving superior title. <u>Martin v. Redmond</u>, 248 Mich.App. 59; 638 NW2d 142 (2001). Without establishing a prima facie case of title, a plaintiff cannot prevail in its action. In the instant action, the Trial Court properly concluded that the October 10, 1990 Mortgage was valid, and that Appellant had the right to foreclose on March 30, 2006. Appellants acquired their interest in the Subject Property on June 28, 2000 and had notice of the Mortgage. Appellants' predecessor in title executed a promissory note and granted the Mortgage in favor of Appellant on October 10, 1990. The Mortgage was duly recorded in the Washtenaw County Records on October 11, 1990 in Liber 2444, Page 538. The Mortgage remained a matter of public record on June 28, 2000 when the Appellants purchased the Subject Property. The Mortgage was not satisfied out of the proceeds of the sale of the Subject Property to Appellants, nor at any other time. "The mandate expressed in MCL 565.25(4) is clear: recordation of a mortgage charges third parties with constructive notice and serves to determine lien priority. Accordingly, a properly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the mortgagor may have on the property whether the record has been examined or not." Ameriquest Mortgage Co. v. Dalton, 273 Mich. App. 84, 94; 731 NW2d 99 (2006). As such, Appellants took title to the Subject Property subject to the Mortgage, which was superior to their newly acquired interest. Accordingly, Appellants' interest in the Subject Property was at all relevant times *subject to* the Mortgage.

By concluding Appellants had made out a *prima facie* case of title, after acknowledging the propriety of Appellee's foreclosure of the Mortgage which predated Appellants' interest, the Trial Court erroneously shifted the burden to Appellee to prove superior title which is inapposite with the Trial Court's own final ruling. The Trial Court properly concluded that the Mortgage was valid, and that Appellee had the right to foreclose as it had done. Appellants' interest in the Subject Property was at all times subordinate to that of Appellee's. As such, the foreclosure of the Mortgage by Appellee operated to extinguish the interest of Appellants. "The foreclosure of a mortgage operates to extinguish subordinate liens *and interests*." Advanta National Bank v. 3 S Investment Group, Inc., 257 Mich. App. 113, 125; 667 NW2d 880 (2003) (*emphasis added*). Appellants' interest in the Subject Property remained, at all times, subordinate to the Mortgage, the foreclosure of the Mortgage resulted in the transfer of title to Appellee (as Sheriff's Deed grantee) and operated to extinguish Appellants' subordinate interest. Given these circumstances, Appellants simply could not make out a *prima facie* case of title, as was implicit in the Trial Court's correct finding that Appellee had the right to foreclose the Mortgage. As such, quieting title in Appellants' names was at odds with both the Trial Court's own ruling regarding Appellee's right to foreclose the Mortgage and binding principals of the law. Special Property VI LLC v. Woodruff, 273 Mich. App. 586, 590; 730 NW2d 753 (2007). Furthermore, even if the Appellants had made out a *prima facie* case of title, the Trial Court acknowledged Appellee's superior interest in the form of the Mortgage, which it was lawfully entitled to foreclose. Appellants would, accordingly, merely have the right to redeem which is not a property right, but rather, is a statutory right – an opportunity to reclaim the property.

> After foreclosure was had and the property deeded by the sheriff to the highest bidder, plaintiffs' equity of redemption was lost, and only a right of redemption during the statutory period remained. "The equity of redemption is that interest in the land which is held by the mortgagor before foreclosure; while the right of redemption is not an interest in the land at all, but a mere personal privilege given by statute to the mortgagor after the land has been sold under the mortgage."

Gerasimos v. Continental Bank, 237 Mich 513, 518-519; 212 NW 7 (1927), *citing*, 2 Jones on Mortgages (7th Ed.), § 1038*a*.

