STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM COURT OF APPEALS

CENTER WOODS, INC., a Michigan Nonprofit Corporation,

Plaintiff/Appellant,

v

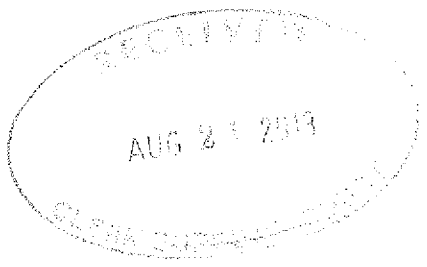
RES-CARE PREMIER, INC., a Delaware Corporation,

Defendant/Appellee.

Michigan Supreme Court No. 144721

SUPPLEMENTAL BRIEF ON APPEAL PURSUANT TO JULY 26, 2013 ORDER- Appellant

ORAL ARGUMENT REQUESTED



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STATE OF MICHIGAN
IN THE SUPREME COURT

SCOTT and JEANNE WOODBURY,

Plaintiffs,
and

CENTER WOODS, INC., a Michigan Nonprofit Corporation,

Plaintiff/Appellant,

v

RES-CARE PREMIER, INC., a Delaware Corporation,

Defendant/Appellee
and

RUTH AVERILL,

Defendant.

Michigan Supreme Court No. 144721
COA Case No.: 297819
Saginaw CC No.: 09-006758-CH-4

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PLAINTIFF/APPELLANT'S CENTER WOODS, INC.'s SUPPLEMENTAL BRIEF ON APPEAL PURSUANT TO JULY 26, 2013 ORDER

ORAL ARGUMENT REQUESTED

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The facts of this case remain unchanged from the first briefing in this matter. Plaintiff/Appellant Center Woods, Inc., relies on its original Brief with regard to the facts and arguments made. With that being said, a short summary follows.

Center Woods, Inc., ("Center Woods" or "Corporation") formed as a non-profit corporation in order to handle the administrative and maintenance needs of a fourteen lot subdivision. As families moved in and out of the subdivision, over time, the responsibilities for maintaining the corporate paperwork passed by virtue of a box of documents typically kept in a garage or basement.

The Corporation had meetings as necessary, collected dues annually, maintained a bank account throughout the history of the Corporation, provided annual accountings of its expenditures, regularly contracted for services for the maintenance of its property, it received notices of the sale of homes in Center Woods as they were being sold, and it owned and maintained assets including the common areas of the subdivision, the private roads, and signage. The recorded Building and Use Restrictions affecting the subdivision grant Center Woods a right of first refusal to purchase any home sold in the subdivision.

While it continued to conduct business in the ordinary course, Center Woods failed to pay $20 to the State of Michigan, as well as the accompanying one page form (Michigan Annual Report or "MAR"), and was dissolved by operation of MCL §450.2922.

During the period of dissolution, Defendant Ruth Averill sold her home without providing notice and a right of first refusal to Center Woods. Averill notified the Corporation of the sale after the closing. This suit followed. Center Woods prevailed in the Trial Court and lost in the Court of Appeals.

STATEMENT OF QUESTIONS INVOLVED

I. Does §925(2) of the Nonprofit Corporation Act ("NCA"), MCL 450.2101 et seq., apply retroactively or prospectively to validate "all contracts entered into and other rights acquired" during dissolution?

Plaintiff/Appellant Would Answer:	Retroactively
Trial Court Would Answer:	Retroactively
Court of Appeals Would Answer:	Prospectively

II. Does renewal of a corporation pursuant to §925 permit an administratively dissolved corporation to enforce contracts and rights not related to winding-up in light of MCL 450.2833 and MCL 450.2834?

Plaintiff/Appellant Would Answer:	Yes
Trial Court Would Answer:	Yes
Court of Appeals Would Answer:	No

III. Did *Bergy Bros., Inc. v Zeeland Feeder Pig, Inc.*, 415 Mich 286; 327 NW2d 305 (1982), correctly interpret MCL 450.1925, the analogous provision in the Business Corporation Act, MCL 450.1101 et seq?

