STATE OF MICHIGAN
IN THE SUPREME COURT

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,

Petitioners-Appellants,

v

DUNE RIDGE SA, LP, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondents-Appellees.
_____/

Supreme Court Nos. 159524 and 159525 (consolidated)

Court of Appeals Nos. 340623 and 340647 (consolidated)

Ingham Circuit Court No. 17-176-AA

MAHS Docket No. 14-026236

APPELLEE THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S APPENDIX, VOLUME 1

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Dated: January 27, 2020

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STATE OF MICHIGAN

COURT OF APPEALS

VINOD SHARMA, M.D.,

Plaintiff-Appellant,

v

PETER T. MOONEY, ESQ., PATRIC A. PARKER, ESQ., SIMEN FIGURA & PARKER, P.L.C., DANIEL J. RITTMAN, ESQ. and SCOTT HOPE,

Defendants-Appellees,

and

GENESEE COUNTY SHERIFF'S DEPARTMENT and MICHAEL GAYLORD,

Defendants.

UNPUBLISHED
September 16, 2004

No. 246257
Genesee Circuit Court
LC No. 02-074710-CZ

Before: Whitbeck, C.J, and Sawyer and Saad, JJ.

PER CURIAM.

This appeal involves an action filed by plaintiff Vinod Sharma, M.D., against defendants-appellees, attorneys Peter T. Mooney, Patric A. Parker, their law firm Simen Figura & Parker (SFP), attorney Daniel J. Rittman, and Genesee County Sheriff's Deputy Scott Hope, in which plaintiff alleged that defendants wrongfully obtained and enforced a writ of execution. The writ of execution stemmed from a prior breach of contract lawsuit against plaintiff by defendant Michael Gaylord, wherein Gaylord obtained a money judgment against plaintiff. Plaintiff now appeals from three separate orders of the circuit court that granted defendants-appellees (hereinafter defendants) summary disposition of plaintiff's complaint, and we affirm.[1]

[1] Plaintiff contends that the circuit court had subject matter jurisdiction to consider the state law tort claims that he raised in his complaint. We agree that that the state tort claims within plaintiff's complaint plainly fall within the broad scope of the circuit court's subject matter jurisdiction. Const 1963, art 6, § 13; *LME v ARS*, 261 Mich App 273, 279; 680 NW2d 902 (continued…)

I

Plaintiff argues that the circuit court erred when it ruled that he lacked standing to bring any of the three counts of his complaint because the legal claims contained therein belong to the trustee in plaintiff's bankruptcy proceedings. Whether a party has legal standing to assert a claim constitutes a question of law that this Court considers de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). This Court also reviews de novo a trial court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a motion brought pursuant to MCR 2.116(C)(5), an appellate court must review the pleadings, admissions, affidavits and other relevant documentary evidence to determine whether as a matter of law the plaintiff lacked the capacity to bring the lawsuit. *Edgewood Development, Inc v Landskroener*, 262 Mich App 162, 165; 684 NW2d 387 (2004); *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003).

Plaintiff filed for bankruptcy. Federal bankruptcy law provides that any property owned by a debtor, including causes of action, become part of the bankruptcy estate. Accordingly, after a bankruptcy petition is filed, a debtor, like plaintiff here, loses standing to pursue these causes of action, because they are part of the bankruptcy estate. Only the bankruptcy trustee has standing to pursue these claims, unless the trustee takes affirmative steps to abandon them and remove the claims from the bankruptcy estate. Here, plaintiff's claims against defendants are part of the bankruptcy estate that was created when he filed his bankruptcy petition. Plaintiff claims that the bankruptcy proceedings were closed and that the instant claims were abandoned, but provided little or no evidence to the circuit court to support these contentions. Accordingly, the circuit court correctly ruled that plaintiff lacked standing to pursue his claims, and correctly granted summary disposition in defendants' favor.

A

The circuit court ruled that the bankruptcy trustee had sole authority to pursue the instant claims filed by plaintiff because plaintiff had petitioned for bankruptcy protection before he filed this lawsuit. 11 USC 541(a) provides:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> * * *

(…continued)

(2004). Because the circuit court did not find that it lacked jurisdiction to consider this matter, and because defendants at no point have challenged the circuit court's subject matter jurisdiction, we decline to further address this issue.

> (7) Any interest in property that the estate acquires after the commencement of the case.

Federal cases interpreting § 541(a)(1) recognize that the broad category of debtor's interests that become a part of the bankruptcy estate includes, importantly for our analysis, causes of action possessed by the debtor at the time that he files a petition for bankruptcy protection. *Integrated Solutions, Inc v Service Support Specialties, Inc*, 124 F3d 487, 490-491 (CA 3, 1997). "A cause of action is a property right which passes to the trustee in bankruptcy, even if such cause of action is not included in schedules filed with the bankruptcy court. Therefore, upon filing a petition for bankruptcy, a debtor loses standing to pursue any claims because those claims become part of the bankruptcy estate."[2]

> Moreover, once a claim becomes the estate's property under § 541(a)(1),
>
> certain conclusions follow. First, the automatic stay applies. Moreover, because the claim is property of the estate, the trustee is given full authority over it. Thus, before a debtor or a creditor may pursue a claim, there must be a judicial determination that the trustee in bankruptcy has abandoned the claim. Without such a determination, a creditor seeking to pursue a claim cannot maintain it. [*Steyr-Daimler-Puch of America Corp v Pappas*, 852 F2d 132, 136 (CA 4, 1988).]

Abandonment may only occur pursuant to 11 USC 554. *First New York Bank for Business v DeMarco*, 130 BR 650, 655 (SDNY, 1991). Under § 554,[3] a trustee may commence formal

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[2] *Carlock v Pillsbury Co*, 719 F Supp 791, 856 (D Minn, 1989); see also *Shearson Lehman Hutton, Inc v Wagoner*, 944 F2d 114, 118 (CA 2, 1991) (observing that under the Bankruptcy Code, "the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy," citing 11 USC 541-542).

[3] Section 554 provides as follows:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
>
> (d) *Unless the court orders otherwise, property of the estate that is not*

(continued…)

abandonment proceedings to abandon estate property, or property "may be abandoned by operation of law if it has been scheduled and not 'otherwise administered' at the time the case is closed." *Stanley v Sherwin-Williams Co*, 156 BR 25, 26 (WD Va, 1993).

A debtor's failure to list a claim within his schedule of assets at the time of his bankruptcy filing prevents any abandonment from occurring:

> Once a cause of action becomes the property of the estate, the debtor may not bring suit on that action unless the property has been abandoned by the trustee. If a trustee chooses to abandon a claim or is ordered to do so, the debtor may assert title to the cause of action and bring suit upon it. If, however, the debtor fails to list a claim as an asset, the trustee cannot abandon the claim because he or she will have had no opportunity to determine whether it will benefit the estate. In such circumstances, the debtor may not claim abandonment and seek to enforce the claim after discharge . . . . [*Krank v Utica Mut Ins Co*, 109 BR 668, 669 (ED Pa, 1990), aff'd 908 F2d 962 (CA 3, 1990), citing *First Nat'l Bank v Lasater*, 196 US 115; 25 S Ct 206; 49 L Ed 408 (1905).]

See also *In re Kottmeier*, 240 BR 440, 442-444 (MD Fla, 1999) (explaining that both causes of action predating and postdating the petition filing must appear in initial or revised bankruptcy schedules for abandonment to potentially occur).

B

Plaintiff contends incorrectly that he has standing to pursue instant claims because, by October 2002, when he commenced this lawsuit, his bankruptcy proceeding had concluded, and the trustee had abandoned the instant causes of action so that plaintiff could pursue them. The circuit court record contains scant documentation from the bankruptcy proceedings. Plaintiff attached to his complaint a copy of the personal bankruptcy petition he filed on November 9, 1999. Plaintiff also attached a copy of the petition that corporate entity Vinod Sharma, M.D., P.C. filed on February 25, 2000. Other than a copy of Gaylord's June 12, 2000, proof of claim against plaintiff's bankruptcy estate, the only bankruptcy-related document within the court file is an August 13, 2001, order regarding objections to claims, which allowed Gaylord's claim for $35,963.95. The August 2001 bankruptcy court order reflects that the court consolidated both plaintiff's personal bankruptcy and the subsequently filed bankruptcy of Vinod Sharma, M.D., P.C.

Plaintiff repeatedly has insisted that all bankruptcy proceedings concluded by May 2000 when the corporation, Vinod Sharma, M.D., P.C., received the discharge of its debt, or October 2000, when plaintiff obtained the discharge of his personal debts. Plaintiff apparently confuses the bankruptcy events of a discharge of debts with the final closing of the bankruptcy estate.[4]

(…continued)

> *abandoned under this section and that is not administered in the case remains property of the estate.* [Emphasis added.]

[4] See *Stanley*, *supra* at 26 (observing that estate property "may be abandoned by operation of law if it has been scheduled and not 'otherwise administered' at the time the case is *closed*") (continued…)

Even assuming that the discharges of plaintiff and Vinod Sharma, M.D., P.C. became effective in October and May 2000, respectively, a fact that plaintiff failed to support with any documentary evidence or testimony, the discharges did not close the consolidated bankruptcy proceedings, as evidenced by the bankruptcy court's subsequent August 2001 order regarding claims.