Under Michigan law, the title conveyed at a foreclosure sale, "is all the right, title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him." Stolte v. Krentel, 271 Mich. 98, 105; *260 N.W. 127* (1935). *See also,* Cooley v. Marx, 17 Mich. App 470; 169 NW 2d 655 (1969). While it is true that the mortgagors, such as Plaintiff, may continue to possess statutory rights *to reclaim* the property with certain protections, their legal interest in the property is, in fact, terminated. The borrower, or in this case the borrower's successor in interest, retains a statutory right of redemption which will allow him to effectively "repurchase" the property from the sheriff's deed grantee during the redemption period.

The only proper conclusion is that the Trial Court incorrectly quieted title in Appellants' names. The Trial Court's ruling essentially operated to vacate the Sheriff's Deed which was issued subsequent to the valid foreclosure of the Mortgage. Because the Trial Court correctly found that Appellee had the right to foreclose the Mortgage, its ruling that the Sheriff's Deed should, nonetheless, be set aside was simply unwarranted and was obvious judicial error. The

Trial Court further ruling, awarding Appellee quiet title in part, in the form of a money judgment renders the decision all the more curious. The Trial Court specifically provided that this money judgment would be a lien upon the Subject Property and superior to all other liens. This further compounded the Trial Court's erroneous decision in that Appellants' had granted a mortgage to Republic Bancorp, which was not a party to this action. As such, the Trial Court fashioned a ruling that was both at odds with the law and also operated to impair the rights and interest of an entity which was not a party to the proceedings.

Interestingly, throughout this action, Appellants have wrongly professed that Appellee was a wrongdoer, that the foreclosure was invalid and that it was not entitled to satisfaction of the Mortgage. This position is strikingly at odds with Appellants' latest declaration that the Trial Court properly used its equitable powers. Appellants' belief is especially perplexing as the Trial Court's ruling ultimately granting financial relief to Appellee, which would be at odds with Appellants suggestion that the Mortgage was represented as paid off and that the foreclosure was unlawful and thus invalid.

The reality is, however unappealing as it may be to Appellants, they have simply not established that they are entitled to quiet title to the Subject Property nor, as will be discussed in the next section, their unjust enrichment claim. It is Appellants who have lost sight of reality by suggesting that they were entitled to equitable relief despite their utter failure to establish all the elements necessary for awarding equitable relief for quiet title and unjust enrichment. Appellants desire to draw the Court's attention away from these indelible requirements. While courts of equity are free to exercise their equitable authority to achieve a fair resolution to a controversy, such authority is not unfettered. Equity has its bounds, and those bounds were exceeded in this matter by the Trial Court.

V. THE TRIAL COURT ERRED IN FINDING THAT APPELLEE WOULD BE UNJUSTLY ENRICHED DESPITE ITS RULING THAT APPELLEE WAS LEGALLY ENTITLED TO FORECLOSE THE MORTGAGE GRANTED BY APPELLANTS' PREDECESSOR IN TITLE.

A. Standard of Review

The viability of a claim of unjust enrichment, which is a question of law, is also reviewed *de novo*. Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187; 729 NW2d 898 (2006). "[W]e review de novo a trial court's dispositional ruling on an equitable matter." Id.

B. Argument

A court must approach the finding of unjust enrichment with some trepidation. "The process of imposing a 'contract-in-law' or a quasi-contract to prevent unjust enrichment is an activity which should be approached with some caution. The essential elements of such a claim are: (1) receipt of a benefit by the defendant *from the plaintiff*, and (2) which benefit it is inequitable that the defendant retain." Dumas v. Auto Club Ins., 437 Mich. 521, 546; 473 NW2d 652 (1991) *(emphasis added)*.

> Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement Restitution, § 1, p 12. The remedy is one by which "the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received" to ensure that "'exact'" justice is obtained. [Kammer Asphalt Paving Co., Inc., v. East China Twp. Schools, 443 Mich. 176, 185-186; 504 NW2d 635 (1993), quoting Detroit v. Highland Park, 326 Mich. 78, 100; 39 NW2d 325 (1949), quoting Cascaden v. Magryta, 247 Mich. 267, 270; 225 NW 511 (1929).]