Plaintiff/Appellant Would Answer:	Yes
Trial Court Would Answer:	Yes
Court of Appeals Would Answer:	No

IV. Is the common-law doctrine of corporation by estoppel applicable here?

Plaintiff/Appellant Would Answer:	Yes
Trial Court Would Answer:	Yes
Court of Appeals Would Answer:	No

V. Were Center Woods' rights to a thirty day notice of the sale of #2 Center Woods and the right of first refusal "acquired" during the interval of Center Woods' dissolution?

Plaintiff/Appellant Would Answer:	Yes
Trial Court Would Answer:	Yes
Court of Appeals Would Answer:	No

VI. If Center Woods' rights to a thirty day notice of the sale of the property at issue and the right of first refusal were NOT "acquired" during the interval of Center Woods' dissolution, whether those rights were nevertheless enforceable after Center Woods renewed its corporate good standing pursuant to §925?

Plaintiff/Appellant Would Answer:	Yes
Trial Court Would Answer:	Yes
Court of Appeals Would Answer:	No

VII. What remedy is available to Center Woods against the seller and purchaser of the property at issue, given that the sale was finalized during the interval of Center Woods' dissolution?

Plaintiff/Appellant Would Answer:	All real property remedies
Trial Court Would Answer:	Rescission
Court of Appeals Would Answer:	None

VIII. Whether Res-Care preserved any objection to the trial court's choice of remedy in this case?

Plaintiff/Appellant Would Answer:	No
Trial Court Would Answer:	No
Court of Appeals Would Answer:	Yes

LAW AND ARGUMENT

I. Does §925(2) of the Nonprofit Corporation Act ("NCA"), MCL 450.2101 et seq., apply retroactively or prospectively to validate "all contracts entered into and other rights acquired" during dissolution?

> §925(2) Upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable.

A. Plain meaning

In order to give meaning to the words "as though a dissolution or revocation had not taken place" one must look back to the period during which the dissolution or revocation occurred, the past. The statute heals any defect which occurred prior to reinstatement. Looking back at a corporation's history, upon reinstatement, if there is any period of time where one applies rules or restrictions of dissolution upon that corporation, that application ignores the specific language of §925. Were this not the case, the language might read: From this point forward or from the time of the filing forward, similar to other prospective statutes. §925 reads "as though a dissolution or revocation had not taken place" and the only period of time where the referenced dissolution or revocation occurred, is in the past. The court recognizes an exception to the general rule for statutes which are remedial or procedural in nature. *White v General Motors*, 431 Mich 387; 429 NW2d 576 (1987).

§925 goes on to state: ". . . **and** all contracts entered into and other rights acquired **during the interval** shall be valid and enforceable" (emphasis added). The interval in question is the period of dissolution, which again occurred in the past. The statute, by its own terms, is backward looking. §925 deals with events which have occurred in the past. It only speaks to

events of the past and therefore applies to past events. In other words, it is a retroactive statute. The Legislature may, by retroactive statutes, ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality. *Stott v Stott Realty Co.*, 288 Mich 35, 46; 284 NW 635 (1939).

B. Enactment vs. enforcement of a retroactive statute

Prospective statutes are more typical. *Brewer v AD Transport Express*, 486 Mich 50; 782 NW2d 475 (2010). The Legislature also regularly creates retroactive statutes. There is a difference between the creation of a statute which applies retroactively and a statute in place which applies to past events. The general rule frowning on retrospective application has been applied in cases where a new statute abolishes an existing cause of action. *Karl v Bryant Air Conditioning*, 416 Mich 558; 331 NW2d 456 (1982). In this case, we are not dealing with whether a statute enacted effects existing rights. Instead we are dealing with an existing statute which applies to the past. §925 was enacted and in effect prior to the events surrounding this case. The Nonprofit Corporation Act was enacted in 1982 and was directly modeled after the Business Corporation Act which was enacted in 1972. However, the idea of reinstatement of a corporation existed in 1931, see *Stott, supra*. This Court has acknowledged remedial nature of the type of language contained in §925. *Id.* The reinstatement rule existed prior to the Building and Use Restrictions in which the notice and contract rights arise. Because this rule of §925 existed prior to the events described in this case the parties were on notice that reinstatement could occur. Reinstatement did occur. Here, the retroactive statute existed when Defendant Averill buys, occupies, participates, then sells her home. Averill's rights have been unaffected by the retroactive nature of the statute.