Plaintiff provided the circuit court with no evidence that the consolidated bankruptcy proceedings had closed by the time he commenced the instant case in October 2002. To the contrary, at the summary disposition hearing on January 2, 2003, defendant Mooney asserted that the bankruptcy proceedings remained open for administration because plaintiff had filed a claim against the bankruptcy trustee and his attorney. Moreover, and dispositively, at the summary disposition hearing, plaintiff essentially admitted that the bankruptcy proceedings had not closed.[5] Clearly, plaintiff failed to establish that the bankruptcy proceedings had closed, and his own statements reflect that the bankruptcy proceeding continued well after he filed his complaint in October 2002, and even after he filed his brief on appeal in September 2003. Because there is no evidence that the bankruptcies concluded, as a matter of law there is no abandonment of claims under § 554. *Stanley*, *supra* at 26.

In the circuit court, plaintiff introduced absolutely no evidence to support his contention that the bankruptcy trustee took affirmative steps to abandon his legal claims against defendant. On appeal, plaintiff presents an exhibit, which is not properly before this Court because it was not presented below, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), indicating that the bankruptcy trustee took affirmative action to abandon property of the bankruptcy estates on September 24, 2002. Were we to consider the proffered exhibit, it establishes only that the trustee had filed an application to abandon "[t]he books and records of the debtor 60 days after the entry of the order closing the estate." Accordingly, no evidence supports plaintiff's suggestion that the bankruptcy trustee took affirmative and formal steps under § 554 to abandon any legal claims that plaintiff or the corporation possessed during the pendency of the consolidated bankruptcy proceedings. *First New York Bank for Business*, *supra* at 655.[6]

(…continued)

(emphasis added).

[5] Plaintiff said that he had "filed an objection to award [certain] payments. So currently there is an objection in the Court on file. And it is going to be heard. The date has not been set yet." Plaintiff further conceded in his brief on appeal that additional bankruptcy proceedings remained outstanding. According to plaintiff's brief, the trustee made decisions concerning abandonment of particular trust property on September 24, 2002, plaintiff then filed an "adversary complaint as to [defendants] in U.S. [B]ankruptcy Court . . . for alleged violation of Federal Statutes," "the trial [wa]s scheduled to begin on October 23, 2003," and a "summary disposition [motion] by . . . defendant's [sic] is on the docket without any known date of hearing being granted by the U.S. Bankruptcy Court."

[6] Aside from the fact that no substantiation exists regarding affirmative trustee abandonment or abandonment through closure of the consolidated bankruptcy estate, another fact precludes any potential finding of abandonment. Plaintiff presented no proof that he or the corporation revealed any legal claims that they possessed in their bankruptcy schedules of assets, either at the time of their bankruptcy filings or by amendment. *In re Kottmeier*, *supra* at 442-444 (explaining

(continued…)

C

The various legal claims within the complaint that plaintiff raised concerning violations of his rights and the rights of Vinod Sharma, M.D., P.C., all arose before or during their respective bankruptcy proceedings, and therefore belonged to the bankruptcy estate. *In re Kottmeier*, *supra* at 442-444; *Carlock*, *supra* at 856. No evidence suggested that at the time plaintiff filed this case, the trustee formally had abandoned any legal claims of plaintiff or the corporation that belonged to the consolidated bankruptcy estate, that the trustee had the opportunity to formally abandon any such legal claims, or that abandonment of any legal claims had occurred as a matter of law when the consolidated bankruptcy estate closed. Because any causes of action possessed by plaintiff and Vinod Sharma, M.D., P.C. constitute property rights that passed to the bankruptcy trustee, plaintiff lacks standing to pursue all of the instant legal claims against defendants. *Shearson Lehman Hutton*, *supra* at 114; *Carlock*, *supra* at 791. Therefore, the circuit court properly granted defendants' motions for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(5).[7]

II

Because we have held that the trial court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(5), we decline to address plaintiff's remaining issues on appeal.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

(…continued)

that both causes of action predating and postdating the petition filing must appear in initial or revised bankruptcy schedules for abandonment to potentially occur); *Carlock*, *supra* at 856. "If . . . the debtor fails to list a claim as an asset, the trustee cannot abandon the claim because he or she will have had no opportunity to determine whether it will benefit the estate. In such circumstances, the debtor may not claim abandonment and seek to enforce the claim after discharge." *Krank*, *supra* at 669.

[7] In addition to plaintiff's bankruptcy-related lack of standing to pursue the instant legal claims, plaintiff does not appear to be the proper party to raise some of the allegations within his complaint for another reason. Plaintiff raises several complaint allegations concerning the wrongful execution against Vinod Sharma, M.D., P.C., on January 24, 2000. This Court has recognized that "[i]n Michigan, the law treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 473-474; 666 NW2d 271 (2003). "The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation . . . ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Id*. at 474.

STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. GORBACH,

Plaintiff-Appellant,

and

ROSALIE GORBACH,

Plaintiff,

v

US BANK NATIONAL ASSOCIATION, RANDALL S. MILLER & ASSOCIATES, PC, and JASON R. CANVASSER,

Defendants-Appellees.

UNPUBLISHED
December 30, 2014

No. 308754
Manistee Circuit Court
LC No. 11-014294-CZ

AFTER REMAND

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

This case, which alleges irregularities in a foreclosure by advertisement, returns to this Court after remand to the trial court. In December 2011, the trial court granted all defendants summary disposition; plaintiff Michael J. Gorbach appealed.[1] We remanded the case to the trial court for a determination of whether plaintiffs' pending bankruptcy petition deprived them of standing to bring this lawsuit. We now affirm the trial court's grant of summary disposition to all defendants, and, for the sake of clarity, remand for entry of judgment for defendants.

Initially on appeal, we determined that plaintiffs' claims against defendants Randall S. Miller & Associates, PC, and Jason R. Cavasser, were meritless. *Gorbach v US Bank Nat'l Ass'n*, unpublished opinion of the Court of Appeals issued January 29, 2013 (Docket No. 308754). We affirmed the trial court's award of sanctions to defendant Canvasser but reversed

[1] Michael's wife, plaintiff Rosalie Gorbach, has not participated in this appeal.

and remanded for reconsideration of sanctions awarded to the other defendants. *Id*. at 6. We also found the record unclear regarding whether plaintiffs had standing to file their complaint because, at the time they did, plaintiffs' Chapter 7 bankruptcy petition was pending in the United States Bankruptcy Court for the Western District of Michigan. *Id*. at 2, 4. "Because a finding that plaintiff had no standing could render most of plaintiff's remaining issues moot, we conclude[d] it [was] premature and unnecessary for this court to address those issues . . . ." *Id*. at 4. So, "we reverse[d] the trial court's grant of summary disposition to defendants and remand[ed] for consideration of this issue." *Id*. at 6. "We also affirm[ed] the trial court's imposition of $4,000 in sanctions against plaintiff for filing frivolous claims against Canvasser; however, because the trial court failed to consider plaintiff's argument, we reverse[d] the court's imposition of $2,000 in sanctions against plaintiff for failing to appear at the pretrial conference." *Id*. We retained jurisdiction.

On remand, plaintiffs and defendant Canvasser settled their claims, and a stipulated order of dismissal entered as to defendant Canvasser on March 18, 2013.[2] With respect to the effect of plaintiffs' bankruptcy on standing, the parties filed briefs and other documents and the trial court heard the parties' arguments on March 28, 2014. The trial court concluded that based on the evidence submitted, the law discussed in *Szyszlo v Akowitz*, 296 Mich App 40, 47-50; 818 NW2d 424 (2012), and the parties' arguments, plaintiffs' pending bankruptcy proceeding did not deprive plaintiffs of standing with respect to this case. Specifically, the trial court found that plaintiffs exempted from the bankruptcy proceedings a "possible claim against Indy Mac for illegal foreclosure proceeding." The trial court reasoned:

> . . . I have to say plaintiff is correct. What's exempted is the lawsuit for wrongful foreclosure. Plaintiff says, well, it's confusing because we have assignments going on and we have some financial institutions that the U.S. government entity in effect directed someone else to take over, and those are a series of things that are happening and it's confusing and so we got the name wrong.
>
> This Court has to agree that it is the lawsuit for wrongful foreclosure that is exempted. If we had several foreclosures that were going on, who the named defendant is could conceivably be more critical. But what we have in the instant case is only one piece of property and only one foreclosure.

Therefore, based on *Szyszlo*, the trial court ruled that plaintiffs had standing. More accurately, the trial court's ruling determined plaintiffs' pending bankruptcy case did not deprive them of standing to file their wrongful forfeiture complaint. We find no clear error in this ruling. But the issue remains whether plaintiffs lost standing under Michigan law when two days after filing their complaint, the time period to redeem the foreclosed property expired. As we noted in our first opinion, "the parties discuss, at great length, plaintiff's standing to sue defendants based on Michigan foreclosure law," yet we deferred addressing that issue pending resolution of "the

[2] The order is not limited to defendant Canvasser, which the record shows was the parties' intent.

crucial question. . . [of] plaintiff's standing [and] whether the instant lawsuit against defendants is property vested with the bankruptcy estate." *Gorbach*, unpub op at 4.