Michigan Educational Employees Mut. Ins. Co. v. Morris, 460 Mich. 180, 198; 596 NW2d 142 (1999).

The Trial Court did not find that Appellant had received a benefit from Appellees (or from any other party for that matter). Yet, the Trial Court seemed to turn a blind eye to the absence of this crucial element. Appellees were required to demonstrate that this unjust enrichment was derived at their expense, which they did not.

Appellants suggest that, despite having statutory authority to foreclose, according to Appellee would be unjustly enriched because (1) according to Appellants, Appellee misrepresented that the mortgage had been paid off; and (2) Appellee sat on its rights for 14 years 7 months while charging what Appellants claim to be an "outrageous" 15.5%. Appellants' argument falters several reasons.

First, Appellee *never* represented that the Mortgage was paid off to any person *ever*, and Appellants repeating it over and over again does not make it so. Second, Appellee's delay in foreclosing the Mortgage is irrelevant because the only question is whether it was foreclosed within the limitations period. The Mortgage was foreclosed within the limitations period, and there is no authority for the curtailment of this limitations period. Third, Appellants' attempt to inflame the Court by characterizing the rate at which the Mortgage accrued interest, a detail which irrelevant to whether the foreclosure was within the limitation period and was lawful, both of which it was. Furthermore, Appellants were not the mortgagors. They would not have standing to challenge the terms of the contract which was secured by the Mortgage. Fourth, and finally, the Appellants acquired an interest in the Subject Property which was *subject to* the Mortgage because they failed to ensure that it was paid out of the proceeds of their purchase from the mortgagor's widow. Had Appellants ensured that the mortgage was paid off out of the proceeds of their purchase the interest would have ceased to accrue and it would not have been their responsibility. But none of these argument posed by Appellants go to the establishing the elements required for a claim of unjust enrichment.

Likewise, Appellants' windfall argument does nothing to establish a claim for unjust enrichment, and is simply incredible - nothing more than an attempt to distract the Court from Appellants' own culpability in the consequences. Appellee sought a remedy to which it was legally entitled. Appellants were in a position, starting from their purchase date, to avoid the ultimate consequence. They were in a position, on June 28, 2000, to ensure that the Mortgage was paid out of the proceeds of their purchase of the Subject Property. Thereafter, during the advertisement and posting for foreclosure, Appellants had the opportunity to cure the default. Appellants had the right to purchase the sheriff's deed for the bid amount, and they also had the right to redeem. Appellants had many opportunities to avoid the ultimate consequence. Appellants have glossed over their culpability in the predicament which was entirely of their (and their agents) making and all the opportunities to mitigate the consequences they ignored. Rather than doing the rational, appropriate thing, Appellants filed the instant action. It is a <u>direct consequence</u> of Appellants' filing this action which had lead to the outcome which they describe as a windfall to Appellees. Appellants' stubborn adherence to their concocted and untenable position which has caused the consequence – *not* Appellee's conduct.

In an attempt to "create" a basis for their unjust enrichment claim, Appellants devote a fair amount of their argument to MCL § 600.3252, despite the fact that it has absolutely no bearing on this matter and is entirely irrelevant. This provision governs the disbursement of funds which exceed the sale amount submitted by the mortgagee at the sheriff's sale. It is in the case where a third-party purchases the sheriff's deed for an amount in excess of the starting bid amount set by the mortgagor (based upon the payoff and all expenses incurred), the surplus amount must be distributed in accordance with the scheme set forth by statute. MCL § 600.3252. This provision has nothing to do with the facts of this case as there was not a third-party bidder and, in its absence, the sheriff's deed was issued to Appellee for the starting bid amount set by the mortgagee. MCL § 600.3252

Although the Appellants wave the value the subject property before the Court, it is irrelevant for the purpose of determining whether the applicable law was applied to the facts of this case. Appellants repeatedly raise the numbers out of an obvious attempt to inflame the passion of the Court out of some perceived notice of injustice which resulted from Appellants' neglect of its own rights. Appellants made a mistake and have, for the past four years, attempted to shift the responsibility for their blunder on to Appellee. Appellee never sought the property – it merely sought the payoff of an outstanding mortgage – amounts to which it was rightfully entitled. Appellants' stubborn refusal to accept responsibility for the predicament of their own creation is ultimately what led to the harsh consequences which have resulted.