II. Does renewal of a corporation pursuant to §925 permit an administratively dissolved corporation to enforce contracts and rights not related to winding-up in light of MCL 450.2833 and MCL 450.2834?

A. The interaction between §§833, 834, and 925

The Court of Appeals decision in this matter must be overturned based on §833, which states in pertinent part, "a dissolved corporation shall continue its corporate existence". The Court of Appeals rendered its decision in direct opposition of this statutory language, claiming the Corporation ceased to exist.

While the issue of "existence" seems to be have been resolved, the limits §833 places on corporations remains unresolved. §833 restricts a dissolved corporation. The dissolved corporation:

> ". . . shall not conduct affairs except for the purpose of winding up its affairs by: (a) Collecting its assets. (b) Selling or otherwise transferring, with or without security, assets which are not to be distributed in kind pursuant to §855. (c) Paying its debts and other liabilities. (d) Doing all other acts incident to liquidation of its affairs".

The essence of §833 is that the corporation sells off or distributes all of its assets and pays off its debts and obligations. It is not until this act of liquidation is completed that the corporation ceases to exist. When the corporation has no more assets and its officers have no more responsibilities, the corporation is no more. But, until then, the corporation continues.

To make this clear - the Legislature enacted §834. §834 clarifies that upon dissolution the nature of directorships is not altered; title to the corporation's assets remains with the corporation; voting and transfers remain the same; a corporation may sue and be sued. The

corporation can also receive notice of a suit just like any other defendant. §834 allows notice in the form of service of process to be made on the corporation.

There appears to be no dispute that the corporation can perform any act so long as the act is incident to liquidation. §833(d) states as much: (d) Doing all other acts incident to liquidation of its affairs.

The corporation can take any action, so long as that action is in furtherance of wind up. It is fair to say then that it is not the status of the corporation as a "dissolved" corporation, which limits its ability to act. It is not corporate status which limits it, but rather an analysis of the action the corporation seeks to take, which is limited, and whether or not that action furthers liquidation.

The corporation can take, receive, or do anything it could otherwise do in liquidating. It could, for example, receive notice or exercise a right of first refusal if those acts furthered liquidation under §833. It is not the capability of the corporation, but the nature of the action which matters. The corporation is capable.

Our analysis cannot stop at §833. Statutes are to be read in context and §§833 and 834 must be read together.

§833 speaks generally to those acts which the corporation may take in winding down its affairs, liquidating its assets, and paying its bills (and only then ceasing to exist). By contrast, §834 is more specific about those things which the corporation is allowed to do and how it is allowed to function during dissolution. But §834 begins by subjecting itself to §833. §834 subjects itself to §833 and is therefore read in light of the limits of §833. §834 begins: "Subject to §833 and except as otherwise provided by court order. . .". It is §833 then which we must

contend with, in order to determine the rights and responsibilities of a corporation in dissolution. But, just as §833 cannot be read without §834, those two statutues as they relate to reinstatement, cannot be read without §925.

Most specifically with regard to corporate renewal, §925 permits administratively dissolved corporations to enforce any contract as though it had never been dissolved. The only way to give meaning to the words "as though a dissolution or revocation had not taken place" is to both apply the statute retroactively then to apply it to those acts specifically outside §§833 and 834.

§§833 and 834 already authorize the corporation to act in conformity with wind down. §§833 and 834 already allow the corporation to sue and be sued, to liquidate property, to vote, to pay debts and liabilities, and to do any other act liquidating the affairs of the corporation.

If it is the case that a corporation may only act in conformity with §833, specifically that its actions are limited to wind down and liquidation, then there is no need for §925(2) to exist, at all. Any action of the corporation would already be specifically authorized under §833. If it is the case that corporations in dissolution can only act in conformity with the restrictions of §833, then §925(2) is meaningless. There would be no contracts nor rights acquired during the interval which were ever of questionable validity. There could only be specifically and previously authorized rights and contracts under §833.