We first note that summary disposition on the basis of lack of standing is properly granted under MCR 2.116(C)(5) (lack of legal capacity to sue). *Aichele v Hodge*, 259 Mich App 146, 152 n 2; 673 NW2d 452 (2003). We also note that the trial court did not cite to MCR 2.116(C)(5) or specifically state that it was granting defendants summary disposition on the basis that plaintiffs lacked standing. In this regard, it is settled law that this Court will affirm the trial court when it reaches the correct result, even if for the wrong reason. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003); *Estate of Mitchell v Dougherty*, 249 Mich App 668, 680 n 5; 644 NW2d 391 (2002).

"We review de novo a trial court's summary disposition ruling." *Szyszlo*, 296 Mich App at 46. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), "this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Sprenger v Bickle*, 302 Mich App 400, 403, 419; 839 NW2d 59 (2013). To the extent questions of statutory interpretation are presented, our review is de novo. *Aichele*, 259 Mich App at 152. Courts must apply clear and unambiguous statutes as written. *Sprenger*, 302 Mich App at 403.

In this case, it is undisputed that plaintiffs took no action to redeem the foreclosed property and never sought a court order to stay the running of the redemption period. So it is undisputed that two days after plaintiffs filed this action, the redemption period expired. It is also clear that even if it had the power to do so, the trial court did not stay the running of the period to redeem the property. Moreover, although plaintiff argues fraud on appeal, plaintiffs never pleaded fraud in their complaint and never moved to amend the complaint; consequently, plaintiff may not now maintain a claim of fraud as a means of maintaining standing to sue. Under these circumstances, we conclude this case is controlled by *Bryan v JPMorgan Chase Bank*, 304 Mich App 708; 848 NW2d 482 (2014), which was decided after this case was remanded and which adopted the reasoning of several unpublished cases. We hold plaintiffs lost standing when the redemption period expired without a court order staying it.

In *Bryan*, sometime after the redemption period had expired following a foreclosure by advertisement, the plaintiff filed an action that alleged "unjust enrichment, deceptive/unfair practice and wrongful foreclosure." *Bryan*, 304 Mich App at 711. The plaintiff argued that although the redemption period had expired, "she still had standing to sue because of 'fraud or irregularity' in the foreclosure process," i.e., the defendant's failure to record its mortgage interest before the sale. *Id.* The Court held that the plaintiff lacked standing to bring her action because the statutory period of redemption had expired, and the plaintiff had made no effort to redeem the property. *Id.* at 713. The Court opined:

> Pursuant to MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit, which here was six months. "Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest

> which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . ." MCL 600.3236. If a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942).
>
> We have reached this conclusion in a number of unpublished cases and, while unpublished cases are not precedentially binding, MCR 7.215(C)(1), we find the analysis and reasoning in each of the following cases to be compelling. Accordingly, we adopt their reasoning as our own. See *Overton v Mtg Electronic Registration Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950), p 2 ("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. Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished.") (citation and quotation marks omitted); *Hardwick v HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191), p 2 ("Plaintiffs lost all interest in the subject property when the redemption period expired . . . . Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period. . . . Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished."); *BAC Home Loans Servicing, LP v Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048), p 4 ("[O]nce the redemption period expired, [plaintiff's] rights in and to the property were extinguished. . . . Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims challenging the foreclosure sale."); *Awad v Gen Motors Acceptance Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692), pp 5-6 ("Although she filed suit before expiration of the redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of [plaintiff's] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing."). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim. [*Bryan*, 304 Mich App at 713-715.]

Although plaintiffs filed their complaint before the expiration of the redemption period, we conclude that the holding of *Bryan* applies to the present case. The *Bryan* Court adopted the reasoning of several unpublished cases, some of which, like the instant case, where owners of foreclosed properties filed complaints alleging fraud or irregularities following a sheriff's sale but before the redemption period had expired. In *Overton*, the plaintiff filed suit alleging fraud in the foreclosure proceedings and one month after filing suit the redemption period expired. The Court held that the plaintiff filing his lawsuit was insufficient to toll the redemption period. *Overton*, unpub op at 2. Further, the Court noted that "[e]ven if [the plaintiff's] assertions were

true, and even if the cases he cites supported his arguments, the time to raise the arguments was when foreclosure proceedings began." *Id*. "Once the redemption period expired, all of [the] plaintiff's rights in and title to the property were extinguished." The plaintiff lost standing to pursue his allegations of fraud when he failed to timely assert them. *Id*.

Similarly, in *Hardwick*, this Court held the plaintiffs lost standing to pursue their complaint alleging wrongful foreclosure when the redemption period expired one week after the lawsuit was filed; the filing of the lawsuit did not toll the redemption period. *Hardwick*, unpub op at 2. And in *Awad*, the plaintiff filed suit alleging improper foreclosure 18 days before the redemption period expired. *Awad*, unpub op at 2. Although the plaintiff filed suit before expiration of the redemption period, she made no effort to obtain an order staying or otherwise challenge the foreclosure and redemption sale; therefore, the Court held that after the expiration of the redemption period, all of the plaintiff's rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing. *Id*. at 5-6.

Although these cases hold out the possibility that an equitable extension of the period to redeem after a foreclosure sale might be obtained on "a clear showing of fraud, or irregularity" in the foreclosure proceedings, *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969), they consistently hold that the mere filing of a complaint, even if it alleges fraud or irregularity, is insufficient to toll the redemption period.[3] Thus, after the period to redeem a foreclosed property has expired, the mortgagor loses standing to assert a claim arising out of the foreclosure or related to the property. MCL 600.3236; *Bryan*, 304 Mich App at 713, 715.

Last, we consider plaintiff's argument that defendants' motions for summary disposition, and the trial court's ruling granting the motions, violated the automatic stay of 11 USC 362(a) because plaintiffs bankruptcy petition remained pending at the time.[4] We review this question of law de novo. *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). When interpreting a statute, our goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765NW2d 31 (2009). Unambiguous statutory language should be given its ordinary meaning and we presume the legislative body intended the meaning expressed in the statute. *Id.* at 629; *Deutsche Bank Nat'l Trust Co v Tucker*, 621 F3d 460, 462-463 (CA 6, 2010).

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[3] Although not discussed in the cited cases, nothing in MCL 600.5856 provides for the tolling of a foreclosure redemption period. That statute provides for the tolling of a statute of limitations or repose on the filing of a complaint and service of a copy of the complaint and summons on a defendant. On the basis of statute's clear and unambiguous text, it would not toll a foreclosure redemption period because a redemption period is neither a period of limitations or repose. Furthermore, nothing in MCL 600.3236 suggests that the redemption period will be tolled or that title will not automatically transfer upon expiration of the period in the event that a party files a complaint challenging the validity of the foreclosure.

[4] Plaintiffs filed their bankruptcy petition on June 16, 2011, an order of discharge was entered on October 12, 2011, the trustee filed his final report on December 19, 2011, and the bankruptcy case closed by final decree on January 24, 2012.

In general, the filing of a petition under the Bankruptcy Code, 11 USC 101 *et seq.*, "operates as a stay, applicable to all entities, of . . . the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case . . . ." 11 USC 362(a)(1) (emphasis added). The critical point in time to determine whether a judicial proceeding is automatically stayed under § 362 is the initiation of the proceeding. *Cathey v Johns-Manville Sales Corp*, 711 F2d 60, 61-62 (CA 6, 1983). The stay applies to proceedings that were initially instituted "against the debtor." *Id*. On the other hand, the statutory automatic stay patently does not apply to actions that the debtor initiates. "[A]s the plain language of the statute suggests, and as no less than six circuits have concluded, the Code's automatic stay does not apply to judicial proceedings . . . that were initiated by the debtor." *Brown v Armstrong*, 949 F2d 1007, 1009-1010 (CA 8, 1991). Consequently, the trial court did not err by finding that defendants did not violate the automatic stay by defending this action.

We affirm the trial court's original grant of summary disposition to all defendants and, for the sake of clarity, remand for entry of judgment for defendants. As the prevailing party, defendants may tax costs. MCR 7.219. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

Court of Appeals, State of Michigan

ORDER

Detroit Club Holdings LLC v Jay Edward

Docket No. 340874

LC No. 16-015714-AV

Jane M. Beckering
Presiding Judge

Mark J. Cavanagh

Amy Ronayne Krause
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's for publication opinion issued June 18, 2019 is hereby VACATED. A new unpublished opinion is attached to this order.

/s/ Jane M. Beckering

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

August 13, 2019
Date

Chief Clerk

013b

STATE OF MICHIGAN

COURT OF APPEALS

DETROIT CLUB HOLDINGS, LLC,

Plaintiff-Appellant,

and

CHARLES SOULE and JEREMY LANGENDERFER,

Intervenors-Appellants,

v

JAY EDWARD, a/k/a J. EDWARD KLOIAN,

Defendant-Appellee.