Furthermore, Appellants are not paying the ultimate price here. Appellants engaged the services of their title agent, which insured the title for Appellants and provided insurance for same. There is little doubt that Appellants have already been made whole as a result of a claim they surely have made. Moreover, the Subject Property was *not* Appellants' home. Appellants lived elsewhere, even before this action was initiated, while the Subject Property was vacated and awaited renting.

For purposes of setting forth a claim for unjust enrichment, it is not enough for Appellants to complain that interest continued to accrue or that Appellee might ultimately obtain title to the Subject Property, the value of which is higher than Appellee originally sought. These repeated complaints lodged by Appellants should be seen for what they are: an attempt to inflame the Court out of some perceived notion of injustice which resulted from Appellants' neglect of their own rights. Appellants had the opportunity to redeem for the bid amount and affirmatively chose not to do so. It is the failure of Appellants, in commencing this spurious action, and stubbornly maintaining it despite knowing they were wrong, that resulted in the consequence of title passing to Appellant. This is the natural consequence of an unredeemed mortgage foreclosure.

In any respect, the value of the Subject Property or the accrual of interest are irrelevant for the purpose of determining whether the applicable law was applied to the facts of this case. Appellee never sought the property – it merely sought the payoff of an outstanding mortgage – amounts to which it was rightfully entitled. Appellants' stubborn refusal to accept responsibility for the predicament of their own creation is ultimately what lead to the harsh consequences which have resulted.

At trial, Appellees claimed Appellants had been unjustly enriched by waiting for the fourteen years and nine months after the last payment to foreclose upon the Mortgage. In agreeing with Appellees, the Trial Court acted in clear contravention to the specifically articulated statute governing the time period permitted for foreclosure. According to MCL 600.5803, foreclosure upon a mortgage is expressly allowed to occur up to 15 years from the date of the last payment. MCL § 600.5803. Accordingly, Appellee unequivocally had the right to foreclosure the Mortgage when it did. The elapse of 14 years and 7 months did nothing to weaken its rights. In fact, according to MCL § 600.5803, Appellee would legally have had until October 10, 2020 to foreclose the Mortgage[4].

Finally, Appellants never demonstrated Appellee had received a benefit *from Appellants*, because Appellee did not receive a benefit from Appellants. The Trial Court's finding of unjust enrichment in the absence of Appellee deriving some benefit *from Appellants,* and in light of the Trial Court's express acknowledgement that Appellee had the right to foreclose the Mortgage, is

[4] Mortgage due date was October 10, 2005.

particularly puzzling. Because Appellee was lawfully entitled to foreclose the Mortgage as it had done, the imposition of a constructive contract was without basis, as was the finding of unjust enrichment. There simply is no legal basis for the Trial Court's finding that Appellee was unjustly enriched where Appellee acted within its legal rights with regard to foreclosing the Mortgage and where Appellee had received nothing from Appellants. The Trial Court, therefore, erred in concluding Appellee was unjustly enriched at the Appellants' expense.

Appellants contend that the Trial Court's unusual Judgment was an appropriate exercise of the Trial Court's equitable authority. As previously stated, equity is not boundless and the Trial Court still was required to make a finding that the elements of unjust enrichment existed. Appellants' argument is simply untenable as it would effectively allow any court of equity to ignore a party's inability to establish minimal standards for an equitable claim, such as here, and yet award relief to that party. Actually, this operates as an inequity upon Appellee. This brings the analysis back to the truism that "where, as the present case, a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere. Senters, 443 Mich 45, 56.