If it is the case that a corporation may only act in conformity with §833 once it dissolves, actions inconsistent with liquidation are invalid and unenforceable. This throws into question any contract or action in which the corporation engages during the period, and it specifically ignores §§925(1) and 925(2). §833 cannot be read by ignoring §925.

B. Application in this case

Since we are not looking at the status of the Corporation as "dissolved" in order to determine its rights and responsibilities, but in fact we are looking at the acts the Corporation takes and whether those acts are valid actions of a corporation in dissolution, the notice which was to be provided by Averill could have and should have been given to Center Woods and Center Woods could receive that notice. Theoretically, and assuming that §833 exists (without §925(2)), the Corporation would then be incapable of acting on its right of first refusal, because it was "dissolved" (and then limited by §833).

C. The ultimate act in contravention of §833

If a corporation or entity was only permitted to conduct "winding-up" activities pursuant to §833, then how could a corporation be permitted to renew its existence? Is not the ultimate act in opposition to liquidation the act of renewal itself?

III. Did *Bergy Bros., Inc. v Zeeland Feeder Pig, Inc.*, 415 Mich 286; 327 NW2d 305 (1982), correctly interpret MCL 450.1925, the analogous provision in the Business Corporation Act, MCL 450.1101 et seq?

In *Bergy Bros.*, the defendants incorporated a pig farm in 1967 and operated that farm continuously into the late '60s and early '70s. The corporation, Zeeland Feeder Pig, failed to pay its annual fee and submit its MAR and was dissolved on May 15, 1971, because of that failure. Following the dissolution the corporation, operating in the ordinary course, ordered and took delivery of pig feed from *Bergy Bros.* The plaintiff *Bergy Bros.* maintained that when the corporation failed to file its annual report and pay its fee, that its corporate existence was extinguished and that the officers and directors of the pig farm became personally liable for the debts and obligations of the dissolved corporation. The statute, at that time, allowed corporations

to be sued, but not to maintain suit upon dissolution. *Bergy Bros.*, at 293. The *Bergy Bros.* court dealt with a reinstatement statute which said:

> "Sec. 2. Upon compliance with the provisions of this act, the rights of such corporation shall be the same as though no forfeiture had been operative and all contracts entered into during such intervals shall become valid." (*Id.* at 294)

The *Bergy Bros.* decision relied upon the de facto status of the corporation during the dissolution in order to hold that corporate shareholders were not converted to partners upon dissolution of the corporation. Under partnership law, general partners would be liable for acts of the partnership. MCL 449.15(b)

Bergy Bros. relied on *Stott, supra* and held that as long as the corporation remained eligible for reinstatement, it maintained its de facto existence. *Bergy Bros.*, at 295. The court in *Bergy Bros.* and in relying on *Stott*, declared that the effect of the reinstatement statute was to make the voidance of the charter more in the nature of a suspension of corporate privileges than an absolute termination of corporate existence.

The *Bergy Bros.* court used the de facto status as a shield to individual liability under a partnership theory of liability. The court concluded that Michigan law expressly made the reinstatement statute retroactive by providing that reinstatement operated to validate all contracts entered into during the period of forfeiture.

The *Bergy Bros.* language, upon reinstatement, is operatively the same as that which we find in the statute today under §925(2). Today's language is probably clearer and more encompassing. This Court should follow *Bergy Bros.* in at least the following sense: Owners, officers, and directors of corporations should not be converted into partners following dissolution

when the corporation contracts for services in the ordinary course (seemingly in violation of §833) and prior to reinstatement under §925(2). Corporations should continue to maintain de facto status during the period of dissolution according to the ruling in *Bergy Bros.*

A. Inadvertence

In *Bergy Bros.* the court accepted that a failure to pay the $20 or 25 fee and file the MAR might be as a result of inadvertence or neglect rather than an indication that the corporation was defunct. The *Bergy Bros.* court acknowledged that the reinstatement statute was put into place specifically for corporations which continue to operate in the ordinary course (outside the scope of §833) and that all contracts the corporation entered into would be enforceable by and against the corporation.

