

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,

v

Docket No. 139769

SHIRLEY HURT f/k/a SHIRLEY ROBBINS,

Defendant,

and

STERLING MORTGAGE AND
INVESTMENT COMPANY,

Defendant-Counter-Plaintiff-
Appellee.

BRIEF OF AMICI CURIAE

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STATEMENT OF QUESTIONS PRESENTED

The *Amici Curiae* address the following questions:

1. The courts may not interfere with the statutory foreclosure process where fraud or irregularity is not present. The trial court made no findings of fact regarding fraud or irregularity. Nonetheless, the trial court used its equitable powers to extend the Appellant-mortgagors' statutory redemption period, to quiet title in the Appellant-mortgagors, and to impose an equitable mortgage in favor of the Appellee-mortgagee. Did the trial court err in granting this equitable relief?

The Michigan Court of Appeals answered yes.

Amici Curiae answer yes.

Plaintiff-Appellants answer no.

Defendant-Appellee answers yes.

The trial court answered no.

2. Laches may bar foreclosure only where fraud or irregularity in the foreclosure process are present. The trial court made no findings of fact regarding fraud or irregularity in the foreclosure process. Laches also requires an unexplained or unexcused delay that causes a change in the defendant's material condition. The Appellee-mortgagee waited less than one year from the time the mortgage became due to foreclose. The Appellant-mortgagors claim only that the continued existence of the mortgage changed their material condition. The trial court held the doctrine of laches applied. Did the trial court err in finding laches?

The Michigan Court of Appeals answered yes.

Amici Curiae answer yes.

Plaintiff-Appellants answer no.

Defendant-Appellee answers yes.

The trial court answered no.

3. Unjust enrichment may only affect a foreclosure sale where fraud or irregularity in the foreclosure process is present. The trial court made no findings of fact regarding fraud or irregularity in the foreclosure process. Unjust enrichment requires: (1) the plaintiff to receive a benefit from the defendant and (2) an inequity resulting from the defendant's retention of the benefit. The Appellant-mortgagors claim that Appellee-mortgagee's purchase of the property at the foreclosure sale for the amount of the outstanding debt was an inequitable benefit to the Appellee *from the Appellants*, despite the fact that this is the usual outcome of any foreclosure sale. The trial court agreed. Did the trial court err in holding that the elements of unjust enrichment were met?

The Michigan Court of Appeals answered yes.

Amici Curiae answer yes.

Plaintiff-Appellants answer no.

Defendant-Appellee answers yes.

The trial court answered no.

4. The Appellants assert a new ground for invalidating the foreclosure sale on appeal. Appellants argue that the redemption period on the foreclosure notice was incorrect, stating that the proper period was one year and not the six months stated. Under the foreclosure scheme, Appellees could have obtained a one-month redemption period. Foreclosure sales are not invalidated for errors that do not harm the mortgagor. Should this Court consider this new argument and hold the foreclosure sale invalid?

The Michigan Court of Appeals did not address this argument.

Amici Curiae answer no.

Plaintiff-Appellants answer yes.

Defendant-Appellee answers no.

The trial court did not address this argument.

BASIS OF JURISDICTION

The *Amici Curiae* agree with the parties' statements of the basis of jurisdiction.

STATEMENT OF INTEREST

The *Amici Curiae*, Michigan Bankers Association, Michigan Credit Union League, Michigan Association of Community Banks, Michigan Mortgage Lenders Association, and Michigan Mortgage Professionals Association, are trade associations of businesses and individuals who work in the mortgage lending industry. *Amici Curiae*'s members are vital providers of mortgages to Michigan's citizens, allowing homeowners and businesses alike to realize their goals. This matter has the potential to alter Michigan's statutory foreclosure scheme dramatically. As such, *Amici Curiae* respectfully request to be heard.

INTRODUCTION

The Appellants seek to alter the statutory foreclosure process. They ask this Court to use its equitable powers to invalidate a properly conducted foreclosure sale, to extend their redemption period, to quiet title in the Appellants, and to give the Appellees an equitable mortgage. But the Legislature has clearly and fairly defined the rights of the mortgagor and the mortgagee at each stage of the foreclosure process. Under the guise of equity, this Court cannot disregard this legislative scheme, absent fraud or irregularity. Neither is present here. In effect, the Appellants wish this Court to relieve them of their own knowing errors.

First, the Appellants failed to discharge a pre-existing mortgage when they purchased the property. Appellants' title company knew of the mortgage. The mortgage was properly recorded. But the title company did not secure the mortgage's discharge. The Appellants must seek relief for this error, if anywhere, from the erring party, the title company, or from the title insurance policy issued. The Appellee-mortgagee is not responsible for the Appellants' failure to discharge the mortgage.

Second, the Appellants failed to redeem their property following foreclosure. The Appellants were aware of the foreclosure; the Appellee followed the proper procedures. But the Appellants chose not to redeem the property. The Appellants' entire case rests on the notion that the Appellee received a "windfall" when the Appellee purchased the mortgaged property at the foreclosure sale for the amount of the outstanding debt. The Appellants assert that this is unfair because the purchase price was not equal to the property's fair market value, and so the Appellants have lost their equity in the property. This position ignores the fact that this is the usual result of foreclosure: the purchaser, usually the mortgagee, buys the property for the amount of the outstanding debt. Interfering with statutory foreclosures every time the purchaser

buys the property for the amount of the outstanding debt would throw the foreclosure system into chaos and require the courts to determine for every foreclosure whether the purchaser paid the property's real value. This is contrary to historical practice, the clear will of the Legislature, and basic common sense. The Legislature has provided the redemption mechanism for any mortgagor who wishes to preserve the mortgagor's equity in the foreclosed property. The courts cannot save a mortgagor who fails to take advantage of this option.

The Court of Appeals recognized the Appellants' errors as their own and denied the Appellants the relief they sought. This Court should also hold the Appellants responsible for their own mistakes and affirm the Court of Appeals. After all, "[e]quity is not intended to aid persons who . . . make poor business decisions." *Burkhart v Bailey*, 260 Mich App 636, 660; 680 NW2d 453 (2004).

STATEMENT OF FACTS

In 1990, William Hurt obtained from Appellee Sterling Mortgage and Investment Company a loan in the amount of \$76,500, secured by a mortgage (the "Mortgage") upon 2106 Jackson Place, Ann Arbor, Michigan (the "Property"), bearing interest at 15.5 percent per annum. (Sterling Mortgage, App 209a.) The Mortgage was properly recorded. (*Id.*) William Hurt later married and quit claimed the Property to himself and his wife, Shirley Hurt. (Quit Claim Deed, App 214a.) The last payment William Hurt made on the Mortgage was on May 15, 1991. (Borrower Ledger Card, App 213a.) Following William Hurt's death, Shirley Hurt sold the Property to Appellants on June 28, 2000. (Warranty Deed, App 230a.) The Mortgage remained a matter of public record and encumbered the Property at the time of the sale to Appellants. (*See* Title Search Certificate, App 235a.) Appellants engaged American Title Company of Washtenaw ("American Title") to conduct a title search on their behalf before the

sale. (Trial Tr 39-40, App 256a-257a.) American Title's search revealed the Mortgage. (*Id.* at 30-32, App 254a-255a.) Appellants did not discharge the Mortgage at the time of purchase. (Title Search Certificate, App 235a.) American Title obtained title insurance for Appellants and Appellants' mortgagee. (Trial Tr 50-53, App 259a-260a.) Appellants purchased the Property as an investment in order to rent it; the Property has been unoccupied for several years. (Trial Tr 37, App 67b.)

The Mortgage became due on October 10, 2005. (Sterling Mortgage 1, App 209a.) On February 23, 2006, Appellee began foreclosure proceedings by publication. (Judgment 4, App 313(iv)a.) The foreclosure sale was conducted on March 30, 2006. (*Id.*) At the time of the foreclosure sale, the amount of the debt secured by the Mortgage was \$27,351.54. (Sheriff's Deed, App 238a.) Appellee purchased the Property for that outstanding debt. (*Id.*)

Nearly six months later, the Appellants filed this lawsuit seeking to invalidate the foreclosure sale. (Compl, App 1a-6a.) The Complaint included two claims against Appellee: (1) quiet title, and (2) slander of title. Both were based on the assertion that the Appellants had discharged the Mortgage on June 28, 2000, when they purchased the Property. (*Id.*)

Upon realizing that the Mortgage was never discharged, the Appellants filed their First Amended Complaint, asserting four causes of action against the Appellee: (1) quiet title, (2) slander of title, (3) unjust enrichment, and (4) promissory estoppel. All four were grounded in a new story: The Appellants now alleged that the Appellee informed American Title that the Mortgage was discharged. To support the new complaint, the Appellants filed an affidavit from Gregg Ottaviani, American Title's president and owner stating, "American Title contacted Sterling Mortgage and Investment Company (hereinafter "Sterling") and inquired as to the status of Sterling's mortgage against the property Sterling represented that the mortgage was paid

off, had a balance of zero, and that a discharge would be issued.” (Ex A to First Amended Compl ¶¶ 3-4, App 15a-16a.) At the hearing on the Appellee’s motion for summary disposition, the Appellee noted that the affidavit provided no real information regarding the alleged contact between American Title and the Appellee: it failed to identify who at American Title contacted the Appellee and to whom that person spoke, among other deficiencies. The Appellants then changed their story a second time, now asserting that Ottaviani himself contacted an unknown employee of the Appellee who told him that the Mortgage was paid in full. (Ex D to Pl’s Resp to Def’s Mot for Summ Disposition, App 164a-165a.)

Following the filing of the First Amended Complaint, the Appellants filed a Motion for a Temporary Restraining Order and Motion to Extend the Redemption Period. (Pl’s Ex Parte Mot for TRO and Mot to Extend the Redemption Period, App 17a-26a.) The Appellants requested that the trial court extend the six-month redemption period for 30 days following final judgment in this matter. (*Id.*) The Appellants did not argue that this extension was warranted due to fraud or irregularity in the foreclosure process, instead, basing their motion on the likely success of the four claims made in the First Amended Complaint. (*See id.*) The trial court granted the Motion (TRO, App 27a), and later entered a preliminary injunction providing the same relief (Order, App 29a).

The Appellee filed a Motion for Summary Judgment on all counts. The trial court granted the motion as to the slander-of-title claim, but left the other three claims (quiet title, promissory estoppel, and unjust enrichment) for trial. (Order, App 180a-181a.)

A bench trial was held in August 2007. At trial, the following testimony was offered on whether the Appellee informed American Title that the Mortgage was discharged. First, Ottaviani testified that American Title received a “payoff letter” from the Appellee. (Trial Tr 42,

App 257a.) Ottaviani did not personally remember the letter. (*Id.* at 62-63, App 262a.) He stated only that it was the practice of American Title to receive such letters. (*Id.* at 32-42, App 255a-275a.) Second, Ottaviani stated that on the day of the closing he personally called the Appellee to ask whether the Mortgage was paid in full (*id.* at 42-43, App 257a), but he did not recall with whom he spoke, only that it was a woman. (*Id.*) Ottaviani did not produce a copy of the alleged payoff letter, claiming that American Title had destroyed it in its normal course of business. (*Id.* at 32-33, 64, App 255a, 263a.)