UNPUBLISHED
August 13, 2019

No. 340874
Wayne Circuit Court
LC No. 16-015714-AV

ON RECONSIDERATION

Before: BECKERING, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff Detroit Club Holdings, LLC (DCH) and intervenors Charles Soule and Jeremy Langenderfer appeal by leave granted the circuit court's order reversing a denial by the district court of a motion for relief from judgment filed by defendant Jay Edward Kloian (Kloian), and vacating the district court's default judgment previously entered against defendant. This matter arises out of summary proceedings for possession of a condominium originally owned by defendant, purchased by DCH at a foreclosure sale, and subsequently re-sold to intervenors. The foreclosure is not at issue in this appeal. Rather, defendant contends that DCH did not provide him with adequate notice of its claim for possession. Based on the unusual facts of this matter and the difficulty we encountered in comprehending the record or the circuit court's ruling, we affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

On April 27, 2010, defendant purchased condominium unit 20 in the Belle Point Estates Condominium by covenant deed. The deed was recorded, and it showed defendant's home address in Ann Arbor, Michigan. Defendant then sold the unit to non-party Aisha Crawford on land contract. Crawford failed to pay property taxes or condominium association dues, as required by the land contract. In October of 2014, the condominium association sent a notice to Kloian at his Ann Arbor address of a lien for unpaid condominium assessments. The association also recorded a notice of the lien, which also listed Kloian's Ann Arbor address. Kloian received the notice, but took no action because he relied on Crawford's assurances that she would pay any outstanding dues. Crawford continued to evade payment. Kloian contends that on March 30, 2016, to avoid tax foreclosure, he paid $8,200.31 on the 2014 delinquent real estate taxes to the Wayne County Register of Deeds. Kloian further contends that after pursuing foreclosure against Crawford, she agreed to vacate the condominium by May 1, 2016, and quit-claim her interest back to Kloian.

However, in the meantime, on March 16, 2016, the Association posted a Notice of a Foreclosure Sale on the condominium and published the notice in the Detroit Legal News. The notice stated an amount owed of $4,950.00 and a Sheriff's sale date of April 21, 2016. No notice was sent to Kloian's Ann Arbor address. Unbeknownst to Kloian, the Sheriff's sale was held as scheduled, and DCH purchased the condominium unit for $45,249.25. That same day, DCH posted a Notice to Inspect at the condominium unit and sent a copy of the notice by certified mail, addressed to the condominium unit. Although Kloian protests the failure to notify him of the sale, he does not challenge the legality of the foreclosure or the foreclosure sale in this action.

DCH contends that on April 27, 2016, it was unable to gain access to the condominium unit when its representative attempted to conduct an inspection. The inspector deemed the property vacant and in damaged condition—a broken window, a damaged garage door, and overgrown grass. Relying on MCL 600.3238(6), DCH then initiated summary proceedings for possession of the property, asserting that Kloian unreasonably refused to allow DCH access to the condominium unit for an inspection and that damage to the property had occurred. On April 28, 2016, DCH mailed a notice of an action for possession to defendant, addressed to him at the condominium unit's address. DCH was aware that the US Postmaster had posted a vacancy notice on the property at that time, indicating that the property was vacant. In May of 2016, DCH recorded a "Sheriff's Deed on Association Dues/Fees Sale" pertaining to the condominium with the Wayne County Register of Deeds, detailing the foreclosure sale of the condominium to plaintiff. DCH searched for Kloian's address on LexisNexis and found the address of the condominium to be Kloian's last known address. DCH did not make any other efforts to discover where Kloian might be found. DCH then mailed a notice to Kloian of Demand for Possession/Health Hazard, again only addressed to him at the condominium unit.

On May 20, 2016, DCH filed a complaint in district court against Kloian, alleging that Kloian remained in possession of the condominium, and asserting that DCH had a right to enter into possession of the condominium pursuant to MCL 600.3238 and MCL 600.5714(1)(d) because Kloian unreasonably refused an inspection by DCH and the property was in damaged condition. The district court addressed a summons to Kloian "and all other [o]ccupants" of the condominium, informing Kloian of DCH's complaint to evict him from the condominium. The summons and the complaint listed Kloian's address as that of the condominium unit. On June 9, 2016, the district court entered a default judgment of possession against Kloian, ordering that

DCH had a right to possession and that Kloian was to be evicted. DCH then recorded an "affidavit of termination of redemption rights" with the Wayne County Register of Deeds. On June 22, 2016, DCH conveyed the property to intervenors for $115,000.00.

Kloian contends that he first learned of the proceedings the next month, when he sent a locksmith to change the locks on the condominium unit. Kloian apparently sent the locksmith because he had a prospective buyer for the property, who had previously tried to view the property but had been unable to gain access. According to Kloian, the locksmith was ordered to leave the property by a person who claimed to have purchased the property. On July 28, 2016, Kloian sent a request to DCH for a calculation of the redemption amount for the property and expressing his intent to redeem the property. DCH did not respond to that request.

On September 1, 2016, Kloian filed a motion for relief from judgment pursuant to MCR 2.612(B), contending, in relevant part, that he had never received notice of any actions against the property, and DCH had constructive notice of his correct address in Ann Arbor because that address had been listed on the 2010 deed. The district court denied Kloian's motion for relief from judgment, finding that DCH provided adequate notice to Kloian. The district court also held that under MCR 2.612(B), personal jurisdiction over Kloian was unnecessary because this was an *in rem* proceeding. Furthermore, the district court stated that there were innocent third-party purchasers, and granting Kloian's motion would be prejudicial to those purchasers. Kloian appealed to the circuit court.

The circuit court held a hearing at which it rendered a somewhat piecemeal bench ruling. The circuit court held that the notice requirements set forth in MCL 600.3238, which addresses the right to inspect property after a mortgage foreclosure sale by advertisement, were inapplicable because no mortgage was involved; however, the circuit court also opined that DCH failed to comply with the notice requirements in that statute. The circuit court noted that "everybody knew" that Kloian did not live at the condominium, yet DCH continued to mail notices to the vacant property and made no further efforts to discover Kloian's whereabouts. The circuit court also found that Kloian had standing to appeal despite having failed to tender a redemption amount pursuant to MCL 559.208(2), which pertains to the foreclosure of condominium liens, because any such tender would have been futile. The circuit court ultimately concluded that MCL 600.3240 and MCL 559.208, when read in conjunction, indicated that Kloian's period to exercise his right of redemption would have been "six months." The circuit court declined to address whether intervenors were subsequent bona fide purchasers without notice.

On April 3, 2018, this Court entered an order granting appellants' application for leave to appeal. *Detroit Club Holdings, LLC v Edward*, unpublished order of the Court of Appeals, entered April 3, 2018 (Docket No. 340874).

II. STANDARD OF REVIEW

"Whether a party has standing is a question of law that this Court reviews de novo." *In re Gerald L Pollack Trust*, 309 Mich App 125, 154; 867 NW2d 884 (2015). "Issues of statutory construction are questions of law," which this Court reviews de novo. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 253; 819 NW2d 68 (2012). "Court rules are

interpreted using the same principles that govern statutory interpretation." *Pellegrino v AMPCO Sys Parking*, 485 Mich 1134, 1135 n 1; 789 NW2d 777 (2010). "We review for an abuse of discretion a circuit court's ultimate decision to grant or deny relief from a judgment." *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). We review for clear error a lower court's findings of fact. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). Under the clear error standard, this Court defers to the lower court unless definitely and firmly convinced that the court made a mistake; and under the abuse of discretion standard, we will affirm unless the "decision . . . falls outside the principled range of outcomes." *Id*. at 472.

An issue raised in the lower court and pursued on appeal is preserved, irrespective of whether the lower court addresses the issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). An issue is not considered unpreserved merely because a party makes a more sophisticated, more developed, or better briefed argument on appeal. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). "Further, this Court may overlook preservation requirements where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Id*. (citations omitted); see also *Mack v Detroit*, 467 Mich 186, 207-209; 649 NW2d 47 (2002) (issue presentation requirements do not necessarily preclude courts from identifying and analyzing controlling legal issues). We will affirm a correct result arrived at for an incorrect reason, especially when our review is de novo. *Kirl v Zinner*, 274 Mich 331, 336; 264 NW 391 (1936); *Michigan Gas & Elect Co v City of Dowagiac*, 278 Mich 522, 526; 270 NW 772 (1936).

III. STANDING

DCH and intervenors argue that Kloian's right to redemption was terminated on June 9, 2016, by the district court's entry of the default judgment; or in the alternative, Kloian's right to redemption terminated on October 21, 2016, because Kloian did not tender the redemption amount within six months of the foreclosure sale. DCH and intervenors argue that, for either reason, Kloian no longer has standing to assert any right to the condominium unit. We disagree.

"The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (internal quotation omitted). "Under this approach, a litigant has standing whenever there is a legal cause of action." *Id*. at 372. In a civil action to enforce private rights, a person must have " 'in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.' " *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992), quoting 59 Am Jur 2d, Parties, § 30, p 414 (quoted with approval by *Lansing Sch Ed Ass'n*, 487 Mich at 359). Standing does not depend on whether the claim is substantively meritorious or the requested relief can be granted. *Lansing Sch Ed Ass'n*, 487 Mich at 355-358.