The annual fee of $20-25 is the same for Center Woods as it is for General Motors. While it is certainly unlikely to occur, imagine if a large publicly traded corporation like General Motors, through some administrative error, failed to pay its $25 annual fee for two years and the shareholders of General Motors became personally liable under a partnership theory of liability for the debts and obligations of that publicly traded company. Imagine too the large number of questionable contracts it would possess upon reinstatement under §925, if §925 is prospective, if it could not operate in the ordinary course, and if *Bergy Bros.* got it wrong. *Bergy Bros.* acknowledged that corporate penalty was not the legislature's intent in charging $25 per year to maintain a corporation ($20 for non-profits). Simply put, this Court should affirm *Bergy Bros.* and consider this case *Bergy Bros.* for non-profit corporations.

B. How can these rules and cases be reconciled?

The focus of this Court which would be consistent with §925, as that statute modifies §833, as well as all of the case law of the past dealing with dissolved corporations, de facto corporations, and corporations by estoppel should be two-fold:

1. What was the intent of the parties in maintaining or dissolving the corporation?

2. Did the corporation continue to operate in the ordinary course or did it conclude liquidation? Concluding liquidation would include a complete distribution of corporate assets. Prior to a complete distribution of assets the corporation might reinstate under §925 or revoke its dissolution pursuant to §811.

This standard is consistent with *Bergy Bros., Estey Mfg v Runnels*, 55 Mich 130; 20 NW823 (1884); *Flint Cold Storage v Dept of Treasury*, 285 Mich App 483; 776 NW2d 387 (2009); *Flueling v Goeringer*, 240 Mich 372; 215 NW 294 (1927); *Stott, supra*; and *Center Woods, Inc. v Res-Care*. It would provide clear guidance to companies and cases in the future. Center Woods intended to continue and reinstated under §925.

IV. Is the common-law doctrine of corporation by estoppel applicable here?

A. Estoppel

It is undisputed that Center Woods was incorporated as a non-profit corporation in 1941. It is further undisputed that Center Woods renewed its certificate of authority in 2009 and, finally, it is undisputed that Center Woods is a corporation in good standing in the State of Michigan. Based upon these three facts, only the State of Michigan may challenge the existence of Center Woods. *Miller v Allstate Ins.*, 481 Mich 601; 751 NW2d 463 (2008).

Specifically, Averill, who paid dues to the Corporation, received accountings from the Corporation, attended meeting(s) of the Corporation, voted as a member of the Corporation, and ultimately sent notices to the Corporation (albeit defective), Averill cannot then claim the Corporation did not exist in order to defeat her obligation to provide the notice of sale. The doctrine of corporation by estoppel has existed for well over a hundred years in the State of Michigan. *Cahill and Smith v Kalamazoo Mutual Ins Co.*, 2 Doug 124 (1845).

In the case of *Duray Dev, LLC v Perrin*, 288 Mich App 143, 152-3; 792 NW 2d 749 (2010) (quoting *Estey Mfg* and referencing *Swartwout v Michigan Air Line Railroad Co.*, 24 Mich 389, 396 (1872)), the Court of Appeals summarized the corporate estoppel doctrine.

> "Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence." (Quoting *Estey Mfg* at 133)
>
> * * *
>
> In that setting, the rule is:
>
> > "In the case of the associates in the corporation de facto, and those who have had dealings with it, there is a mutual estoppel, resting upon broad grounds of right, justice and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers." *Swartwout, supra* (citations omitted)

Neither Defendant in this case is therefore capable of challenging the validity of Center Woods in order to get away with their collective failure to follow the subdivision rules.

B. When Averill purchased her home

When Defendant Averill purchased her home, she did so under the specific restrictions of the Building and Use Restrictions. Her predecessors in interest maintained those restrictions

which admittedly included blatantly discriminating provision which society and the Legislature have since corrected. MCL 37.2505. Defendants would have this Court believe that the owners of Center Woods are raving bigots. This is neither true, nor supported by the record.

What is clear though is that big multi-national corporations have never been accepted as operators in Center Woods. Defendants should be further estopped from changing the nature of the neighborhood rendering it inconsistent with the enforceable portions of the Building and Use Restrictions.