Maurice Janowitz, president of Appellee Sterling Mortgage and Investment Company, explained why Ottaviani could not have received a payoff letter or spoken with Appellee's employee on the telephone. If a request for payoff information is made to Appellee, then an entry is made in a logbook. (*Id.* at 162-164, App 287a-288a.) The logbook did not contain an entry for a payoff-letter request on the Mortgage. (*Id.* at 164, App 288a.) Further, the Appellee requires a signed document from the mortgagor authorizing a third party to obtain payoff information. (*Id.* at 149, App 284a.) There was no record of such a document in this case. Ottaviani also did not produce a copy of Hurt's authorization for American Title to receive payoff information, claiming that it, too, was purged from the file. (*Id.* at 80-81, App 267a.)

Janowitz also explained why it was also impossible for Ottaviani to have obtained payoff information over the phone from one of his employees on the date of the closing. A call to the Appellee reaches a receptionist who answers the phone for multiple companies. (*Id.* at 152-153, App 285a.) This receptionist has no access to payoff information. (*Id.* at 156-57, App 286a.) When payoff information is requested, the receptionist places the call into a prerecorded message explaining how payoff information can be obtained. (*Id.* at 152-153, App 285a.) The message

includes the process for third parties, like Ottaviani, which requires written authorization from the mortgagor. (*Id.*)

Following trial, the trial court rendered an unusual judgment. First, the trial court held that the Appellants had failed to prove their promissory-estoppel claim because they had offered no evidence of the Appellants' reliance on the alleged representation of payoff. (Trial Tr 104, App 84b.) The trial court did not believe that any portion of its ruling, on this claim or any other, required it to address the question of whether the alleged payoff representations occurred. (*See id.*) The trial court next noted that the Appellee had the statutory right to foreclose the mortgage. (*Id.* at 109, App 85b.) Then, inexplicably, the trial court set aside the Sheriff's Deed, quieted title in the Appellants, and granted the Appellee an equitable mortgage on the Property for the outstanding Mortgage balance. (*Id.* at 112-113, App 86b.) The seeming basis for this ruling was the trial court's belief that the Appellee was unjustly enriched because the Appellee purchased the Property at the foreclosure sale for the amount due on the Mortgage, rather than the Property's real value; thus, the court found in favor of the Appellants on their unjust-enrichment claim. (*See* Trial Tr 100-120, App 83b-88b; Judgment, App 313(i)a-313(v)a.) The trial court also supported the relief it granted by holding that the Appellee was guilty of laches because of (1) the time between the last payment on the mortgage and the foreclosure, and (2) the Appellee's unjust enrichment. (Trial Tr. 112-113, App 86b.)

Appellee appealed this Judgment. The Court of Appeals reversed. (Opinion, App 335a-340a.) First, the Court of Appeals held that the trial court erred in extending the six-month redemption period because the courts can only interfere with the statutory foreclosure scheme if there is "fraud mistake or accident" and the Appellants had failed to make this argument to the trial court. (*Id.* at 3-4, App 337a-338a.) Next, the Court of Appeals considered whether the

trial court properly quieted title in the Appellants. The Court concluded that this too was error because the Appellants had the statutory right to foreclose and were not guilty of laches because the statute of limitations had not expired. (*Id.* at 4-5, App 338a-339a.) Lastly, the Court of Appeals examined whether the trial court properly held in favor of the Appellants on their unjust-enrichment claim. The Court of Appeals again found error, noting that the elements of unjust enrichment were not met. The Appellees had received no benefit from the Appellants; the Appellees merely purchased the Property at the foreclosure sale, pursuant to the statutory scheme. (*Id.* at 5-6, App 339a-340a.)¹

Following the adverse ruling, the Appellants filed a motion for reconsideration, asserting for the first time that the foreclosure notice was defective because it did not state the correct redemption period. The Court of Appeals refused to consider this new argument and denied the motion. The Appellants then filed a request for leave to appeal in this Court, which this Court granted.

STANDARD OF REVIEW

This Court reviews the trial court's decision to quiet title, to grant equitable relief, and to apply the equitable doctrines of laches and unjust enrichment *de novo*. *Charter Township of Shelby v Papesh*, 267 Mich App 92, 108; 704 NW2d 92 (2005); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 192-193; 729 NW2d 898 (2007). All supporting findings of fact are reviewed for clear error. *E.g.*, *Papesh*, 267 Mich App at 108.

¹ The Court of Appeals also ruled on the propriety of sanctions in this matter and whether the Appellee has standing. As *Amici* do not address these issues, those portions of the Court of Appeals' ruling are not discussed here.

ARGUMENT

I. The trial court erred in granting equitable relief in the absence of fraud or irregularity in the foreclosure process.

A. The trial court erred in extending the redemption period without fraud or irregularity during the foreclosure process.

As long ago as 1875, this Court recognized that while a court may apply its equitable powers “for relief against the consequences of inevitable accident in private dealings, . . . there is no such power to relieve against statutory forfeitures.” *Cameron v Adams*, 31 Mich 426; 1875 WL 3655, at *2 (1875). In *Cameron*, this Court refused to extend the redemption period even though, before the redemption period expired, the complainant “became dangerously ill, and unable to attend to any business, and was delirious much of the time; and by reason of this misfortune, was, as he claims, prevented from redeeming.” 1875 WL 3655, at *1.

This Court explained:

Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. 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.

Id. at *2. In several cases, this Court has quoted with approval this language from *Cameron*. *E.g.*, *Senters v Ottawa Sav Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993); *Carlisle v Dunlap*, 203 Mich 602, 605-606; 169 NW 936 (1918).

More than 65 years after its decision in *Cameron*, this Court said, “The policy of our court in construing the provisions of the [mortgage foreclosure] statute relative to statutory foreclosures of mortgages is well expressed in *Cameron*.” *Heimerdinger v Heimerdinger*, 299

Mich 149, 154; 299 NW 844 (1941). This Court then quoted extensively, and with approval, from its opinion in *Cameron*. *Id.*²

In another case, the mortgagor brought a proceeding in equity to obtain an equitable extension of the period to redeem from a statutory foreclosure sale by advertisement, because (1) plaintiff erroneously believed that the redemption period was one year, when actually it was six months, and (2) the price paid at foreclosure was well below its value. In holding that the mortgagor was not entitled to the requested relief, the Court of Appeals said:

The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.

Schulthies v Barron, 16 Mich App 246, 247-248; 167 NW2d 784 (1969).

A 2002 decision of this Court reiterates this well-established principle that “it is not [the courts’] place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.” *Stokes v Millen*, 466 Mich 660, 672; 649 NW2d 371 (2002).

² The opinion reads:

The policy of our court in construing the provisions of the statute relative to statutory foreclosure of mortgages is well expressed in *Cameron v. Adams*, 31 Mich. 426, where we said: “If the sale had been made under the decree of a court, the authorities cited on the argument would bear very strongly in favor of relieving complainant. Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. 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.”

Heimerdinger, 299 Mich at 154.

Although *Stokes* did not involve an attempt to extend the redemption period with respect to a mortgage foreclosure sale, it illustrates the principle that the courts may not override the mandate of a clear and validly enacted statute.

Stokes involved the Michigan residential builders act, which provided that an unlicensed residential contractor who did not have the required residential contractor's license could not obtain compensation for its residential contracting work. In *Stokes*, the contractor sought equitable relief in the form of reimbursement to the contractor for payments made and return of the slate that the contractor had installed on the plaintiff's roof. *Id.* at 663. In holding that the contractor could not have equitable relief, this Court said:

[I]n 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.

* * *

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.

* * *

Millen cannot have equitable relief because any such relief would allow equity to be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction.

Id. at 671-673.

Stokes applies equally in this case. The Appellants request this Court to invoke equity to avoid application of the six-month redemption period that the mortgage foreclosure statute prescribes. (See Appellants' Br 9-29.) But, under this Court's holding in *Stokes*, a court may not "create an equitable remedy for a hardship created by an unambiguous validly enacted, legislative decree." *Stokes*, 466 Mich at 674 (citation omitted). Yet that is precisely what Appellants are asking this Court to do. They want this Court to amend a clear and valid statute, which specifies a six-month redemption period, by extending the period to whatever longer

period a court concludes is appropriate under the circumstances. But the courts have no equitable power to intervene in the statutory foreclosure process, absent fraud or irregularity in the foreclosure process. *E.g.*, *Schulthies*, 16 Mich App at 247-248.

Some published opinions have recited in *dicta* that this principle is also subject to exceptions for “mistake” or “accident.” *E.g.*, *Senters*, 443 Mich at 50. *Amici Curiae* have been unable to find a single case applying on either of these exceptions. Appellants cite none. *Amici Curiae* urge this court to reject these improvident *dicta* and to confine the ability of the courts to interfere with the statutory foreclosure scheme to cases of fraud or irregularity in the foreclosure process. This after all was the original rule. *Cameron*, 31 Mich 426; 1875 WL 3655, at *2. The vague exceptions for mistake and accident crept in later and have since only been repeated in rote recitation, never applied.

Important policy considerations counsel in favor of this more limited original exception to court interference. Allowing increased judicial intervention without defined limits for the courts’ authority will destroy the needed certainty in foreclosure sales. As the Court of Appeals has said, “[T]he need for certainty in such sales is, under present law, compelling.” *Schulthies*, 16 Mich App at 248.

Writing for the majority in *Stokes v Millen*, Chief Justice Kelly said:

[I]t is not for a trial court to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle, until eventually the statute is made practically innocuous and the teeth of the strong legislative policy effectively pulled. If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it

466 Mich at 672. Yet that is precisely what this Court would be doing if it were to permit “mistake” or “accident” to be used as exceptions to the long-standing principle that equitable remedies may not be applied to change the mandates of a clear and valid statute. “[T]o hold

otherwise would set a dangerous precedent which would deprive every title to real estate purchased at foreclosure sale of the finality and security clearly intended under the statute.”

Grossman v Elliott, 382 Mich 596, 605-606; 171 NW2d 441 (1969).

Here, the needed fraud or irregularity is not present. First, as the Court of Appeals wisely noted, in seeking extension of the redemption period, the Appellants failed to argue in the trial court that fraud or irregularity in the foreclosure process entitled them to an extension. (Opinion 4, App 338a.) Therefore, the argument is waived. *See Goolsby v Detroit*, 419 Mich 651, 655; 358 NW2d 856 (1984) (arguments not made below are waived).³

Second, the trial court did not find that fraud or similar circumstance was present in this case.⁴ The Appellants allege that, when they purchased the Property, the Appellee informed their agent, American Title, that the Mortgage was paid in full. The trial court’s formal findings of fact do not recognize these allegations. (Judgment 1-5, App 313(i)a-313a.) In the trial transcript, Judge Brown notes that he does not decide the issue of whether the Appellee made such statements. (Trial Tr 104, App 84b.) Thus, the best result that the Appellants can hope for is remand to the trial court to determine whether fraud was present. *See, e.g., Papesh*, 267 Mich App at 108 (remanding for findings of fact where trial court failed to make any). However, remand is unnecessary because no reasonable fact-finder could find that Appellants proved fraud by clear and convincing evidence. *Flynn v Korneffel*, 451 Mich 186, 197; 547 NW2d 249 (1996)

³ In addition, this dispute regarding whether the trial court’s preliminary injunction extending the redemption period is valid is moot because a preliminary injunction does not survive the final judgment on the merits. *See Alliance for Mentally Ill of Mich v Dep’t of Cmty Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998) (noting that a preliminary injunction maintains the status quo pending final judgment). The final judgment in this case does not extend the redemption period. (Judgment, App 313(i)a-313(v)a.)