Liens based on unpaid condominium assessments fall under the Condominium Act, MCL 559.101 *et seq*. Specifically, MCL 559.208(1) provides, in relevant part, that "[s]ums assessed to a co-owner by the association of co-owners that are unpaid . . . constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment," and "[t]he lien may be

foreclosed by an action or by advertisement by the association of co-owners in the name of the condominium project on behalf of the other co-owners." Under MCL 559.208(2), a "foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action," and "[t]he redemption period for a foreclosure is 6 months from the date of sale unless the property is abandoned . . . " It is well settled that in the context of mortgages, any rights to property held by a mortgagor are extinguished if the mortgagor fails to exercise the right of redemption within the statutory period. See *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). The same principle would appear to apply to the right of redemption under the Condominium Act. Consequently, there is properly no dispute that, but for the effect of the June 9, 2016, default judgment, Kloian would have had until October 21, 2016, to redeem the property.

Critically to the standing argument, a request for relief from judgment is, functionally, an exception to the general res judicata and collateral estoppel rules prohibiting the relitigation of matters that would otherwise be final. See *Colestock v Colestock*, 135 Mich App 393, 397-398; 354 NW2d 354 (1984); *Vanderwall v Midkiff*, 186 Mich App 191, 203; 463 NW2d 219 (1990). The effect of setting aside a judgment or order is to nullify that judgment or order, whereupon the proceeding then stands as if the judgment or order had never occurred at all. *Smith v MEEMIC Ins Co*, 285 Mich App 529, 532-533; 776 NW2d 408 (2009); *Rice v Benedict*, 18 Mich 75, 76 (1869). We presume for the sake of argument that it was otherwise proper for the district court to enter the June 9, 2016, default judgment, and we further presume that the default judgment properly cut off Kloian's right to redemption. The effect of setting aside that default judgment would be to restore Kloian's right to redemption, which he otherwise unambiguously still had as of September 1, 2016, when he filed his motion for relief from judgment.

The entry of the June 9, 2016, default judgment therefore clearly could not have deprived Kloian of standing. Kloian still retained a " 'real interest . . . in the subject matter of the controversy.' " *Bowie*, 441 Mich at 42, quoting 59 Am Jur 2d, Parties, § 30, p 414. At the time Kloian filed his motion for relief from judgment, the statutory redemption period had not yet expired, and successfully setting aside the default judgment would restore his right to avail himself of that redemption period. As noted, standing does not depend on whether a particular claim or argument is meritorious, but rather whether the litigant is sufficiently interested in the matter. Kloian's rights were directly affected by the default judgment, so Kloian had standing to challenge that judgment.

DCH and intervenors argue in the alternative that Kloian lost standing because he failed to tender the redemption amount before the redemption period expired. In cases of mortgage and land contract foreclosures, DCH and intervenors correctly observe that a property owner must generally preserve the right to redeem by unconditionally tendering the redemption amount during the redemption period. *Flynn v Korneffel*, 451 Mich 186, 203-204; 547 NW2d 249 (1996); *Gordon Grossman Bldg Co v Elliott*, 382 Mich 596, 606-607; 171 NW2d 441 (1969); *Strempek v First Nat'l Bank-Detroit*, 293 Mich 435, 437; 292 NW 358 (1940). However, making a futile attempt at "a mere formality and a useless procedure" is generally not required. *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954). Under exceptional circumstances, equity may dictate that full technical compliance with the tender requirement should be forgiven. See *Marble v Butler*, 249 Mich 276, 279-280; 228 NW 677 (1930).

Here, it appears that Kloian attempted to inquire into the redemption amount and expressed his intention to exercise his right to redeem. Given Kloian's reliance, which we will discuss below, on the fact that his home address was readily available in the property's title history, we think it somewhat disingenuous that he did not look to the same title history, where he would have discovered the Sheriff's Deed. Nevertheless, by the time Kloian discovered that the foreclosure sale had occurred, the default judgment was already in place. As the circuit court correctly observed, "an order of the court must be complied with at the time it is entered even if the order is clearly incorrect." *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004). Irrespective of whether the June 9, 2016, default judgment was wrongly entered, the judgment had the legal effect of terminating Kloian's redemption rights. The better practice would have been for Kloian to deposit the redemption amount with the clerk of the court. See *Marble*, 249 Mich at 279. Nevertheless, the circuit court found that until such time as the default judgment was set aside, any effort by Kloian to tender a redemption amount would have been both legally and practically futile. We are not definitely and firmly convinced that this finding was mistaken. See *Herald Co, Inc*, 475 Mich at 472.

We therefore conclude that the circuit court properly found that Kloian does not lack standing in this matter.

IV. ADEQUATE NOTICE

DCH and intervenors next argue that the circuit court erred when it concluded that DCH failed to comply with the notice requirements set forth in MCL 600.3238(2) and (6) of the foreclosure by advertisement procedures, MCL 600.3201 *et seq*. We agree in part.

A. APPLICABILITY OF MCL 600.3238

As an initial matter, we must first determine whether MCL 600.3201 *et seq*. is applicable to foreclosures under the Condominium Act. We conclude that it is.

As discussed, MCL 559.208(2) provides, in relevant part, that "foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action . . . " Our Supreme Court has indicated that MCL 559.208 is a command to proceed under MCL 600.3201 *et seq*. See *Matteson v Stonehenge Condo Ass'n*, 469 Mich 941; 670 NW2d 669 (2003). In *Matteson*, this Court observed that the prior version of MCL 559.208(2) "was silent regarding a specific period of redemption and provided only that a foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action." *Matteson v Stonehenge Condo Ass'n*, unpublished per curiam opinion of the Court of Appeals, Docket No 231713 (Issued September 10, 2002), n 2 (quotation symbols omitted). On appeal, our Supreme Court held that as a consequence, the redemption period was one year from the date of sale, citing MCL 600.3240(12). Peremptory orders of our Supreme Court are binding to the extent they can be comprehended, even if doing so requires consideration of other unpublished opinions from this Court. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018). Clearly, MCL 600.3201 *et seq*. applies to foreclosures of condominiums.

Furthermore, statutes with similar "in the same manner as…" language are not novel, or even unusual. It is well understood that such language effectively incorporates the procedural substance of the indicated law by reference. See *Runnels v Moffat*, 73 Mich 188, 195-197; 41 NW 224 (1889); *Morris v Donovan*, 130 Mich 336, 337-338; 89 NW 963 (1902); *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 488 n 11; 511 NW2d 661 (1994); *Beason v Beason*, 435 Mich 791, 797, 797 n 2; 460 NW2d 207 (1990). We find it unambiguous that our Legislature's reference to "the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement" incorporates by reference the procedural requisites of MCL 600.3201 *et seq*. The fact that some of the terminology found in the foreclosure by advertisement provisions may not be literally applicable is a matter of form over substance, which the courts look past. *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958). As a consequence, the circuit court erred in holding that the notice provisions set forth in MCL 600.3238 were inapplicable.

B. NOTICE REQUIRED BY MCL 600.3238

Notwithstanding its erroneous conclusion that MCL 600.3238 did not apply, the circuit court also considered whether DCH had properly complied with those notice provisions. We agree with the circuit court's conclusion that DCH did not properly comply with those provisions.

"Foreclosure sales by advertisement are defined and regulated by statute." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993). MCL 600.3238 provides, in relevant part:

> (1) After a foreclosure sale under this chapter and providing notice under [MCL 600.]3237, the purchaser at the sale may inspect the property, including the exterior and interior of any structures on the property, as provided in this section.
>
> (2) The purchaser may conduct an initial inspection of the interior of any structures on the property. In addition to the notice provided in [MCL 600.]3237, the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any manner reasonably calculated to achieve actual notice of the purchaser's intent to inspect the property at least 72 hours in advance and shall set the time of the inspection at a reasonable time of day, in coordination with the mortgagor if possible.
>
> * * *
>
> (6) If an inspection under this section is unreasonably refused or if damage to the property is imminent or has occurred, the purchaser may immediately commence summary proceedings for possession of the property under [MCL 600.5701 et seq.] or file an action for any other relief necessary to protect the property from damage. If a purchaser commences an action for possession or any other relief under this section, the purchaser may also name as a party to the action any person who may redeem the property under [MCL 600.]3240.

> (7) Before commencing summary proceedings for possession of the property under this section, the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any other manner reasonably calculated to achieve actual notice, that the purchaser intends to commence summary proceedings if the damage or condition causing reasonable belief that damage is imminent is not repaired or corrected within 7 days after receipt of the notice.
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> * * *
>
> (10) If a judgment for possession is entered in favor of the purchaser in an action under [MCL 600.5701 et seq.] as described in subsection (6), the right of redemption under [MCL 600.]3240 is extinguished and title to the property vests in the purchaser as provided in [MCL 600.]3236 as to all persons against whom judgment was entered.