In the final analysis, Appellants essentially contends that, where there is a negative outcome – that they have a loss and Appellee has a gain – the reworking of the outcome is justified. But this is not the law, and the end does not justified the means when it results in the up-ending of well-established legal principles and placement of any level of certainty for the public in the most precarious position imaginable. The public is deserving of the consistency available by the well-established law and Appellants must be declined.

As an aside, Appellants' initial Complaint alleged that the Mortgage was paid from proceeds and Appellee had failed to issue a discharge. After receiving Appellee's Answer and

First Interrogatories, Appellants realized that the Mortgage was *not* paid out of the sale proceeds. Rather than acting in accordance with reason, Appellants concocted a story claiming that Appellee *told them* that the Mortgage was satisfied and a discharge would be issued. This matter is tantamount to the well-settled principal estopping insurance companies from denying payment on one basis and then supplementing that reason once it becomes aware of litigation. See e.g., Ohio & M.R. Co., v McCarthy, 96 U.S. 258 (1877) ("Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus, to mend his hold. He is estopped from doing it by a settled principle of law."). Harbor Insurance Co. v Continental Bank Corp., 922 F.2d 357 (7th Cir. 1990). Mutual Benefit v Chisholm, 329 N.W. 2d 103 (Neb. 1983); and Bosko v Pitts & Still, 454 P.2d 229 (Wash. 1969).

This position has been adopted across the Country and in our own Sixth Circuit. See Wykoffs Assoc. v Standard Fire Insurance Co., 936 F2d 1474, 1489 (6th Cir. 1991) "A denial of liability on specified grounds constitutes a waiver and estopped of other defenses". Appleman Insurance Law and Practice, Sec 9260 (1981).

Moreover, our own Michigan Supreme Court adopted this position in C.E. Tackels, Inc v Fantin, 341 Mich 119 (1954). Here the Court stated:

> Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

In this matter Appellants (or more likely their title insurance agent) initially asserted that the Mortgage was paid in full. Later, they drastically changed their theory. It certainly seems that were Appellants had already set forth one reason for claiming they are entitled to quiet title, they should be estopped from trying to formulate another reason for their clear refusal to exercise redemption, particularly where their change of rationale is untrue. As such, the principles of equity as well as the "mend the hold" doctrine should prohibit the Appellants from trying to improve upon the position which they had already taken.

VI. THE TRIAL COURT WAS IN THE BEST POSITION TO DETERMINE WHETHER APPELLANTS HAD ENGAGED IN SANCTIONABLE MISCONDUCT AND HAD THE AUTHORITY TO IMPOSE SANCTIONS UPON APPELLANTS FOR SUCH MISCONDUCT.

A. Standard of Review

The decision to impose sanctions by a trial court is reviewed for an abuse of discretion. Casey v. Auto Owners Ins. Co. 273 Mich App 388; 729 NW2d 277 (2006). Such an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome, but instead there may be more than one reasonable and principled outcome. Id. An abuse of discretion occurs where the trial court chooses and outcome which falls outside the principled range of outcomes. People v Babcock, 469 Mich 247, 666 NW2d 231 (2003)

B. Argument

The Trial Court's imposition of sanctions against Appellants was within its discretion. Appellants waited to file their Motion to Strike Affirmative Defenses and claim that it was nothing more than a motion in limine on a housekeeping matter. The fact is, Appellants delayed in asking that the defenses be stricken and further had made an argument regarding the defenses in their opposition to Appellee's Motion for Summary Disposition. Clearly, the Trial Court heard what it needed to hear when it granted partial summary disposition and denied partial summary disposition.

The Trial Court was in the best position to observe the acrimony between the parties during numerous hearings, so it was in the best position to determine if there was "brinksmanship." Appellants make a point that the trial court did not exclude Appellee in this characterization. The Trial Court observation was made in the context of ruling upon a spurious motion filed by Appellants. Had Appellee filed a similar spurious motion at that point of the proceedings, it might have been similarly sanctioned. But it did not. Nevertheless, Appellee contends that it vigorously defended its position, particularly in view of Appellants' fabrication of facts designed to deprive Appellee of its rightful remedy.