⁴ The trial court also made no findings of fact to support mistake or accident. (Judgment 1-5, App 313(i)a-313a.) If this Court chooses to expand the courts’ power to interfere with the statutory foreclosure scheme to include mistake or accident, then all the arguments in this brief regarding fraud apply with equal force.

(requiring usual proof by clear and convincing evidence to toll redemption period for fraud). If the trial court had so found, then this Court would be compelled to reverse those findings as clear error. *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 588; 654 NW2d 572 (2002) (the appellate court must reverse where factual findings have no evidentiary support or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake).

The Appellants' first complaint in this matter alleged that *the Appellants paid the Mortgage* in full on the date that they purchased the Property. (Compl ¶¶ 7, 12, App 3a-4a.) It was only after the Appellants learned that they did not pay the mortgage that they first told their new story that the Appellee informed American Title that the Mortgage was satisfied. (First Amended Compl ¶¶ 13-16, App 9a.) This new story was supported by a vague affidavit from Gregg Ottaviani, American Title's president and owner. (Ex A to Compl, App 15a-16a.) This affidavit stated, "American Title contacted Sterling Mortgage and Investment Company ("Sterling") and inquired as to the status of Sterling's mortgage against the property Sterling represented that the mortgage was paid off, had a balance of zero, and that a discharge would be issued." (*Id.* ¶¶ 3-4, App 15a-16a.) At the hearing on the motion for summary disposition, the Appellee pointed out that this affidavit failed to identify who from American Title contacted the Appellees, among other deficiencies; after all, a company cannot speak to or contact another company. In response, Appellants changed their story a second time, now asserting that Ottaviani himself contacted an unknown employee of Appellees who told him that the Mortgage was paid in full. (Ex D to Pl's Resp to Def's Mot for Summ Disposition, App 164a-165a.)

At trial, Ottaviani testified that American Title received two assurances from the Appellee that the Mortgage was paid in full. First, Ottaviani stated that American Title received a “payoff letter” from the Appellee. (Trial Tr 42, App 257a.) He does not personally remember seeing this letter. (*Id.* at 62-63, App 262a.) He merely notes that it was the practice of American Title to receive such letters. (*Id.* at 32-42, App 255a-275a.) Second, Ottaviani testified that on the day of the closing he personally called Appellee to ask whether the Mortgage was paid in full. (*Id.* at 42-43, App 257a.) He does not remember with whom he spoke, only that it was a woman. (*Id.*) At the time, no discharge of the Mortgage had been recorded. (*Id.* at 44-45, 73, App 258a, 265a.) Ottaviani was unable to produce a copy of the alleged payoff letter, claiming that American Title destroyed it in its normal course of business. (*Id.* at 32-33, 64, App 255a, 263a.)

Maurice Janowitz, Appellee’s president, testified why it would have been impossible for Ottaviani to have obtained a payoff letter or to have received payoff assurance from Appellee’s employee on the telephone. The Appellee requires a signed document from the mortgagor authorizing a third party to obtain payoff information. (*Id.* at 149, App 284a.) If a payoff request is made, then an entry is made in a logbook. (*Id.* at 162-164, App 287a-288a) The logbook also indicates whether a signed authorization was obtained and whether a payoff letter was sent. (*Id.*) The logbook did not contain an entry indicating a request for a payoff letter on the Mortgage. (*Id.* at 164, App 288a.) There was also no way for Ottaviani to have orally obtained payoff information from an employee of Appellee on the closing date. If someone calls the Appellee, he speaks with a receptionist who answers the phone for multiple companies. (*Id.* at 152-153, App 285a.) This receptionist cannot obtain payoff information. (*Id.* at 156-57, App 286a.) When payoff information is requested, the receptionist transfers the call into a

prerecorded message stating how the caller can receive payoff information. (*Id.* at 152-153, App 285a.) It explains the process for third parties, like Ottaviani, which requires written authorization from the mortgagor. (*Id.*) Ottaviani was also unable to produce a copy of Hurt's authorization for American Title to receive payoff information, again claiming it was purged from the file. (*Id.* at 80-81, App 267a.)

In short, the Appellants' evidence of fraud consists only of Ottaviani's testimony that his company received a payoff letter and that he called Appellee who told him the Mortgage was paid in full. The Appellants cannot produce a copy of the payoff letter. The Appellants cannot produce a copy of the signed authorization from Hurt that would have allowed them to obtain a payoff letter. The Appellants cannot identify the employee of the Appellee with whom Ottaviani spoke. In other words, no documentation supports Ottaviani's story. And Ottaviani has every incentive to lie. The title company for which he is the president and owner issued a title commitment and insurance (for both the Appellants and the new mortgagee) stating that the Property was free and clear of any mortgages or other encumbrances. This turned out not to be the case. Further, as explained above, the Appellee's normal business practices make Ottaviani's story impossible. If that were not enough, Ottaviani's version of events was not even the Appellants' original story. Ottaviani's story is the third that the Appellants have presented to shield Ottaviani's company from liability for its failure to include the Sterling mortgage in its title policy.

In sum, the record is devoid of clear and convincing evidence of fraud.⁵ As such, no remand is necessary. There was no fraud or irregularity present to justify interfering with the statutory foreclosure process, and this Court should affirm the ruling of the Court of Appeals.

B. The trial court erred in disturbing the usual statutory foreclosure process, quieting title in the Appellants, and imposing an equitable mortgage on the Property.

The trial court concluded that the Appellee had the statutory right to foreclose on the Property. (Trial Tr 109, App 85b.) But then, in the name of equity, dissolved the resulting Sheriff's Deed, quieted title in the Appellants, and granted the Appellee an equitable mortgage in the amount of the outstanding debt. (Judgment 5, App 313(v)a.) In so doing, the trial court erred. As discussed at length above, the trial court had no power to interfere with the statutory foreclosure process absent fraud or irregularity. *E.g., Heimerdinger*, 299 Mich at 154. Neither exists here. The trial court made no findings of fact to support a finding of fraud (Trial Tr 100-120, App 83b-88b; Judgment 1-5, App 313(i)a-313a), and any findings to that effect would have been clear error. As such, the trial court erred in using equity to alter the statutory foreclosure scheme.

II. Laches does not bar the Appellee's right to foreclose on the Property.

A. The trial court erred in applying the doctrine of laches to vary the statutory foreclosure scheme.

Laches is an equitable doctrine that applies where there is "an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in

⁵ Specifically, fraud requires: (1) "[t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." *Hi-Way Motor Co v Int'l Harvester, Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

prejudice to a party.” *Johnson Family Ltd P’ship v White Pine Wireless, LLC*, 281 Mich App 364, 394; 761 NW2d 353 (2008) (quoting *Dep’t of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996)).

Here, the Appellants seek to invoke laches to alter the legislature’s specifically designed foreclosure scheme. As discussed above, such judicial interference is prohibited unless fraud or irregularity exists. *E.g.*, *Heimerdinger*, 299 Mich at 154; *City of Wayne v Sturdy Homes Corp*, No. 256056, 2005 WL 3018584, at *4 (Mich App Nov 10, 2005) (trial court erred in applying laches to alter statutory foreclosure scheme). As discussed in Section I, these conditions are not present here. The trial court made no findings of fact to support fraud (Trial Tr 100-120, App 83b-88b; Judgment 1-5, App 313(i)a-313a.), and no reasonable fact-finder could hold that fraud occurred. Consequently, the trial court erred in applying the equitable doctrine of laches to alter the statutory foreclosure scheme.

Brydges v Emmendorfer, 311 Mich 274, 18 NW2d 822 (1945), does not change this result. *Brydges* stands for the proposition that generally laches applies, in addition to the statute of limitations, to bar a suit. *Id.* at 279. This holding is codified in MCL 600.5815. MCL 600.5815 (“The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. The equitable doctrine of laches shall also apply in actions where equitable relief is sought.”). This is usually true. But, as noted above, this Court has long held that equity, through the doctrine of laches or otherwise, cannot act to defeat the statutory foreclosure scheme absent fraud or irregularity.

B. The Appellants have failed to demonstrate unexplained or unexcused delay.

But, even if the courts had the power to apply laches, the trial court improperly held that the elements were met. The Appellee did not unduly delay in bringing its claim. Where a

plaintiff files his claim within the statute of limitations, “any delay in the filing of the complaint [is] . . . presumptively reasonable.” *Mich Educ Emps Mut Ins Co v Morris*, 460 Mich 180, 200; 596 NW2d 142 (1999). Here, MCL 600.5803 provides the statute of limitations:

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); *see also Degen v Estate of Degen*, 80 Mich App 573, 581; 264 NW2d 64 (1978) (“The mortgage statute provides two periods of limitations, but in the alternative and not running concurrently, the latest in point of time to govern.” (quoting *Hiscock v Hiscock*, 257 Mich 16, 24; 240 NW 50, 53 (1932))). Thus, the Appellee had 15 years from the date the Mortgage became due to begin foreclosure, in other words, 15 years from October 10, 2005. (Sterling Mortgage 1, App 209a.) The Appellee foreclosed well within this timeframe, *less than one year after the Mortgage became due*, beginning foreclosure proceedings by publication on February 23, 2006, and conducting the foreclosure sale on March 30, 2006. (Judgment 4, App 313(iv)a.) This minimal delay resulted from the time that any mortgagee needs to identify and to process delinquent accounts. The Appellants attempt to distract the court from this less-than-one-year delay by focusing on the last payment made on the Mortgage. (*E.g.*, Appellants’ Br 14.) But here the statute of limitations runs from the date the mortgage becomes due, *not* the date of the last payment. The Appellee’s short delay is “presume[ed]” reasonable. *Morris*, 460 Mich at 200. In their brief, the Appellants fail to identify any reason (with or without legal support) this Court should disregard this presumption. (Appellants’ Br 7-36.) As this Court has often noted:

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

Mudge v Macomb County, 458 Mich 87, 105; 580 NW2d 845 (1998) (refusing to reach issue party had inadequately briefed) (quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959)).