DCH and intervenors argue that the circuit court erroneously interpreted the above provisions as requiring Kloian to have successfully received actual notice. We recognize that the circuit court's ruling is not as clear as we might prefer, and some of its statements could be construed as implying a requirement of actual service. However, elsewhere the circuit court expressly recognized that service need not be successful. From our reading of the circuit court's bench ruling in its entirety, we believe the circuit court's holding to be that good faith efforts must be made in the pursuit of achieving actual service. We agree.

The fundamental goal of statutory interpretation is to discover and give effect to the intent of the Legislature as expressed through the plain language of the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999). Critically, all three notice provisions in MCL 600.3238 use the word "or." DCH and intervenors correctly point out that the word "or" is *usually* understood to be disjunctive; that is, signifying exclusive alternatives. Consequently, they argue, it is unnecessary to bother with "any manner reasonably calculated to achieve actual notice" if notice was either sent by certified mail or posted on the property. However, "or" has long been understood to be much more flexible in meaning than many other words, possibly even converging on "and." *Heckathorn v Heckathorn*, 284 Mich 677, 681-682; 280 NW 79 (1938). The word "or" may, in appropriate circumstances, be intended to be explanatory, expository, or interpretive of the words or clauses preceding it. *Blumenthal v Berkshire Life Ins Co*, 134 Mich 216, 219; 96 NW 17 (1903). When read in context, we conclude that the word "or" as used in the notice provisions of MCL 600.3238 is intended to be explanatory rather than truly disjunctive.

Application of the doctrine of *in pari materia* also supports our conclusion. "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Walters v Leech*, 279 Mich App 707, 709-710, 761 NW2d 143 (2008). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes." *Id.* at 710. MCL 600.3238 and MCL 600.3237 relate to the same subject matter: a purchaser's inspection of property foreclosed through advertisement. MCL 600.3237(2) and MCL 600.3238(2) address the notice a purchaser must give the mortgagor if the

purchaser intends to inspect the interior of the property after a foreclosure sale. MCL 600.3238(7) addresses the notice a purchaser must give the mortgagor if inspection is unreasonably refused, or if damage to the property has occurred or is imminent, and the purchaser intends to initiate summary proceedings for possession of the property. MCL 600.3237(2) requires the purchaser to provide notice by certified mail, physically posting on the property, "or any other method reasonably calculated to achieve actual notice." Similarly, MCL 600.3238(7) requires the purchaser to provide notice by certified mail, posting on the property, "or in any other manner reasonably calculated to achieve actual notice . . . " Use of the phrase "any other" in these two subsections makes clear the Legislature's intent that the manner of notice employed must be reasonably calculated to achieve actual notice. Reading MCL 600.3238(2) *in pari materia* with 600.3237(2) and 600.3238(7) compels the same conclusion, and raises the question of whether, given the circumstances of the present case, the notice given was "reasonably calculated to achieve actual notice."

It has long been understood that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) (quotation omitted). The notice need not be successful, but it must take into account the particular circumstances of the person and situation. *Id*. at 508-512. The phrasing of the notice required by MCL 600.3238 therefore closely parallels the phrasing of the notice required under due process. Under the circumstances, we conclude that it is manifestly apparent that the Legislature intended the word "or" to signify that "reasonably calculated to achieve actual notice" is no mere catch-all alternative, but rather explains the kind of notice required. The circuit court properly so held.

C. DCH'S COMPLIANCE WITH MCL 600.3238

The circuit court finally found that DCH did not comply with the notice requirements in MCL 600.3238 by mailing notice to the condominium unit and posting notice on the property. The adequacy of notice is circumstantial. See *Lawrence M. Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 274-275; 803 NW2d 151 (2011) (discussing notice required by due process). The circuit court found that DCH failed to make adequate efforts to provide Kloian with actual notice. Unfortunately, we are unable to discern the factual findings, if any, upon which the circuit court based that conclusion. We cannot, on this record, determine whether the circuit court's conclusion was proper. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000). We therefore vacate the circuit court's ruling that DCH failed to comply with the notice requirements in MCL 600.3238, and we remand for further proceedings.

V. INNOCENT THIRD PARTIES

As an initial matter, we disagree with the argument made by DCH and intervenors that MCR 2.612(B), which permits relief from judgment where a defendant was not personally notified, is inapplicable because personal jurisdiction over Kloian was unnecessary. We find persuasive the United States Supreme Court's observation that "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Schaffer v Heitner*,

433 US 186, 212; 97 S Ct 2569; 53 L Ed 2d 683 (1977). Furthermore, Kloian was explicitly a named defendant in DCH's complaint. As discussed, the courts disregard technicalities to the extent they conflict with substance. Consequently, we hold that Kloian was entitled to seek relief from judgment under MCR 2.612(B).

However, the circuit court declined to address whether intervenors were "innocent third parties who would not be prejudiced" by setting aside the district court's default judgment. Making such a finding is unambiguously mandatory under MCR 2.612(B). The parties seemingly accepted the circuit court's decision. Nevertheless, although parties may stipulate to facts, they may not stipulate to the law. *Staff v Johnson*, 242 Mich App 521, 529-530; 619 NW2d 57 (2000). A court necessarily abuses its discretion when it makes a decision on the basis of a mistake of law. See *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). We therefore require that on remand, if the circuit court again determines that DCH failed to comply with the notice requirements in MCL 600.3238, it must determine whether intervenors are innocent third parties who will be prejudiced if the default judgment is set aside.

VI. CONCLUSION

We note for the bench and bar that our outcome in this matter is partially based on the unusual and somewhat opaque record in this matter, and so we caution against excessively zealous extrapolation. Nevertheless, we hold that on this particular record, Kloian has standing in this matter, because he had an interest in having the default judgment set aside, and we are unable to find clear error in the circuit court's holding that any effort to tender a redemption amount would be futile. We hold that MCL 600.3201 *et seq*. is applicable to foreclosures under the Condominium Act, and the notice provisions in MCL 600.3238 require good-faith efforts to provide actual notice, although they do not require those efforts to succeed. We hold that the circuit court failed to make proper findings in support of its conclusion that DCH failed to comply with the notice provisions in MCL 600.3238. We finally hold that the circuit court abused its discretion by failing to determine whether intervenors were innocent third parties who would be prejudiced. Accordingly, we affirm in part certain of the circuit court's rulings as discussed, we vacate the circuit court's order setting aside the default judgment, and we remand the matter to the circuit court for further proceedings consistent with this opinion. On remand, the circuit court may, in its discretion, further remand the matter to the district court, in whole or in part, if the circuit court deems the district court a more proper forum for any reason. We do not retain jurisdiction. We direct that the parties shall bear their own costs, no party having prevailed in full. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

LAKESHORE GROUP AND ITS MEMBERS, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN and GEORGE SCHUMANN, MARJORIE SCHUHAM, and LAKESHORE CAMPING, Plaintiffs, -vs- DUNE RIDGE, SA LP, Defendants.	File No. 17-292-CE

ORAL ARGUMENT

BEFORE THE HONORABLE ROSEMARIE E. AQUILINA

Lansing, Michigan - August 2, 2017

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None

* * *

EXHIBITS:

None

Lansing, Michigan

August 2, 2017

2:42 p.m.

RECORD

THE COURT: This is docket circuit court case number is 17-176-AA. It is an appeal.

And, counsel, your appearance for the record. This is Lakeshore Group and group members Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga -- Reininga, et al, versus Dune Ridge SA LP and State of Michigan, Department of Environmental Quality.

Counsel, your appearance.

MR. ORDWAY: Good afternoon, Your Honor, Dustin Ordway on behalf of Lakeshore Group.

MR. KONWINSKI: Kyle Konwinski on behalf of Dune Ridge.

MR. BOCK: And Dan Bock on behalf of the Department of Environmental Quality.

THE COURT: Thank you. You may be seated. Counsel.

MR. ORDWAY: Your Honor, I'd be happy to answer questions. I know this has been briefed at some length. Otherwise, I can launch into a summary of some high points, whatever the court prefers.

THE COURT: I'm not sure if this is a high point or a low point, and I don't know you can answer this. It might be better for defendants, but tell me about -- there was a parcel that was sold, right?

MR. ORDWAY: Yes, Your Honor.

THE COURT: Okay. So -- and that was sold by defendants, right? And that's the part that allegedly no longer gives you standing, right?

MR. ORDWAY: That's what they're claiming, Your Honor.

THE COURT: That's what they're claiming.

MR. ORDWAY: I have a map if that would help.

THE COURT: I don't even need a map. My question is -- and I don't know if you've thought about this, but I want to pose it to all three of you, because today I'm wondering if that smacks of unclean hands.

MR. ORDWAY: Your Honor, I can't give the court any facts about the motivation for the sale.

THE COURT: Some things speak without a whole lot, because that changed the playing field, so to speak. Tell me about that.

MR. ORDWAY: Well, a couple of comments. One, we already had the decision by the ALJ that you

could not create a buffer. In the outline of the property -- may I approach?

THE COURT: You may.