V. Were Center Woods' rights to a thirty day notice of the sale of #2 Center Woods and the right of first refusal "acquired" during the interval of Center Woods' dissolution?

By virtue of §§833 and 834, a corporation, be it non-profit or otherwise, can conduct any business whatsoever as it relates to liquidation of the entity (§833(d)). It is therefore capable of receiving notices.

A right of first refusal arises at the time a seller is willing to accept an offer. This is a condition precedent to the right of first refusal. Following the fulfillment of the condition precedent, a seller is then duty bound to notify the holder of the right of first refusal of the seller's intent to sell. Typically, the holder of the right of first refusal will have some time period within which to organize its affairs in order to exercise its right (or fail to do so). Once the condition precedent has occurred, the right of first refusal becomes vested or irrevocable. The holder of the right of first refusal has the right to exercise the purchase right. *Phillips v Homer (In re Egbert R. Smith Trust)*, 480 Mich 19; 745 NW2d 754 (2008).

In *Phillips,* tenants held what was called a right of first refusal and an option under the terms of a farm lease. The lease expressly granted the tenant an option to purchase the leased

premises and further provided that the tenant had the right of first refusal to match any bona fide offer to purchase. After the tenants were given notice of a bona fide offer to purchase the farm, the seller changed its mind and attempted to revoke the offer to sell. This Court held that under the terms of the lease, the parties "intended that when a third party made a bona fide offer to purchase the property and the respondent presented the offer to the petitioners, the petitioners had an irrevocable option to purchase the property for the purchase price within thirty days of the notice". *Id.*, at 25.

An option to sell real estate given by the owner of the property is an obligation which can run with the land and may be exercised by the optionee, so long as those purchasers are not bona fide purchasers for value. *Nu-Way Service Stations, Inc. v Vandenberg Bros. Oil Co.*, 283 Mich 551; 278 NW 683 (1938). The recording of documents with the register of deeds in a county puts the public on notice of building and use restrictions effecting real property. The fact that a document is "of record" prohibits claims that the existence of a document was unknown. *Babcock v Young*, 117 Mich 115, 159; 75 NW 302 (1898). Buyers are on constructive notice of public records. *Fitzhugh v Barnard*, 12 Mich 104, 110 (1863).

In this case then, both Defendants Averill and Res-Care are prohibited from claiming they did not know of the right of first refusal by virtue of constructive notice. Res-Care cannot claim to be a buyer without knowledge. Res-Care is, therefore, not a bona fide purchaser for value. This point has never been disputable. As such, the Defendants are charged with knowledge of the existence of the right of first refusal. As a practical matter, in addition to being on constructive notice, both Defendants had actual knowledge of the right of first refusal; the

restrictions having been specifically referenced in the title commitment provided by Averill to Res-Care.

Averill had a duty and an obligation to provide the notice to Center Woods, but arguably, under §§833 and 834 (and ignoring §925), Center Woods was incapable of exercising its right upon receipt of the notice. Again, Center Woods could receive notices, but might be limited in what it could do once it received the notice. Center Woods, however, within the thirty day period, cured its defect pursuant to §925 and, at that point, became eligible to exercise the right of first refusal.

Typically, rights of first refusal are not one day long. Instead, they extend over a period of time because an individual may be unable or unwilling (for a variety of reasons) to exercise in a day. Real estate purchases often require financing which takes time to put together. In this case, Center Woods may have been incapable of financing the purchase on day one, but fully capable of doing so on day twenty. Center Woods may have been incapable of exercising its rights on day one because of §833, but resolved that impediment as well. In fact, Center Woods stood capable of purchasing the property, was in good standing, and requested the exercise of its right of first refusal within the required thirty day period set forth in the Building and Use Restrictions. Counsel for Defendant solicited Plaintiff's exercise of the right of first refusal at the November 9, 2009, Trial Court hearing (see hearing transcript, pp. 56-67). Center Woods should be granted the opportunity to purchase the property for the $170,000.

VI. If Center Woods' rights to a thirty day notice of the sale of the property at issue and the right of first refusal were NOT "acquired" during the interval of Center Woods' dissolution, whether those rights were nevertheless enforceable after Center Woods renewed its corporate good standing pursuant to §925?