Additionally, important policy considerations counsel against finding a mortgagee's less-than-one-year delay "unexcused or unexplained." Michigan ranks 6th nationwide in foreclosures, one filing for every 241 households, 18,833 filings last month alone. Cami Reister, *West Michigan sees rise in foreclosure filings in July*, Grand Rapids Press, Aug. 12, 2010, http://www.mlive.com/business/west-michigan/index.ssf/2010/08/west_michigan_see_rise_in_fore.html. Given the State's current 13.2 percent unemployment rate, these foreclosures are not likely to end in the near term. *Michigan unemployment rate dips slightly in June*, Crain's Detroit Business, Jul. 14, 2010, <http://www.crainsdetroit.com/article/20100714/FREE/100719935> (Michigan Department of Energy, Labor, & Economic Growth reports 13.2 percent unemployment). Applying the doctrine of laches harshly to limit a mortgagee's ability to foreclose would only increase the number of foreclosures. Afraid to lose their rights, banks, credit unions, and other lending institutions might feel compelled to foreclose more quickly. A less-than-one-year delay should not be sufficient "unexcused or unexplained delay" as to warrant the application of laches.

A harsh application of laches also threatens to undermine the certainty of foreclosure sales. Certainty of title is essential to a functioning foreclosure scheme. Bidding at a foreclosure sale will be "chilled; [and] potential bidders may be discouraged if they cannot ascertain when, if

ever, their interest will become finalized.” *Fed Land Bank of Louisville v Glenn (In re Glenn)*, 760 F2d 1428, 1436 (CA 6, 1984). Recognizing this important concern, Michigan courts have long held that statutory foreclosures should be set aside rarely, only for “very good reason.” *Markoff v Tournier*, 229 Mich 571, 575, 201 NW 888, 889 (1925). Finding an unexcused or unexplained delay easily here, with a less-than-one-year delay, would greatly impair the public confidence in foreclosure sales. This lack of confidence would further depress Michigan’s already troubled real-estate market. This Court should require a more substantial delay before imposing the harsh bar of laches.

C. The Appellants have failed to prove that delay caused a material change in their condition.

The Appellants have also failed to demonstrate the second requirement of laches. The Appellants suffered no change of material condition as a result of the Appellee’s short delay. This Court has repeatedly held that no change of material condition occurs where a mortgagee does not immediately foreclose on a property. For example, in *Union Guardian Trust Co v Marquette Park Co*, 300 Mich 89; 1 NW2d 464 (1942), Frank Amour and his wife mortgaged property to the plaintiff. *Id.* at 90. The mortgage was properly recorded. *Id.* Defendant Marquette Park Co. purchased the property and expressly assumed the mortgage. *Id.* Defendant Freada Ullman later purchased the property, *id.*, defaulting on the mortgage in 1932, at 93. Defendant Marquette Park Co. received no notice of default. *Id.* The mortgage became due in 1937. *Id.* at 91. The plaintiff instituted foreclosure proceedings in 1938, six years after the initial default. *Id.* at 93. Throughout the default period, the plaintiff received partial payments. *Id.* at 96-97. The Amours died before foreclosure. *Id.* The property’s value also declined significantly during the default period: At the time of the initial default, the property was valued at \$100,000, more than sufficient to cover mortgage amount. At the time of the foreclosure, the

property value had declined to \$35,000, far less than the roughly \$70,000 owed on the mortgage. *Id.* at 97-98. Defendant Marquette Park Co. argued that laches barred the plaintiff from foreclosing. *Id.* at 105. But this Court disagreed, holding that defendant Marquette Park Co. was not harmed by any delay. *Id.* at 106. The Court noted that it was the mortgagee's decision whether to accelerate a delinquent debt and to foreclose. *Id.* The defendant Marquette Park Co. "could have at any time, protected itself by paying such debt." *Id.* Thus, defendant's condition remained the same; laches did not apply to prevent foreclosure.

Similarly, here, the Appellants' condition did not change. The Mortgage affected the Property from the moment the Appellants purchased the Property until the moment the Appellee foreclosed. This continued existence of the Mortgage is the only change in condition that the Appellants allege. (Appellants' Br 13.) Yes, interest continued to accrue. Yes, the Property's value fluctuated. But this alone is insufficient; the existence of the mortgage was not a change in the Appellants' condition. The Mortgage merely continued to run its course.⁶ The Appellants' condition did not change. Appellants "could have at any time, protected [themselves] by paying such debt." *Union Guardian Trust Co*, 300 Mich at 106; *accord Plager v Leonard*, 316 Mich 174, 181; 25 NW2d 156 (1946) (no prejudice where mortgagee delayed roughly ten years in foreclosing mortgage); *see also Township of Yankee Springs v Fox*, 264 Mich App 604, 611-614; 692 NW2d 728 (delay of eight years in enforcing anti-funneling ordinance did not prejudice property owners who purchased property in violation of the ordinance; property owners situation did not change during the eight-year delay); *Dobson v S Mich Bank & Trust (In re Dobson*

⁶ In fact, the Appellants' situation is far better than that of the defendant in *Union Guardian Trust Co*. There, value of the mortgaged property declined so that it was insufficient to cover the mortgage balance. *Id.* at 97-98. If the mortgage had been promptly foreclosed, the defendant would not have owed the residual balance. Here, the Property was purchased for the amount due on the Mortgage.

Trust), No. 285248, 2010 WL 173604, at *5 (Mich App Jan 19, 2010) (no change in material condition where trustee delayed five years in recovering real property from improper beneficiary); *Doty v Eby*, No. 279665, 2008 WL 4684160, at *1-2 (Mich App Oct 23, 2008) (no prejudice where the defendant merely had to pay a debt he owed).

This long-held approach is derived from sound policy considerations. Any other rule would result in a finding of material change any time a mortgagee delayed in foreclosing. As discussed above, such a loose laches standard would only compel more rapid foreclosures and inject increased uncertainty into foreclosure sales. Both outcomes that this Court should seek to prevent.

In sum, the trial court improperly applied laches to vary the statutory foreclosure scheme without finding fraud or other irregularity in the foreclosure process. And even if the doctrine applied, the Appellants have failed to prove an improper delay or a material change in their condition. The Appellee waited less than a year from the time the mortgage became due to foreclose, and the Appellants' situation did not change from the time they purchased the Property until the date of the foreclosure.

III. The foreclosure sale did not unjustly enrich the Appellee.

The equitable doctrine of unjust enrichment requires: (1) the “receipt of a benefit by the defendant from the plaintiffs”; and (2) “an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007); *accord Morris*, 460 Mich at 198. The remedy creates “the fiction of a quasi or constructive contract with an implied obligation to pay for benefits received.” *Morris*, 460 Mich at 198 (citations omitted). Because unjust enrichment “vitiates normal contract

principles, the courts ‘employ the fiction with caution.’ ” *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 186, 504 NW2d 635 (1993) (citations omitted).

First, like the doctrine of laches, the equitable doctrine of unjust enrichment does not apply to save the Appellants from the statutory foreclosure scheme, unless fraud or irregularity is present. *See, e.g., Heimerdinger*, 299 Mich at 154. As discussed above in Section I, neither was present here, and so the trial court erred in applying the doctrine of unjust enrichment to this case.

Second, the elements of the doctrine have not been satisfied. As the Court of Appeals correctly held (Opinion 5-6, App 339a-340a), the Appellants received no benefit from the Appellee. Appellants assert that Appellee received a “windfall” because it purchased the property at the foreclosure sale by paying only \$27,351.54 when the property had a much greater market value (Appellants Br 4, 29-30), ignoring that such “windfalls” occur frequently and routinely as a result of the foreclosure procedure that the Legislature has established. A bargain foreclosure purchase is not a benefit to the purchaser from the defaulting mortgagor.

When a lender forecloses a mortgage by advertisement, MCL 600.3201 *et seq.*, the lender typically appears at the foreclosure sale and bids the amount that the mortgagor-borrower owes the lender. The borrower then has six months (or other applicable period) in which to redeem the property by paying to the lender the amount that it bid at the sale plus accrued interest. MCL 600.3240. If the borrower-mortgagor fails to redeem within six months after the sale, then title to the property passes to the purchaser.

If the value of the property exceeds the amount bid at the foreclosure sale, then the purchaser at the sale (usually the lender-mortgagee) receives and retains the excess. This is an inevitable and routine consequence of the statutory mortgage foreclosure procedures that the

Legislature has established in Chapter 32 of the Revised Judicature Act. *See Macklem v Warren Constr Co*, 343 Mich 334, 339; 72 NW2d 60 (1955) (a low sale price alone is never sufficient reason to vitiate a foreclosure sale); *Schulthies*, 16 Mich App at 248 (“Although the trial court found that the price paid at foreclosure sale was well below the worth of the property, the need for certainty in such sales is, under present law, compelling.”).

If Appellants believe that it is inappropriate to permit a mortgagee, at a foreclosure sale, to purchase the mortgaged property at a price equal to the amount of the debt (an ability that is only available where the mortgagor chooses not to redeem), then Appellants should seek to persuade the Legislature to change the relevant statutes. The Courts do not have authority to do so. *See, e.g., Koontz v Ameritech Servs., Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (courts may not change statutory requirements); *Fed Land Bank of St Paul v Brown (In re James)*, 20 BR 145, 150 (Bankr ED Mich, 1982) (“The Debtors in these cases are asking the Court to enter into a revision of state law. This proposed revision of state law is properly the concern of the Michigan Legislature. If Michigan wishes to [change its foreclosure scheme,] . . . it is well within the province of the Michigan Legislature to pass such a bill and the Governor of the State of Michigan to sign it into law.”).⁷

⁷ The Legislature appears well satisfied with the current scheme. The statutes setting forth the procedure for foreclosure sales and redemption, MCL 600.3201 *et seq.*, have been amended numerous times since their enactment. Indeed, in 2009, the foreclosure scheme was amended to require mortgagees to offer to meet with mortgagors prior to foreclosure by advertisement. 2009 PA 29, 30, 31. If the Legislature believes that the foreclosure procedure is deficient and should be amended to permit a court to lengthen the foreclosure period, then the Legislature could have easily taken any of these occasions to enact an amendment. The Legislature did not do so, demonstrating that the Legislature is satisfied with the scheme’s operation. *See Dean v Chrysler Corp*, 434 Mich 655, 664-665; 455 NW2d 699 (1990) (“To the extent that prolonged acquiescence suggests legislative approval of the construction given by this Court to a statutory provision, it is reinforced when the Legislature reenacts the statutory language without change.”).

This conclusion finds further support in the nature of unjust enrichment. The doctrine implies a *contract* between the parties to pay for a benefit received by one party from the other. *Morris*, 460 Mich at 198. In other words, the law cannot conceive of a world in which one party should not have to pay the other for his assistance, and so it enforces an obligation to pay. *See id.* This does not fit the situation here. The Appellee was the highest bidder for the Property at the foreclosure sale. The Appellee offered a particular price; that price was accepted; and the Appellee acquired the Property. Aside from this statutorily governed purchase, the Appellants and the Appellee did not interact. There is no additional relationship that one would view as supporting a contract. Thus, it makes little sense for the law to imply one. *Cf. Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2003) (no claim for unjust enrichment exists where another express contract governs the parties' interactions).