MR. ORDWAY: This does not show those properties but it shows the overall -- here, I can give you another copy. These two pages are from Exhibits 5 and 7 to our brief. They're both pages from the administrative record. What's been changed is that on the one from Exhibit 5 we drew in with an outline a portion of the outline of the Dune Ridge property. It is 130 acres. We were struggling because we couldn't find a page in the administrative record that simply showed to the court in Saugatuck, this is where the property is from Lake Michigan to the Kalamazoo River. It goes up from the dunes of the shore through the vegetated dunes and the woods and all the way back down to the other side.

The permits were sought first for this area and a road coming in and utilities and then for this area and back dunes. The areas that were sold were over here. There actually were two different parcels sold. First they sold this property and said Mrs. Underwood no longer has standing and then they sold this property and said Mr. Zolper no longer has standing.

THE COURT: So when you're facing this document you gave me you're referring over to the right-hand quadrant, top and bottom, right?

MR. ORDWAY: That's right, Your Honor. And the second page is simply included because it's the page from the record that shows where Mrs. Underwood lives, and she still lives there; where Mr. Zolper lives, and he still lives there; where Mr. Altman is, very close to all this; where Reininga and Hoyt are located immediately adjacent; and that Schuham and Schumann, other members of the group, are just slightly south.

THE COURT: But the issues haven't changed, right?

MR. ORDWAY: Excuse me?

THE COURT: The issues have not changed?

MR. ORDWAY: The issues have not changed and they were found by the administrative law judge to have standing to challenge these permits. There was no permit sought out here, so we're just befuddled as to how the ALJ could believe that since they did nothing that altered their standing in regard to their relation to the property, how the sale of a part of the property by the developer could change their standing.

THE COURT: But I'm also understanding that the ALJ did not have a full hearing, either, right?

MR. ORDWAY: That's right.

THE COURT: There wasn't a full hearing.

MR. ORDWAY: That's right. He dismissed the contested case before there was an evidentiary hearing based on their argument arguing that we lost our standing.

THE COURT: Um-hum. Based on what I perceive to be unclean hands, so, sir, please have a seat. I'd like them to address this issue. I am a bit befuddled about that issue, and maybe I'm the one that's confused, and if so, I apologize.

MR. ORDWAY: And, Your Honor, I will sit down. I just ask to reserve some time --

THE COURT: Of course.

MR. ORDWAY: -- for either further points or rebuttal.

THE COURT: Of course.

MR. ORDWAY: Thank you.

THE COURT: Could you please explain this to me and tell me why I'm confused or how I'm confused?

MR. KONWINSKI: I'm going to address it as best as I can, Your Honor.

THE COURT: Thank you.

MR. KONWINSKI: Neither party addressed unclean hands in the briefing so I'll do as best as I can based upon what I know, but I certainly can't give you legal argument as to whether that doctrine actually applies here.

The facts, though, that are in the record -- and I don't know the exact citation. I know it is, in fact, in the record. There are two affidavits, one from my client and one from a gentleman named Brad Rottschafer, and he is actually the principal of the entity that purchased the second piece of the parcels, and if you actually read those affidavits, they explain that the sale of the property to Vine Street, which is actually the sale that made it so Mr. Zolper no longer lived immediately adjacent, was put into works. I think --

THE COURT: I'm sorry to interrupt you. That sale occurred during the pendency of this case, right?

MR. KONWINSKI: The sale actually occurred during the pendency of this case. Both of their affidavits independently discuss how that sale was actually put into place before the petitions were ever filed so it's not like we -- this was concocted

all of a sudden.

Second, as far as unclean hands, too, though, the first -- the first sale was to Oval Beach Preservation Society. The entire purpose of the petitioners' petitions was to preserve the land and make it so that the dunes weren't being affected or whatever. That entire 20 acres is now to an entity that is literally not touching it, so it's not like we're selling it to another developer and they're going to develop it. It's not going to be used at all for development.

The other aspect we need to remember here is it's not as if these petitioners lost any rights that they had. If these people that now own the property that is now immediately adjacent to them are going to develop property, they can, presumably, file the same exact petition as they did here, so they haven't lost the right.

The most fundamental principle, though, I think, out of all of this as far as legalese goes is the ALJ is an administrative agency that only has powers granted to it by the legislature. The cases say that the agency can only act pursuant to actions that the legislature says affirmatively and plainly, that's the language the case law says, and the cases

also say doubtful power does not exist, so if a statute is silent on a particular issue, that means that the administrative agency doesn't have that power, and in that regard, ALJ Pulter, when he ruled on this issue, he read the statute. The statute says you must live immediately adjacent to the proposed use and he says the statute doesn't say anything about how you came to live immediately adjacent, how you came to be not immediately adjacent. The statute simply says you must live immediately adjacent to the proposed use. The only powers he has and the only thing this court needs to decide is whether the statute affirmatively and plainly allows him to thus dismiss the case since they didn't have standing. There's no other basis for standing that is affirmatively and plainly granted.

So in that regard, Your Honor, the unclean hands issue, I think, too -- I think Judge Pulter correctly saw that the only issue before him was whether that statute was satisfied, and it wasn't.

THE COURT: So you're suggesting it's how you define adjacent?

MR. KONWINSKI: Immediately adjacent to the proposed use, correct.

THE COURT: Well, according to this map,

how are they not adjacent?

MR. KONWINSKI: Well, you see where parcel C says -- that was sold. That's what was sold to the Oval Beach Preservation Society, right? So that's gone. Parcel B, you see where it says B, that's what was sold to Vine Street Cottages, so this property, C and B -- I believe it's all B. If not, it's, you know, at least half of B or so, they don't live next to any property Dune Ridge owns.

Now, what I also wanted to point out -- and I only have one copy of the actual statute, Your Honor. This isn't really an issue that was completely briefed in the appeals but since we kind of ventured on a little bit, if you pull up the statute -- and this was something we argued below. He touched on this buffer concept that he mentioned. The statute actually says you have to be immediately adjacent to the proposed use. It doesn't say you have to be immediately adjacent to the land owned by Dune Ridge.

It further highlights the fact that the proposed use is way down here by Lake Michigan, and of course -- this looks small, Your Honor. We actually did a site visit with the ALJ before he made his decision at some point in the proceeding. It's

about a 20 minute walk from any sort of development going on up here to Mr. Zolper's property, so I understand it looks small here, but to say they're immediately adjacent to anything that Dune Ridge even owns right now, I don't know how that interpretation could be made considering what's currently owned by Dune Ridge.

THE COURT: So you're saying what's in quadrant A?

MR. KONWINSKI: The development is going on somewhere there. So what this actually reflects, Your Honor, is the old church camp buildings, so you see all the buildings that the church camp had on this parcel for a number of years, and actually these tracks are where the roads -- there were dirt roads but they're currently being paved, but, yes, down here, it's really toward the lake. Even kind of below the last drive is where the development is occurring.

THE COURT: So is your argument that even if -- because let me just tell you, I am ignoring the fact that the land was sold, for argument sake here.

MR. KONWINSKI: Okay.

THE COURT: I'm not quite sure that was done with clean hands, at least during the pendency

of this, or thought out appropriately, especially without hearing. It just doesn't sit well with me, so if I take out that fact, and I understand here I'm not supposed to add facts and all of these other things, but if I take out this gnawing piece and look at what you're telling me, okay, this part that's to be developed is in this quadrant that is marked as A, that is not adjacent -- your argument is that it's not adjacent to these other -- let's say the petitioners.

MR. KONWINSKI: That's correct. Exactly, Your Honor. The statute says to have standing you must be, quote, the owner of the property immediately adjacent to the proposed use, so I don't mean to be nit-picky, but the statute says immediately adjacent, and in our mind, if the statute just said adjacent, what does adjacent mean? Do you have to be the most adjacent property? Can there be five houses in between you and the proposed use? The legislature determined to use the word immediately, so what does immediately adjacent mean? To us and what we argued is that only means you have to be next to it. I mean, you have to be the property next to whatever it is that gives you standing, which is the second point is what do you have to be next to, and the statute

says you have to be adjacent to the proposed use. We didn't propose to use all the parcels and we're certainly not proposing to use all the parcels now because we sold two of them, B and C, so we would still contend that we're not -- there's no one immediately adjacent to the proposed use, and even if B and C were there, those people weren't -- aren't immediately adjacent to the proposed use.

THE COURT: And you're also suggesting that it doesn't take a hearing to determine what you've just told me, because the ALJ did not have a hearing?

MR. KONWINSKI: That's correct, Your Honor. And he -- for sake of this argument, I guess you could say he found as a matter of fact they were immediately adjacent to these property lines and he made clear in his -- Judge Pulter made clear in his rulings -- he rejected our argument that you had to be next to the proposed use. He found you had to be next to the proposed -- or you had to be next to the property owned by the developer, or something to that effect. So I don't think there needs to be a hearing on whether or not they're immediately adjacent to the property we used to own, if that's what you're saying, and of course our position is if they don't have standing to even file a petition, they're

certainly not entitled to a right to a hearing. If you're not -- if you don't have standing in a circuit court to file a lawsuit, you don't get your trial.

THE COURT: All right. Anything else?