The primary goal of judicial interpretation of statute is to assert and give effect to the intent of the legislature. *Frankenmuth Mutual Ins. Co. v Marlette Homes*, 456 Mich 511; 573 NW2d 611 (1998). The first step in doing that is looking at the language. *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 441; 596 NW2d 164 (1999). Unambiguous statutory language is afforded its plain meaning and is enforced as written. *Id.* The plain language of §925(2) states that "upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable." The clear and unambiguous meaning of this statute itself states that upon reinstatement, the corporate rights shall be the same and treated as though dissolution had not occurred.

Several cases in lower courts have found the language of §925 to be straight forward. In *Cardinal-Franklin Collections Inc. v Dept of Licensing & Regulations*, 177 Mich App 594; 443 NW2d 176 (1989), the Michigan Department of Licensing and Regulations sought a subpoena against Cardinal-Franklin to produce records held by the company. Cardinal-Franklin filed a petition to quash the subpoena. The Department argued that Cardinal-Franklin lacked standing to file the petition to quash because it had automatically dissolved as a corporation for failure to file annual reports at the time it filed its petition to quash the subpoena. The Michigan Court of Appeals disagreed.

The court indicated that although Cardinal-Franklin had automatically dissolved for failure to file the annual reports at the time it filed its petition, it subsequently complied with the statutory requirements of §925, which treated the dissolution as if it had not taken place. Filing a petition to quash the subpoena is an act clearly not related to winding-up in light of §833 and §834 and yet, after reinstated, the court ignored the fact that the corporation had ever been dissolved.

Other courts have reviewed the plain meaning of §925. In *United States v Van*, 931 F2d 384 (1991), the Department of Immigration and Naturalization Service served a subpoena on Vita Van, d/b/a ADT Engineering, Inc., a dissolved corporation, to produce certain documents. The defendant refused to produce the documents, claiming in part that the government had failed to name the proper party. The Department filed a petition to enforce the subpoena naming the defendant company which had been administratively dissolved. The court addressed the issue of standing to appeal the enforcement of the subpoenas. The court determined that because the corporate entity had been reinstated, the entity itself had proper standing to contest the subpoena. *Id.* The subpoena was issued during the interim of dissolution and the defendants challenge arose during that same time.

Center Woods exercised its right of first refusal within thirty days of being notified of the terms of the sale. At that time, the Corporation was in good standing and ready, willing, and able to purchase the property. §925 provides that upon reinstatement, the corporation exists as if no dissolution or revocation had occurred and therefore could exercise its rights. The Corporation learned of the terms and conditions of sale, the most important of which was the purchase price of $170,000 at a time following renewal. The condition precedent to Center Woods' right of first

refusal was notice from Averill of the price equal to a bona fide offer (Exhibit 33a). That notice, while never formally given, was discussed at November 9, 2009, Trial Court hearing. Center Woods having been put on notice of the sale, exercised its right to purchase the property for $170,000.

VII. What remedy is available to Center Woods against the seller and purchaser of the property at issue, given that the sale was finalized during the interval of Center Woods' dissolution?

In an action to determine interests in real property, many courts have recognized a number of allowable remedies. MCL 600.2932 states:

> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.
>
> * * *
>
> (5) Actions under this section are equitable in nature.

All equitable remedies are available to the Trial Court in determining the rights of the parties.

It is undisputed that Center Woods did not know the terms and conditions of the sale on October 12, 2009, when Center Woods, through its attorney, put Averill on notice that she did not comply with the thirty day notice provision and requested the operative terms of the sale. It is upon notice that the thirty day time period began to run. The exact date is not relevant in that Center Woods filed its Complaint on October 13, 2009, requesting its opportunity to purchase the house well within the thirty day period. Center Woods expressed its desire to exercise its right to purchase at the November 9, 2009, Trial Court hearing. Again, within the required thirty day period.