Third, the Appellants' Brief fails to cite a single case in support of its (presumed) position that the Appellants received a benefit from the Appellee; the Brief does not even identify the supporting legal theory of unjust enrichment or the theory's basic requirements. The Appellee, this Court, and *Amici* can only assume that the Appellants intend to argue that the trial court properly found the Appellee liable on the unjust-enrichment claims. (Appellants' Br 29-30.) The Appellants state only that the Appellee has received a "windfall" because the Appellee purchased the Property at the foreclosure sale for less than its true value. Because the Appellants make no attempt to ground this in existing law or precedent, this Court should deem the issue of unjust enrichment waived. *Mudge*, 458 Mich at 105 (refusing to reach issue party had inadequately briefed) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority

either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.” (quoting *Mitcham*, 355 Mich at 203)).

Lastly, as noted above, the Appellants’ claimed “losses” could have been avoided if they had exercised their statutory remedy of redemption. Setting aside for the moment the impact of the Appellants’ failure to redeem, the Appellants’ “losses” are the consequence of the foreclosure and redemption procedure that the Legislature has established and that only the Legislature can change. For that reason alone, the equitable doctrine of unjust enrichment cannot provide the Appellants the relief they seek. This Court should affirm the Court of Appeals’ holding.

IV. The Appellants improperly attempt to make a new argument on appeal that the foreclosure sale should be invalidated because the redemption period in the foreclosure notice was incorrect.

Years after foreclosure, the Appellants now seek to vitiate the sale in this matter because the foreclosure notice stated that the applicable redemption period was six months, asserting that the proper period was one year. (Appellants’ Br 23.) But the Appellants have long since waived this argument because the Appellants failed to argue it before the trial court or in their first Court of Appeals briefing. *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987) (arguments not made below are waived).⁸ Instead, the Appellants have repeatedly represented to the trial

⁸ The policy behind this rule is well stated in *Napier*:

There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the

and appellate courts that six months is the proper redemption period. (*E.g.*, Pl's Ex Parte Mot for TRO and Mot to Extend the Redemption Period ¶ 14, App 19a.) The Appellants first raised this question in their motion for reconsideration in the Court of Appeals. The Court of Appeals properly refused to consider the new argument and denied the motion. This Court should do the same.

However, even if reached, this new argument does not change the result. The Appellants were not harmed by the error in stating the redemption period. The Appellee could have pursued a redemption period of only one month. MCL 600.3241(11); MCL 600.3241a. MCL 600.3241(11) provides that the redemption period for abandoned property is one month. Property is deemed abandoned where the property is not occupied. MCL 600.3241a. Here, the Property was not occupied. As the Appellants testified at trial, the Property had been vacant for two years at the time of trial. (Trial Tr 37, App 67b.) As such, the Appellants were not harmed by the Appellee's selection of the longer six-month period provided by MCL 600.3241(8). Consequently, the foreclosure sale is not void. *See Jackson Inv Corp v Pittsfield Prods, Inc*, 162 Mich App 750, 756; 413 NW2d 99 (1987) (courts should not void foreclosure sales unless the procedural defect harmed the mortgagor); 2 John G. Cameron, *Michigan Real Property* § 18.81 (3d ed 2005) (same); *Calvert Assocs v Harris*, 469 F Supp 922, 927 (ED Mich, 1979) (mortgagor not harmed where mortgagee incorrectly stated on notice that no right of redemption existed). Furthermore, even if the redemption period would have been identified as one year, this would

parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.

Napier, 429 Mich at 228-229 (citations omitted). All of these reasons apply to prohibit the Appellants' gamesmanship here.

not have changed the present situation. The Appellants had no intention of redeeming whatever the stated period. Their position throughout this litigation has been that they do not need to redeem because the foreclosure sale was invalid and resulted in a “windfall” to the Appellee. Thus, because the Appellants were not harmed, the foreclosure sale is valid. *See Jackson Inv Corp*, 162 Mich App at 756.

CONCLUSION

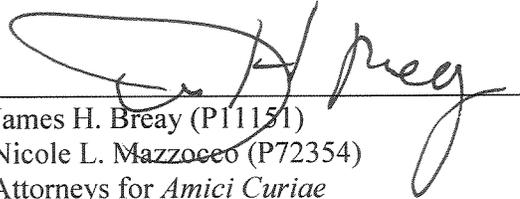
The Appellants seek to hold the Appellee responsible for the Appellants’ own errors. The Appellants failed to discharge the Mortgage when they purchased the Property. The Appellants failed to redeem the Property from the foreclosure sale. Equity cannot save them from their deliberate actions, whether the result of poor advice or not. This Court cannot ignore the statutory foreclosure process, unless fraud or irregularity in the foreclosure process is present. None is present here. This Court should affirm the Court of Appeals and hold Appellants responsible for their own decisions. As this Court stated in *Grossman v Elliott*, “[T]o hold otherwise would set a dangerous precedent which would deprive every title to real estate purchased at foreclosure sale of the finality and security clearly intended under the statute.” 382 Mich at 605-606.

Dated: August 25, 2010

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APPENDIX

Not Reported in N.W.2d, 2005 WL 3018584 (Mich.App.)
 (Cite as: 2005 WL 3018584 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Appeals of Michigan.
 CITY OF WAYNE, Plaintiff-Appellee,

v.

STURDY HOMES CORPORATION, Defendant-
 Appellant.

No. 256056.

Nov. 10, 2005.

Before: SAAD, P.J., and JANSEN and MARKEY,
 JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendant Sturdy Homes Corporation appeals as of right from a trial court order granting plaintiff City of Wayne's motion for summary disposition, ordering that plaintiff is the owner in fee simple of land described as lots 82, 83, 84, and 85 in Louis Savage Garfield Park Subdivision in Wayne County (hereinafter "lots 82-85"), and ordering that the court order be recorded with the Wayne County Register of Deeds to vest good title in plaintiff. On appeal, defendant argues that the trial court erred in granting summary disposition pursuant to adverse possession and equitable principles when it did not receive proper notice to redeem the property pursuant to MCL 211.140 and MCL 211.141,^{FN1} when the State of Michigan acquired the property through its forfeiture process. We affirm.

^{FN1}. The Legislature has extensively amended the procedure to collect taxes assessed after December 31, 1998, that are delinquent, replacing the statutes here at issue with a system of forfeiture, foreclosure, and sale. See 1999 PA 123. Some of the statutes noted in this case have been repealed effective December 31, 2003, or will be repealed

effective December 31, 2006. *Id.* (enacting §§ 4 and 5); 2001 PA 94 (enacting § 1). Statutory sections contained within the General Property Tax Act (GPTA) refer to the statutes in effect at the time the original complaint was filed, December 20, 2001. See *In re Wayne Co Treasurer Petition*, 265 Mich.App 285; 698 NW2d 879 (2005).

I

Defendant purchased lots 82, 83, 84, 85, 205, and 206, on February 7, 1972 for \$2,500. Tax rolls indicate that taxes were not paid for lots 82-85 in 1977, 1979, 1980, and 1981, but they, apparently, were paid in 1976 and 1978. In 1981, the State of Michigan acquired the property through its forfeiture process pursuant to defendant's non-redemption from a 1980 tax sale. In 1982, the Michigan Department of Natural Resources (DNR) conveyed the property to plaintiff for \$1.00. No taxes have been paid on the property since plaintiff acquired it.

On December 20, 2001, plaintiff filed a complaint to quiet title alleging that: (1) defendant at one point was the owner of a piece of property known as lots 82-85; (2) plaintiff obtained from the State of Michigan a deed to the property subsequent to the property not being redeemed; (3) plaintiff has had equitable title for several years; (4) plaintiff was in the process of selling the property for development and learned there was a cloud on the title; (5) plaintiff needs to clear the title for title insurance; and (6) plaintiff has carried the property on its tax role for several years having taxed no individual, corporation, or partnership. Defendant filed an answer to the complaint in which it asserted that it had never received notice of delinquent taxes and that plaintiff had not even claimed as such in its complaint.

Subsequently, plaintiff filed a motion for summary disposition, and contended that there were no genuine issues of material fact, and that defendant failed to state a valid defense.^{FN2} A hearing was conducted on plaintiff's motion for summary disposition, and the trial court stated that once plaintiff produces the deed as prima facie evidence the burden is on defendant to show that it did not receive notice. The trial court

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granted plaintiff's motion for summary disposition finding that defendant could not meet its burden, and further ordered that plaintiff was the owner in fee simple of lots 82-85.

FN2. We note that plaintiff did not reference which provision of the court rule its motion was brought pursuant to, but defendant treated the motion as a MCR 2.116(C)(9) motion for failure to assert a defense, but plaintiff's motion did reference "no genuine issue of material fact," which suggests the motion was brought pursuant to MCR 2.116(C)(10).

Defendant filed a delayed application for leave with this Court. This Court issued an order under MCR 7.205(D)(2), reversing the order granting plaintiff summary disposition because defendant "stated a valid defense" to plaintiff's claims (Docket No. 245828).

*2 Subsequently, defendant filed a motion for summary disposition and contended that plaintiff failed to state a cause of action and or raise genuine issues of material fact because it failed to plead or provide evidence that it complied with the statutory requirements to commence the redemption period and quiet title in itself.

Plaintiff filed a motion to amend its complaint to include adverse possession, stating that it had learned through additional discovery that it has openly and notoriously possessed the property for more than fifteen years, and contended in its brief in support that the amendment would not prejudice defendant. Thereafter, plaintiff filed a motion for summary disposition, and contended that: (1) defendant made no tax payments 1977, 1979, 1980, and 1981, at which time the State of Michigan acquired title in September 1981 through its forfeiture process; (2) the State through the DNR deeded the property to plaintiff; (3) defendant acknowledged tax deficiencies; ^{FN3} (4) plaintiff has maintained the property since it acquired title in 1982 and has listed it as plaintiff owned property; (5) laches applies; (6) Michael Tobin, an officer for defendant, stated that defendant mailed in a list of properties it wanted to pay taxes on and that at a certain point lots 82-85 were not listed, thus, defendant actively decided not to pay; ^{FN4} and (7) plaintiff has openly, notoriously and adversely possessed the

property for over twenty years having cared for it, listed it on city records, and mowed it, thus, plaintiff has acquired title through adverse possession.

FN3. Defendant in its answers to plaintiff's request for admissions admitted it did not pay taxes from 1981 to 2003, but claimed it was because it was not invoiced.

FN4. Defendant owned a significant number of properties in southeast Michigan. Tobin testified in a deposition that typically in the 1980s and 1990s defendant would allow tax deficiencies to continue for a period of two or three years on its properties, and then pay off the deficiencies and penalties during the redemption process. Apparently, each year, defendant would mail a list of its Wayne County properties to request outstanding amounts owed, and would redeem to save the properties from tax sales. Defendant's list of properties sent to Wayne County during the challenged years did not include lots 82-85.

Defendant filed a response to plaintiff's motion to amend the complaint, and argued that the adverse possession claim was not properly plead, was factually and legally void of any substance, and was futile. In addition, defendant filed a response to plaintiff's motion for summary disposition, and contended there was no notice and that the adverse possession was not pleaded properly and had no relevance to the case.