In the end the question is this: Was the imposition of sanctions upon Appellants a reasonable and principled outcome? The fact that Appellants do not agree with this outcome is not dispositive. Of course Appellants would not agree with this outcome. But this is insufficient. Naturally, the Trial Court did not have to impose sanctions upon Appellants, but that does not mean that it could not. It was certainly within the Trial Court's discretion to impose sanctions upon Appellants and there is nothing in the record that suggests that the Trial Court abused its discretion in imposing such sanctions. As such, there is no basis for disturbing the Trial Court's imposition of sanctions upon Appellants.

CONCLUSION

There is great irony to Appellants' statement that although "the Trial Court reached this result for the wrong reason, it nevertheless reached the right result." **(Appellants' Brief, P. 22).** Appellants have steadfastly maintained that Appellee was not entitled to foreclose the Mortgage because, according to their made-up claim that a representation had been made by Appellee,

Appellee was not entitled to foreclose the Mortgage and that such foreclosure was invalid. Taking Appellants' argument to its logical conclusion, Appellants' position would mean that Appellee should have been deprived of any relief altogether. Why, then, do Appellants believe that the Trial Court ultimately reached the right result (even if for the wrong reason)? Because Appellants always had the right to foreclose and were entitled to full relief, and Appellants know this to be true.

It cannot be overlooked that this entire action arose as a consequence of a set of circumstances of Appellants own creation. Appellants were, at all times, on notice that the Mortgage preceded their interest in the Subject Property. The Mortgage was a matter of public record at the time Appellants acquired their interest in the Subject Property. For whatever reason, which is attributable exclusively to Appellants, they neglected to ensure that the Mortgage was satisfied and discharged from the public records. Thereafter, Appellee commenced proceedings to foreclose the Mortgage by advertisement. Despite having knowledge of the impending foreclosure, as a result of the publication and posting of notice upon the Subject Property, Appellants did nothing and the Mortgage was foreclosed. Appellants finally reacted to the Mortgage, and its ultimate foreclosure, just prior to the expiration of the redemption period. Leaving aside that even Appellants believed the Mortgage had been satisfied out of the proceeds of their purchase of the Subject Property, Appellants unjustifiably requested the Trial Court to alter the redemption period. Here again, was a failure of Appellants to take responsibility for the circumstances of their own making. The Trial Court, in extending the redemption period, committed clear error which essentially condoned Appellants negligence in protecting their own interests.

The Trial Court, having committed clear error in extending the redemption period in clear contravention of the redemption statute, fashioned a convoluted decision to detract from the error. The Trial Court engaged in legal acrobatics to achieve the same outcome had the Trial Court simply ruled against Appellants. Had the Trial Court found that Appellants had not established their claims for quiet title, unjust enrichment or promissory estoppel, Appellants still would have had the opportunity to redeem pursuant to the preliminary injunction delaying the expiration of redemption until thirty (30) days subsequent to the conclusion of the action. For all intents and purposes, this was the exact same result as in the decision fashioned by the Trial Court: Appellants were required to pay Appellee the amount to which it was entitled pursuant to the Sheriff's Deed. While the outcome is effectively the same, the error does operate to detriment of Appellee since Appellee had the right to foreclose the Mortgage and the Trial Court did not have the right to extend the redemption period. Appellee is, therefore, entitled to have title to the Subject Property quieted in its name.

RELIEF REQUESTED

Appellee Sterling Mortgage & Investment Co. respectfully requests this Honorable Court to affirm the Order of the Court of Appeals issued on June 25, 2009..

Respectfully submitted,

Eden J. Allyn (P54638)
Attorney for Appellee/Defendant
Sterling Mortgage & Investment Co.
31333 West Thirteen Mile Road
Farmington Hills, Michigan 48334
(248) 855-2550

Dated: August 2, 2010