A. Specific Performance

Specific performance of the right of first refusal is appropriate because it involves real property, which is unique. *Phillips, supra. Phillips* involved a question of whether a tenant was entitled to specific performance for a right of first refusal. The parties had a lease agreement which contained a right of first refusal providing in part:

> "Tenant shall have the right of first refusal to match any bona fida [sic] offer to purchase made with regard to the subject property. In the event Tenant fails to exercise his option within 30 days following presentment of said bona fida [sic] offer to purchase the option herein granted shall terminate."

This Michigan Supreme Court determined that the tenant was entitled to specific performance of the option because once the landlord notified the tenant of the third party offer the option to purchase became operative. Michigan courts have long recognized that rights of first refusal are governed by the contract terms and the plain language of the contract determines the nature of those rights. *Phillips, supra.*

Here, the Court should enforce the terms of the right of first refusal, which provided that the association shall be given thirty days notice and "first opportunity to purchase said property at a price equal to a bonafide offer". Real property is at the center of this issue and being that real property is unique, the remedy of specific performance is appropriate.

B. Rescission

The Trial Court's decision in this case was rendered artfully. The Trial Court placed the parties back in the positions they would have been, but for Defendants' failure to notify and the transaction closing. All parties rights were intact and preserved at that time. The Trial Court simply required Averill to provide the thirty day notice to Center Woods should she wish to do so

again, or not, as she chose. In that way, all of Res-Care's claims for discrimination, etc., would have been preserved. Instead of acting in conformity with the Trial Court's decision, with its rights preserved, Res-Care chose the course of appeal. When applying equitable remedies, the court looks to place the parties back into the position they would be in had the violation not occurred. Rescission has been approved as an equitable remedy in dealing with real property.

VIII. Whether Res-Care preserved any objection to the trial court's choice of remedy in this case?

Upon review of the pleadings and record, Plaintiff is unable to find that Defendant objected to or appealed, the choice of remedy rendered by the Trial Court. Defendant admits that where it failed to raise an issue, that issue is waived. S`ee Defendant's original Brief on Appeal, p. 25, relying on *Walters v Nathan Nadell*, 481 Mich 377; 751 NW2d 431 (2008) and *Therrian v General Laboratories, Inc.*, 372 Mich 487, 490; 127 NW2d 319 (1964).

CONCLUSION

§925 validates Center Woods' rights to receive the thirty day notice and right of first refusal which should have been afforded Center Woods. By reinstating under §925, Center Woods was the same as though a dissolution had not taken place. By reinstating, Center Woods became eligible to exercise its rights as against the Defendants and did so. Center Woods should be offered the right to purchase #2 Center Woods for $170,000.00 or alternatively this Court should require Averill to the re-notice her sale consistent with the Building and Use Restrictions and the Trial Court's decision.

WHEREFORE, Plaintiff/Appellant CENTER WOODS, INC., requests this Honorable Court determine:

A. That §925(2) of the Nonprofit Corporation Act ("NCA"), MCL 450.2101 et seq., applies retroactively to validate "all contracts entered into and other rights acquired" during periods of corporate dissolution;

B. That renewal of a corporation pursuant to §925 permits an administratively dissolved corporation to enforce contracts and rights not related to winding-up;

C. That *Bergy Bros., Inc. v Zeeland Feeder Pig, Inc.*, 415 Mich 286; 327 NW2d 305 (1982), correctly interprets MCL 450.1925, the analogous provision in the Business Corporation Act, MCL 450.1101 et seq.;

D. That the common-law doctrine of corporation by estoppel applicable here to prohibit Defendants from challenging the existence of Center Woods;

E. That Center Woods' rights to a thirty day notice of the sale of #2 Center Woods and the right of first refusal were rights "acquired" during the interval of Center Woods' dissolution pursuant to §925;

F. That Center Woods' rights to a thirty day notice of the sale of the property at issue and the right of first refusal were enforceable after Center Woods renewed its corporate good standing pursuant to §925;

G. That all equitable remedies and real property remedies are available to Plaintiffs;

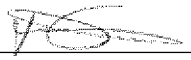
H. That Res-Care failed to preserve any objection to the Trial Court's choice of remedy in this case;

I. Plaintiffs have the right to purchase #2 Center Woods for $170,000; and

J. With costs and fees to Plaintiff/Appellant.

Dated: August 21, 2013

SHINNERS & COOK, P.C.



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