A hearing was conducted on the parties cross motions for summary disposition. The trial court granted plaintiff's motion for summary disposition, and seemed to rely on *D & W Rottschafer, Inc v. Grand Rapids*, 346 Mich. 687; 78 NW2d 624 (1956), in applying a combination of adverse possession, equitable estoppel, and laches.

II

On appeal, defendant argues that the trial court erred in granting summary disposition to plaintiff on the basis that it acquired title to the property by a combination of adverse possession, equitable estoppel, ^{FN5} and laches, ^{FN6} without formally granting plaintiff's motion to amend its complaint and allowing defendant to answer and properly oppose the complaint.

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FN5. With regard to equitable estoppel, in Conagra, Inc v. Farmers State Bank, 237 Mich.App 109, 140-141; 602 NW2d 390 (1999), this Court stated:

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.

“Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact.” *Id.* at 140-141.

FN6. Laches bars a party from bringing a delayed claim when the other party has been prejudiced by the delay, Dep't of Public Health v. Rivergate Manor, 452 Mich. 495, 507; 550 NW2d 515 (1996), and requires a showing of prejudice, the passage of time, and lack of diligence. Torakis v. Torakis, 194 Mich.App 201, 205; 486 NW2d 107 (1992).

A. Standard of Review

This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. Phillips v. Deihm, 213 Mich.App 389, 393; 541 NW2d 566 (1995). We review a trial court's equitable decisions de novo. Yankee Springs Twp v. Fox, 264 Mich.App 604, 611; 692 NW2d 728 (2004). This Court also reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. Maiden v. Rozwood, 461 Mich. 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Corley v. Detroit Bd of Ed. 470 Mich. 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evi-

dence submitted in the light most favorable to the nonmoving party. *Id.* A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); Scalise v. Boy Scouts of America, 265 Mich.App 1, 10; 692 NW2d 858 (2005). The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4); Maiden, supra at 120, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, Smith v. Globe Life Ins Co, 460 Mich. 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, Smith, supra, and the disputed factual issue must be material to the dispositive legal claims, Auto Club Ins Ass'n v State Automobile Mutual Ins Co, 258 Mich.App 328, 333; 671 NW2d 132 (2003). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. Quinto v. Cross & Peters Co, 451 Mich. 358, 362; 547 NW2d 314 (1996).

B. Motion to Amend the Complaint

*3 Defendant argues that the trial court improperly granted plaintiff's motion to amend its complaint. MCR 2.118(A)(2) states: “Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.” Further, our Supreme Court has provided that:

A motion to amend ordinarily should be granted, and denied only for particularized reasons:

“In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” [Ben P Fyke & Sons, Inc v. Gunter Co, 390 Mich. 649, 656; 213 NW2d 134 (1973), quoting Foman v. Davis, 371 U.S. 178,

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182; 83 S Ct 227; 9 L.Ed.2d 222 (1962).]

“On a motion to amend, a court should ignore the substantive merits of a claim or defense unless it is legally insufficient on its face and, thus, ... it would be ‘futile’ to allow the amendment.” *Fyke, supra* at 660. Where a plaintiff merely restates or slightly elaborates on counts or allegations already pleaded, an amendment is futile. *Dowork v. Oxford Charter Twp*, 233 Mich.App 62, 76; 592 NW2d 724 (1998).

The trial court did not abuse its discretion in allowing plaintiff to amend its complaint. There is nothing before this Court supporting that the amended complaint caused undue delay, was the result of bad faith or dilatory motive, was the result of repeated failures to cure deficiencies, caused undue influence, or was futile. The amendment was not futile as it was more than a restatement of the previous allegations because it added the adverse possession claim, which as discussed, *infra*, is a claim with merit.

Defendant also contends that if it had known the Court was considering the motion it would have presented further evidence to the contrary. However, defendant did respond to the motion. Defendant filed a response to the motion for the amended complaint and a response to the motion for summary disposition, and argued that: (1) it would be futile to add adverse possession; (2) the adverse possession claim was not properly plead; and (3) mowing the grass is not enough to support a claim for adverse possession. To the extent defendant did not raise arguments or present further evidence in its response motion, it cannot now claim reversible error on the account of its own omissions. Reversible error must be predicated on trial court error, not upon an error contributed to by the aggrieved party's plan or negligence. *Lewis v. LeGrow*, 258 Mich.App 175, 210; 670 NW2d 675 (2003). Thus, any error in this regard was contributed to by defendant's plan or negligence and is not grounds for reversal.

C. Adverse Possession

*4 Defendant argues that the trial court erred in granting summary disposition on the basis of adverse possession, equitable estoppel, and laches. The trial court, following *D & W Rottshafer, supra*, applied both adverse possession and equitable principles in granting plaintiff's motion for summary disposition.

In *D & W Rottshafer, supra*, an ejectment case, the court applied adverse possession and estoppel where the municipality had exercised acts of ownership for fifteen years via its tax deeds and more than ten years had elapsed before the claim was commenced.

We find on review de novo that the trial court erred in applying *D & W Rottshafer*, which was an ejectment case to the present situation, a adverse possession claim with a question regarding statutory notice for redemption. A court may not act in equity to avoid the application of a statute. *Stokes v. Millen Roofing Co*, 466 Mich. 660, 671; 649 NW2d 371 (2002). Rather, where a statute controls the requirements of redemption, equitable considerations are inapplicable “ ‘absent fraud, accident, or mistake.’ ” *Freeman v. Wozniak*, 241 Mich.App 633, 637; 617 NW2d 46 (2000), quoting *Senters v. Ottawa Savings Bank*, 443 Mich. 45, 55; 503 NW2d 639 (1993). The General Property Tax Act (GPTA), MCL 211.1 et. seq., controls the taxation of property and establishes the procedures through which property delinquent for taxes may be conveyed. The GPTA specifically sets forth how property conveyed through a tax deed may be redeemed, notice requirements, and what happens if the GPTA's notice requirements are not met. MCL 211.73c; MCL 211.74; MCL 211.131e; MCL 211.140; MCL 211.141.

In this case, the trial court repeatedly noted that its decision was based on equitable principles and adverse possession. Based on the record, the trial court erred in relying on equitable principles because there is a controlling statutory scheme that sets forth the requirements for redeeming property conveyed through a tax deed and what should happen if the statutory scheme's notice requirements are not met. MCL 211.73c; MCL 211.74; MCL 211.131e; MCL 211.140; MCL 211.141; Freeman, supra at 637. There have been no specific allegations of fraud, accident, or mistake raised in this case to support the reliance on equitable principles. Therefore, the use of equitable principles was error.

However, we affirm the trial court on the basis of adverse possession alone. This Court need not reverse where the trial court reached the right result for the wrong reason. *Taylor v. Laban*, 241 Mich.App 449, 458; 616 NW2d 229 (2000). We find on review de novo that plaintiff's motion for summary disposition is properly granted on the basis of adverse pos-

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session.

To support a claim for adverse possession, plaintiffs were required to show that during the fifteen-year statutory period they had actual, visible, open, notorious, exclusive, and uninterrupted possession of the property that was hostile to the owner and under cover of a claim of right. Rozmarek v. Plamondon, 419 Mich. 287, 295; 351 NW2d 558 (1984) (citation omitted). The true owner must have actual knowledge of the adverse possession, or alternatively, the possession must be so notorious as to raise the presumption to the world that the possessor claims ownership. Ennis v. Stanley, 346 Mich. 296, 301; 78 NW2d 114 (1956). Generally, the extent of the actions necessary to constitute adverse possession depends on the character of the land involved. See Dauids v. Davis, 179 Mich.App 72, 83; 445 NW2d 460 (1989). The possession must be continuous. Beecher v. Ferris, 117 Mich. 108, 110; 75 NW 294 (1898); Duck v. McQueen, 263 Mich. 325, 327-328; 248 NW 637 (1933).

*5 In plaintiff's motion for summary disposition, it contended, with regard to lots 82-85, that since September 1982:(1) it had maintained the property by virtue of cutting or mowing weeds and caring for the lawn on lots 82-85 on a continuous basis for at least twenty years; (2) listed it on its city owned property list; (3) listed it with the Register of Deeds' office as property owned by plaintiff; and (4) when inquiries were made by parties interested in acquiring said property over the last twenty years, plaintiff indicated that it was the owner. In response to plaintiff's motion for summary disposition, defendant attached no documentary evidence to dispute the supported contentions of plaintiff, and argued: (1) plaintiff did not plead proper elements and (2) periodically cutting wild grass does not constitute actual possession to constitute adverse possession (citing Bankers Trust Co v. Robinson, 280 Mich. 458; 273 NW 768 (1937)).

Plaintiff's acts of regularly maintaining the property, listing the property, and informing people interested in the property that it was plaintiff's property, openly indicated an assumption of control and was consistent with the character of possession of the property. We find that this supports that plaintiff's behavior was "actual, visible, open, and notorious."

Plaintiff's alleged possession can be construed as hostile because it was possessing the land of another up to a recognizable boundary. See Gorte v. Dep't of Transportation, 202 Mich.App 161, 170; 507 NW2d 797 (1993). There was documentary evidence supporting that plaintiffs had been mowing the disputed property for over twenty years. To support a claim of adverse possession, the "acts of possession must be open and of a hostile character, but it is sufficient if the acts of ownership are of such character as to indicate openly and publicly an assumed control or use such as is consistent with the character of the premises in question." Rose v. Fuller, 21 Mich.App 172, 175; 175 NW2d 344 (1970), citing Monroe v. Rawlings, 331 Mich. 49,52; 49 NW2d 55 (1951); Denison v. Deam, 8 Mich.App 439, 443; 154 NW2d 587 (1967). Regarding these "hostile" and "exclusive" elements, plaintiff's maintenance of the property constituted "use inconsistent with the right of the owner;" this was done without permission and would have "entitled the owner to a cause of action against the intruder." Mumrow v. Riddle, 67 Mich.App 693, 698; 242 NW2d 489 (1976). We find that plaintiff's use was exclusive and hostile.

A claimant attempting to establish adverse possession must act under a claim of right. In the context of an adverse possession claim, "claim of right" contemplates that the claimant possesses the land "with [the] intent to claim the land as his or her own, and not in recognition or subordination to [the] record title owner." Black's Law Dictionary, (6th ed.), p 170. The claimant must only intend to take title. See Smith v. Fenley, 240 Mich. 439, 441-442; 215 NW2d 353 (1927). The payment of taxes is persuasive evidence of a claim of right in an adverse possession action. See Dauids, *supra* at 85; Burns v. Foster, 348 Mich. 8, 15; 81 NW2d 386 (1957); Gardner v. Gardner, 257 Mich. 172, 176; 241 NW2d 179 (1932). Our Supreme Court in McVannel v. Pure Oil Co, 262 Mich. 518, 528; 247 NW2d 735 (1933), stated that "one in possession of land, claiming title, is bound to pay the taxes upon it" (citation omitted). We note that although plaintiff was exempt from taxes, it carried the property on its tax roll, and was listed as the owner for tax purposes, but as exempt. And, that the fact that defendant was not paying taxes further supports that plaintiff was in possession of the land. The fact that plaintiff was the owner for tax purposes would be persuasive evidence on a claim for adverse possession. However, that the claimant paid taxes (or carried on the tax roll as the owner in this case) is but

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one of many factors that may support a claim of adverse possession, and is not itself conclusive. See e.g. *Monroe, supra* at 51-52; *Corby v. Thompson*, 196 Mich. 706, 711; 163 NW2d 80 (1917). Here, plaintiff's actions in caring for the land and mowing the weeds to keep the property compliant with city ordinances, in addition to carrying the property as the owner on its tax roll, demonstrates its intention to claim the land as its own.

*6 Furthermore, plaintiff satisfied the requirement that it had actual, visible, open, notorious, exclusive, and uninterrupted possession that was hostile and under claim of right continuously beyond the statutory period of fifteen years since they have been listed as the tax owner and have mowed the lawn and cared for the land for a period of more than twenty years.

In *Davids, supra* at 72, this Court found that the plaintiff had established fee simple title of an undeveloped parcel of property by adverse possession where he took under color of title, paid property taxes, posted "no trespass" signs, built a fence, and placed posts and chains across the entrance. *Id.* In this case, plaintiff took possession of lots 82-85 under color of title, was listed as the owner for tax purpose (carried the property on its tax roll), informed those inquiring about the land that it was plaintiff's land, and regularly maintained the lawn for a period of more than twenty years. Plaintiffs' acts were of such character as to indicate it openly and publicly an assumed control or use consistent with the character of the disputed property. *Monroe, supra* at 52; *Denison, supra* at 443.

Defendant argues that adverse possession has not been established pursuant to *Bankers Trust Co of Muskegon, supra* at 464-465, which held that the plaintiff's occasional mowing of the defendant's grass did not reasonably apprise the defendant that another was assuming control of the property. However, there is nothing plaintiff's documentation supporting that the grass mowing was sporadic and was coupled with the property being listed as plaintiff's property on the tax roll, thus, we find no merit to this argument.

Plaintiff's motion for summary disposition was supported by documentation, which established its adverse possession claim. See *MCR 2.116(G)(4); Maiden, supra* at 120; *Smith, supra* at 455. The party

opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*; and the disputed factual issue must be material to the dispositive legal claims, *Auto Club Ins Ass'n, supra* at 333; 671. The existence of a disputed fact must be established by admissible evidence. *MCR 2.116(G)(6); Maiden, supra* at 121. Defendant presented no documentary evidence in response to plaintiff's motion for summary disposition, in order to raise a genuine issue fact. As such, we find, on review de novo, summary disposition is properly granted in favor of plaintiff on the basis of adverse possession.^{FN7}

^{FN7.} Because we find that summary disposition was proper on the basis of adverse possession we need not address defendant's arguments that the trial court erred in denying defendant's motion for summary disposition and in granting plaintiff's motion because proper notice was not given for the redemption period.

Affirmed.

Mich.App.,2005.
City of Wayne v. Sturdy Homes Corp.
Not Reported in N.W.2d, 2005 WL 3018584
(Mich.App.)

END OF DOCUMENT

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UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
 In re Elmer M. DOBSON TRUST. Daniel W. Dobson and Steven M. Dobson, Petitioners-Appellees,
 v.
 Southern Michigan Bank & Trust, Respondent-Appellee,
 and
 Autumn L. Ivey and Charity Ivey Taylor, Respondents-Appellants.
Docket No. 285248.

Jan. 19, 2010.

West KeySummary

Trusts 390  119

390 Trusts

390II Construction and Operation

390II(A) In General

390k119 k. Evidence to Aid Construction.

Most Cited Cases

Trial court did not clearly err in determining that based on Trust documents a family trust was intended to be funded before a marital trust. The former trust department manager at the bank where the trust was funded testified that he set up the trust as a family trust because that is how he believed the trust documents directed it be done. An expert witness testified that based upon the Trust document language the Trust should have been set up by the bank as a family trust. The drafter of the Trust documents testified that the original trustee's primary focus in setting up the Trust was to avoid paying estate taxes.

Branch Probate Court; LC No. 06-032131-TV.

Before: SERVITTO, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

*1 Respondents Autumn Ivey and Charity Taylor, hereafter respondents, appeal by right from the April 16, 2008, judgment ordering distribution of Elmer Dobson's estate pursuant to the provisions set forth in the family trust. We affirm.

The Elmer M. Dobson Trust ("Trust") was established in 1975 and amended in 1976. Under the terms of the Trust, upon Elmer Dobson's death in 1986, his spouse, Dorothy Dobson, and the Southern Michigan Bank and Trust ("Bank") became the successor co-trustees of the Trust. Dorothy Dobson resigned as co-trustee in 1995, leaving the Bank as the sole trustee of the Trust. In 2001, at Dorothy Dobson's request, all assets (including real properties) in the Trust were transferred into an account in the name of the Dorothy Dobson Trust. Upon Dorothy Dobson's death in 2005, most of the funds held in the name of the Dorothy Dobson Trust were distributed pursuant to the trust documents-primarily to respondents. In 2006, petitioners sought to remove or surcharge the Bank as a trustee for breach of the Trust.

Petitioners' position throughout this matter was, essentially, that the Bank improperly funded a separate marital trust fund (using the Trust assets) upon Elmer's death, when, pursuant to section 11 of the Trust, it was supposed to have used the Trust assets to first fund a separate family trust. According to petitioners, the Bank then improperly allowed Dorothy Dobson to withdraw the Trust assets from the marital trust, thereby breaching its duty to act in the best interests of the Trust beneficiaries. The Bank denied any wrongdoing and respondents agreed with the Bank's position. After a hearing held on the matter, the trial court entered a judgment distributing the Trust assets, in part, to petitioners. This distribution appears to have been based on a finding that the Trust assets had not been dispersed in a manner consistent with Elmer's intentions and the Trust language; i.e. that the Trust assets should have been used to fund the family trust first and the assets then distributed according to additional Trust language. Respondents appeal the judgment.

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On appeal, respondents first argue that section 11 of the Trust is unambiguous and that the plain language of the Trust instrument shows that Elmer's intent was to first fund the marital trust and to only place the residual amount into the family trust. We disagree.

We review the language used in trusts de novo as a question of law, *In re Reisman Estate*, 266 Mich.App. 522, 526, 702 N.W.2d 658 (2005), while we review the trial court's findings of fact under the clearly erroneous standard, *In re Coe Marital and Residuary Trusts*, 233 Mich.App. 525, 531, 593 N.W.2d 190 (1999). "The rules of construction applicable to wills also apply to the interpretation of trust documents." *Reisman*, 266 Mich.App. at 527, 702 N.W.2d 658. "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Allen Estate*, 150 Mich.App. 413, 416, 388 N.W.2d 705 (1986). Where " 'there is no patent or latent ambiguity in the provisions of a will, the intention to be ascribed to the testator is that intention demonstrated in the will's plain language.' " *In re Dodge Trust*, 121 Mich.App. 527, 542, 330 N.W.2d 72 (1982), quoting *In re Willey Estate*, 9 Mich.App. 245, 249, 156 N.W.2d 631 (1967). "A court may not construe a clear and unambiguous will in such a way as to rewrite it," *In re Allen Estate*, 150 Mich.App. at 417, 388 N.W.2d 705, and each word should be given meaning, where possible, *Detroit Bank and Trust Co. v. Grout*, 95 Mich.App. 253, 268-269, 289 N.W.2d 898 (1980). "However, presence of an ambiguity requires a court to look outside the four corners of a will in order to carry out the testator's intent." *In re Kremlick Estate*, 417 Mich. 237, 240, 331 N.W.2d 228 (1983). Accordingly, under such circumstances, a court may establish intent by considering surrounding circumstances and rules of construction. *Id.* "[We have] held that in interpreting contracts where an ambiguity *may exist*, extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the actual intent of the parties; and, (3) to indicate the actual intent of the parties as an aid in construction." *Id.* at 241, 331 N.W.2d 228.

*2 Here, the plain language of the Trust provides that the marital trust would be funded up to the marital deduction under the Federal Estate Tax Law "if and to the extent that the Federal Estate Tax will thereby be reduced." *Random House Webster's College Dic-*

tionary (1997) defines "if" as meaning: "in case that; granting or supporting that; on condition that." The "if" in this provision thus creates a necessary condition that must be satisfied before the marital trust can be funded. Thus, the plain language of the Trust provides that the marital trust would be funded on the condition that it would result in the federal estate tax being reduced. *In re Dodge Trust*, 121 Mich.App. at 542, 330 N.W.2d 72. Because the marital trust would only be funded on the condition that federal estate tax would be reduced, the plain language of the Trust provides that the family trust must be funded first, up to the point where federal estate tax would begin to be incurred, then the marital trust would be funded only "if" and to the extent that federal estate tax would be reduced. *Id.* This provision is not ambiguous.

Respondents also argue that the extrinsic evidence established Elmer's intent that the marital trust be funded first. Though we need not look to extrinsic evidence to determine Elmer Dobson's intent, due to the unambiguous language employed in the Trust documents, we will briefly consider this argument.

James Cole, the former trust department manager at the Bank, testified that he initially set up the Trust, after Elmer Dobson died, as a family trust because that is how he believed the Trust documents directed that the Trust be set up, and because it would not make sense to try to take advantage of the federal estate tax exemptions and to fund a marital trust. The marital trust was never set up while he worked at the Bank. John Bos, an attorney admitted as an expert in estate planning, tax issues, and trust administration, testified that based upon the Trust language, the Trust should have been set up by the bank as a family trust. Mr. Bos further testified that the type of trust funding found in the Trust at issue (first funding a family trust with the amount that would escape taxation, then funding a marital trust with the remainder) was formatted in a fairly common arrangement used for estate tax planning. Wayne Haupt, the drafter of the Trust documents, testified that Elmer Dobson's primary focus in setting up the Trust was to avoid paying estate taxes. Petitioner Steven Dobson also provided testimony that reflected Elmer's intention to have all his children share equally in his estate. The above testimony supported an inference that Elmer wanted to have the family trust funded first where his property would be equally distributed to his children,

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while still providing for his wife, without funding the marital trust, unless it would reduce the federal estate tax. Based on the foregoing, we find that the trial court did not clearly err when it determined, based on the evidence, that Elmer intended the family trust to be funded first. *In re Coe Marital and Residuary Trusts*, 233 Mich.App. at 531, 593 N.W.2d 190.

*3 Respondents next argue on appeal that because they are not distributees within the clear meaning of MCL 700.1103(p), and they received no improper distributions under MCL 700.7410, they should not be required to give up the property they received. We disagree.

The trial court ordered that the property be placed in a constructive trust and be distributed according to its ruling. A constructive trust is an equitable remedy. *In re Swantek Estate*, 172 Mich.App. 509, 517, 432 N.W.2d 307 (1988). We review equitable decisions de novo and findings of fact in support of the decision for clear error. *Webb v. Smith (After Remand)*, 204 Mich.App. 564, 568, 516 N.W.2d 124 (1994).

Constructive trusts are creatures of equity and their imposition makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by operation of law. Constructive trusts, while infinite in their variety, are imposed only where it would be inequitable to do otherwise. [*Arndt v. Vos*, 83 Mich.App. 484, 487, 268 N.W.2d 693 (1978) (internal citations omitted).]

Actions that would warrant a constructive trust remedy are: fraud, misrepresentation, concealment, mistake, undue influence, duress, and breach of fiduciary or confidential relations. *Chapman v. Chapman*, 31 Mich.App. 576, 580, 188 N.W.2d 21 (1971). However, property need not be wrongfully acquired for imposition of a constructive trust. *Kent v. Klein*, 352 Mich. 652, 657, 91 N.W.2d 11 (1958). Rather, it is sufficient that the property is unconscionably withheld or that a person is unjustly enriched *Id.* Unjust enrichment occurs when (1) the defendant received a benefit from the plaintiff, and (2) it would be inequitable to the plaintiff if the defendant retained the benefit. *Belle Isle Grill Corp. v. Detroit*, 256

Mich.App. 463, 478, 666 N.W.2d 271 (2003).

[W]henever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. *Bruso v. Pinquet*, 321 Mich. 630, 639, 33 N.W.2d 100 (1948).

*4 We first note that it is irrelevant whether respondents perfectly fit within the confines of MCL 700.1103(p) and MCL 700.7410, because the trial court in equity had jurisdiction to reach the property even though the property was held by subsequent parties, *Bruso*, 321 Mich. at 639, 33 N.W.2d 100; *Kent*, 352 Mich. at 658, 91 N.W.2d 11, and to reach it in whatever form that that property was then held, *In re Swantek Estate*, 172 Mich.App. at 517-518, 432 N.W.2d 307. Moreover, we conclude that the trial court correctly ruled that petitioners' share of the property should be placed in a constructive trust, because respondents were unjustly enriched, and if petitioners' share of their property was not returned to them by respondents, that property would be unconscionably withheld. *Belle Isle Grill Corp.*, *supra* 256 Mich.App. at 478, 666 N.W.2d 271; *Kent*, 352 Mich. at 658, 91 N.W.2d 11.

Respondents also argue that it is inequitable for them to have to return the property distributed to them from Dorothy's estate when the Bank was completely responsible for any error, and Dorothy detrimentally relied on the Bank's statement that the Trust was a marital trust in formulating her own estate plan and not exercising her right to make withdrawals from the family trust. Respondents appear to be making a claim for innocent misrepresentation, although they do not set forth any case law in their brief regarding the same. We will not search for authority to sustain

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or reject a party's position, and the failure to cite authority in support of an issue results in it being deemed abandoned on appeal. Davenport v. Grosse Pointe Farms Bd. of Zoning Appeals, 210 Mich.App. 400, 405, 534 N.W.2d 143 (1995).

Nevertheless, innocent misrepresentation exists when a "party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." Forge v. Smith, 458 Mich. 198, 211-212, 580 N.W.2d 876 (1998). Further, the false representation must be made in connection with the making of a contract, and the plaintiff and the defendant must be in privity of contract. M & D, Inc. v. McConkey, 231 Mich.App. 22, 28, 585 N.W.2d 33 (1998). Here, respondents' apparent claim of innocent misrepresentation fails because the misrepresentation did not cause Dorothy to lose a portion of the property and the Bank to gain that portion of the property. *Id.* Moreover, the alleged false representation was not made in connection with the making of a contract, and Dorothy was not in privity of contract with the Bank in relation to the Trust. Dorothy was merely a beneficiary at the time the Bank indicated that the Trust was a marital trust. Respondents' argument fails.

Respondents next argue that the Bank breached its fiduciary duties and because respondents, as third parties, did not participate in the breaches, they should not be liable for the breaches. This issue, and the remainder of the issues raised by respondents, were not presented in their statement of questions presented, other than to the extent of the assertion that the Bank was completely responsible for any errors. "An issue not contained in the statement of questions presented is waived on appeal." English v. Blue Cross Blue Shield of Mich., 263 Mich.App. 449, 459, 688 N.W.2d 523 (2004). Regardless, we find that the issue that respondents should not be liable for any breach of fiduciary duty has no merit because, as already stated above, property need not be wrongfully acquired for imposition of a constructive trust, only that it is unconscionably withheld. Kent, 352 Mich. at 658, 91 N.W.2d 11.

*5 Respondents also argue that laches should result in the Bank being surcharged the value of the property rather than respondents having to give back part of the property because the Bank took no action to set aside the transfers for five years. Laches is an equita-

ble affirmative defense that is applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. Yankee Springs Twp. v. Fox, 264 Mich.App. 604, 611, 692 N.W.2d 728 (2004). The unreasonable delay must cause a change in a material condition, which results in prejudice to the other party. *Id.* at 612, 692 N.W.2d 728. The defendant bears the burden of proving that a lack of due diligence by the plaintiff to file a claim caused him prejudice. *Id.* Here, the Bank did not unreasonably delay the filing of a claim against Dorothy's trust because the Bank did not know that it made a mistake in interpreting the language of the Trust. Moreover, respondents have not proved prejudice. *Id.* at 612, 692 N.W.2d 728. Based on the foregoing, we find that respondents' argument has no merit.

Finally, respondents argue that the Bank should be estopped from initially asserting that there was no improperly distributed property, then subsequently arguing that if property was improperly distributed, respondents should return the property, rather than the Bank being surcharged for the value of the property. Respondents cite Aiken v. Gonser, 342 Mich. 29, 35, 69 N.W.2d 180 (1955), and Baios v. Clark, 304 Mich. 159, 163, 7 N.W.2d 255 (1943), in support of their position. The instant matter is distinguishable from Aiken and Baios.

In Baios, 304 Mich. 159, 7 N.W.2d 255, an insurance company concealed the existence of an insurance policy for a period of time, and then sought to avoid liability by relying upon a provision in the policy that it had formerly claimed was nonexistent. Our Supreme Court held that, "[h]aving in bad faith denied the existence of the policy, the Insurance Company was estopped from asserting or relying upon any limitation in the policy affecting the time within which suit should be brought." *Id.* at 163, 7 N.W.2d 255. Here, on the other hand, the Bank did not argue that there was no Trust, then later try to take advantage of a Trust provision to absolve itself of some liability. Rather, the Bank argued that it properly interpreted the language of the Trust, and thus properly distributed the property in the marital trust. It was only then that the Bank raised an alternative argument-that if the trial court found that the Bank improperly interpreted the Trust, respondents should return the improperly distributed property rather than the Bank being surcharged for the value of the prop-

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erty. These arguments are not contrary to each other.

In *Aiken*, 342 Mich. at 35, 69 N.W.2d 180, the plaintiffs lived under and acquiesced in the terms of a will, (including dividing property under the will terms) for approximately 30 years. They then challenged the property division under the will. Our Supreme Court determined that, “plaintiffs may not now deny the validity of the division of the property under the terms of the will which has been acquiesced in for some 30 years.” Again, the facts in the instant matter are dissimilar. The Bank maintained its primary position that it properly interpreted and administered the Trust throughout this litigation. That the Bank offered an opinion as to what the proper remedy should be if the trial court determined that it had misinterpreted the Trust did not alter, and was not inconsistent with, its primary position. Respondents' estoppel argument fails. The petitioners-appellees, being the prevailing parties, may tax costs pursuant to MCR 7.219.

*6 Affirmed.

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(Cite as: 2008 WL 4684160 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Nancy D. DOTY, f/k/a Nancy D. Eby, Plaintiff-
Appellant,
v.
Lawrence J. EBY, Defendant-Appellee.
Docket No. 279665.

Oct. 23, 2008.

Oakland Circuit Court; LC No. 82-249995-DM.

Before: SERVITTO, P.J., and DONOFRIO and
FORT HOOD, JJ.

PER CURIAM.

*1 This Court granted leave in this case to consider whether the trial court's order denying a motion for reinstatement of arrearages should be upheld. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Preliminarily, we note that the designated plaintiff, Nancy D. Doty, is deceased. Her widower, Donald V. Doty, is pursuing this claim. Although he has not been substituted as a party, the trial court did not find this irregularity significant below, noting that the matter could be easily remedied. Following the trial court's ruling, an estate was opened and Mr. Doty was named personal representative. Absent prejudice to defendant, substitution could now be accomplished pursuant to MCR 2.202(A)(1)(b). For the reasons stated below, we conclude that defendant would suffer no prejudice.

Defendant failed to pay support in accordance with a 1986 order modifying a consent judgment of divorce.

After he evaded payment for many years, a Florida court issued an income deduction order on May 5, 2000, requiring defendant's employer to deduct \$125 per month toward child support arrearages. However, the Florida court issued an order on September 20, 2004, setting the arrearages at \$0. This action was apparently based on the closure of the Oakland County Friend of the Court's file after Nancy Doty's death. On September 30, 2005, Mr. Doty secured a probate court order assigning the arrearages to him, and he then pursued recovery. However, on November 14, 2006, the Florida Attorney General's Office advised that Florida had closed the case because Michigan was treating the arrearages as having been paid in full. Plaintiff's counsel in Florida therefore, in essence, advised plaintiff to pursue reinstatement of the arrearages in Michigan so that he could then pursue enforcement in Florida. On February 6, 2007, plaintiff moved to reinstate the arrearages. The trial court denied the request based on the doctrine of laches.

In Twp. of Yankee Springs v. Fox, 264 Mich.App 604, 611-612; 692 NW2d 728 (2004), this Court stated:

The doctrine of laches is concerned with unreasonable delay that results in "circumstances that would render inequitable any grant of relief to the dilatory plaintiff." In re Contempt of United Stationers Supply Co., 239 Mich.App 496, 503-504; 608 NW2d 105 (2000). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. Gallagher v. Keefe, 232 Mich.App 363, 369; 591 NW2d 297 (1998). Laches does not apply unless the delay of one party has resulted in prejudice to the other party. City of Troy v. Papadelis (On Remand), 226 Mich.App 90, 97; 572 NW2d 246 (1997). "It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches." Id., quoting Great Lakes Gas Transmission Co. v. MacDonald, 193 Mich.App 571, 578; 485 NW2d 129 (1992). The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant. Gallagher, supra, 369-370.

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*2 The trial court found that defendant would be prejudiced by reinstatement of the arrearages because he had relied on the cancellation for three years, and reinstatement would cause undue hardship. We conclude that the trial court clearly erred in making this finding. See *Twp. of Yankee Springs, supra* at 611. In concluding that defendant's reliance on the cancellation of arrearages amounted to prejudice, the trial court impermissibly equated the passage of time with prejudice. Moreover, the finding that defendant would suffer hardship was unsupported; there was no showing of hardship apart from having to pay a debt that defendant did in fact owe. Accordingly, the doctrine of laches does not apply.

We note that the amount of the arrearages is not clear based on the record, and there has been no accounting of the payments that defendant made after entry of the withholding order. Accordingly, a determination of the amount of arrearages owing must be made on remand.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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