MR. KONWINSKI: A few -- one other concept on this topic, and I don't know exactly how the doctrine of unclean hands is, but my understanding is the doctrine of unclean hands is, again, a common law doctrine, if I'm not mistaken, and, again, actually, part of our briefing was, because they argued that they should have common law standing, is that there's case law -- and I'm going to quote published cases that say administrative agencies have no common law powers, so, again, if we're going down a path of asking whether the doctrine of unclean hands applies, if that's a common law doctrine, clearly it doesn't apply to an administrative agency even if Your Honor thinks that may be an issue that should have been explored.

One other important point to point out, Your Honor, and this doesn't come that clear through the briefing. The petitioners' brief, they don't contend that you can't lose standing. What they -- what their argument is is it depends on how you lose standing, this concept again of who caused -- how to

lose standing. In my mind I can't imagine the law would draw a distinction between if a petitioner moved away a hundred miles as opposed to a developer -- I mean, suppose it is a situation where we owned a thousand -- 10,000 acres, Your Honor, and we sold 99,000 -- you know, 9900 of those acres and there's only a hundred acres left as far away as possible from the petitioners. I can't imagine the law would draw a distinction between who causes who to lose standing, and, in fact, I point out -- we cited cases to show standing can be lost. Even after we pointed that out in our response brief, the petitioners didn't cite a single case to say -- whether it was about unclean hands or whatever, they didn't cite a single case to say that what happened doesn't cause them to lose standing, and I think that's important.

THE COURT: Okay. But you did not cite a single published case. You cited only unpublished cases.

MR. KONWINSKI: We cited one unpublished case that -- excuse me, one published case that stood for the proposition that you can lose standing throughout a proceeding and I can -- I tabbed that because I was curious if that issue might come up.

We cited -- the one published case we cited is this Aichele, A-i-c-h-e-l-e, and that's 259 Mich App 146, and that explains -- the parenthetical there is explaining that Michigan law recognizes the distinction between sufficiently pleading standing and actually being able to prove standing, so what that case shows is you can have standing to file a case but you may not have standing at the end of the case, and, again, the Eastern District of Michigan case, that case has a pretty lengthy analysis of the subject, too, and, again, it's all Michigan case law they're analyzing. It's Granger verse Klein, 197 F Supp 2d 851, and that's one of the cases I believe that ALJ Pulter cited. We certainly cited it to him.

And, nonetheless, while I acknowledge that the others are unpublished, you know, it's three unpublished cases and, again, there's no unpublished treatise or otherwise saying the opposite, so I'd argue that those should be persuasive.

THE COURT: I'm just looking for the published case because what you attached were all unpublished cases.

MR. KONWINSKI: Right. Page eleven is the case we cited. We didn't attach our published cases to the briefing.

THE COURT: Okay.
MR. KONWINSKI: Only the published (sic) cases.
I'm happy to address any of the other issues in the briefings, Your Honor, if you want.
Looking through my outline here, there's another quote I have from -- this is either a published Michigan Court of Appeals case or perhaps even a Michigan Supreme Court case, I'm not sure, but the quote is this: Quote, the power and authority to be exercised by boards or commissions, agencies must be conferred by clear and unmistakable language, since doubtful power does not exist, end quote. And so I would implore this court when analyzing this issue to ask, did Judge Pulter follow the legislature's statute that he -- that gave him the power to do what he wanted -- what he did, and to the contrary, what statute supports the petitioners' argument that he didn't properly do what he was supposed to do? Because he can only act by statute. He can only act by what the legislature said he can and cannot do, and the law is crystal clear on that, and he followed the law, in our opinion, Your Honor.
Your Honor, I'm happy to address other issues in the brief or if you have any further

questions about this topic at this time.
THE COURT: Let me hear from the other party. Anything else you wish to add, sir?
MR. BOCK: Just very quickly, Your Honor, if I may. Just a couple of quick points on behalf of the DEQ here. Number one, I'd like to, if I may, address the court's question about unclean hands.
THE COURT: Yes.
MR. BOCK: Contrary to Mr. Konwinski, it just so happens I actually argued an unclean hands two weeks ago in Eaton County so it's fresh in my mind. Two reasons that unclean hands didn't come up in this hearing. Number one, as Mr. Konwinski was getting at a moment ago, unclean hands, as I think we all know, is an equitable doctrine. The law is crystal clear that administrative law judges don't have equitable powers and principles of equity do not essentially play a part in contested case hearings. These are, as I -- and I didn't brief that because it wasn't raised in the briefing by opposing counsel. I could have and I'm happy to provide a supplemental brief if the court would like, but there's ample case law that says you don't have equity or equitable arguments in contested case hearings. In fact, multiple times my recollection is throughout this

hearing Lakeshore Group sought injunctions from the administrative law judge and the ALJ ruled again and again, I don't have equitable authority. I can't argue -- I can't issue injunctions. I can't grant estoppel. He couldn't have ruled on unclean hands because there's no place for it in this purely statutory creation.
Number two, Lakeshore Group never raised it. I mean, they argued that they can't have their standing taken away from them, but they didn't argue unclean hands specifically, so those are the two reasons it didn't come up. It wasn't raised by any party but it couldn't have been raised by any party because it's an administrative contested case hearing, so that's the only reason.
To the court's question about why a hearing was not necessary, I think a hearing was not necessary here because of how this was argued. I think there's a little bit in the arguments of both my opposing counsel and counsel that's on the same side as my client about this buffer zone argument and things like that, and I think I'm remembering this clearly, it's -- there was a lot of paper flying around in this case, long history, but initially my recollection is that Dune Ridge argued, we own this

big chunk of property. We're only using this piece here and these petitioners live adjacent to this side of it and so there's this buffer zone and they're not immediately adjacent to the proposed use, and the administrative law judge said, no, no, no. Dune Ridge owns this whole parcel. The proposed use is going on this parcel and so I'm not divesting them of standing because of the buffer zone which consists of the parts of Dune Ridge's parcel that was not getting used for this project. Does that make sense?
THE COURT: Makes sense.
MR. BOCK: The sales of portions of this parcel were completed while the case was going on. I personally -- I'll trust Dune Ridge's -- Dune Ridge as to when those sales began, but they were completed while this contested case hearing was going on, and so the issue becomes can Dune Ridge effectively divest Lakeshore of their jurisdiction by selling off a piece of the property?
Now, the ALJ and the parties in this case, I believe, are bound solely by the language of the statute. We don't have equitable principles to rely on. On behalf the DEQ -- and I can tell the court as the DEQ attorney, I don't care one way or the other. DEQ decided to issue these permits here but that's

because they felt it was the proper thing to do. If they get overturned and told not to issue the permits, they're fine with that, I'm fine with that, but just looking at the law, the legislature appears to have created a situation here where you have to own property immediately adjacent to the proposed use, as we've heard, and there's no provision for what happens if a sale changes things in the middle of a case.

The law in Michigan appears to be clear, at least there's ample persuasive authority and nothing to the contrary, that you have to have standing all throughout the entire case. If you lose standing at some point in the case, then you lose standing and your case has to be dismissed. Those are the cases that Mr. Konwinski was referring to just now, and so our position was that the ALJ made the correct decision using the powers that were at his disposal.

Unless the court has any questions for me, that's all that I have

THE COURT: Not at the moment. Thank you very much, sir.

MR. BOCK: Thank you, Your Honor.

THE COURT: All right.

MR. ORDWAY: If I may?

THE COURT: Yes. Respond to all of that.

MR. ORDWAY: Your Honor, there is -- there are a lot of cases where one homeowner wants to add a deck to their cottage in the dunes or they want to add a bedroom or they want to tear down a house and replace it as one lot. The effect of the arguments they're making would be that if a neighbor on one side objects to the deck, the owner could say, well, instead of putting it on your side, we'll put it on the other side. You're no longer immediately adjacent. The fact is that Dune Ridge's own papers say and the owner of Dune Ridge himself in the public hearing said the entire property is a project and the goal is to make a profit by developing or selling the property. And there's nothing wrong with that, but the point is the entire property is the project, and what they did is they sold a piece here, sold a piece there. It's in furtherance of the project. It doesn't change the concerns here.

The effect of their argument would be -- lots five through 12 are along here. Suppose instead of this being Oval Beach Park, one petitioner lived right there. Dune Ridge would argue we just sold lot 12 so you're out of the case, even though your case had to do with lots one through 21. It just doesn't

make sense. The cases they've cited are all, including the public case, about situations -- should I stop? I thought it was coming from up here.

All of the cases are about a party giving up their basis of standing. If Mrs. Underwood had sold her property and moved to Texas, she might still try to argue, I care about these dunes, but she's not there. None of that happened. Mr. Zolper is still right here. Mr. Altman, all of these other people are still there.

There's another way to look at this, Your Honor, and I'll come back to their point, but I think they're simply wrong about how they try to apply the cases where a plaintiff gave up his or her own basis for standing. That's not happened here. Those cases simply don't apply.

THE COURT: Let me just stop you there. The second page of -- that you've given me, this A, B, C, if we can all just turn to that?

MR. ORDWAY: Right.

THE COURT: Is it the position -- your position that A, B, C is a bit misleading because it's not three separate projects, it's one big project that, based on whatever is going on with the builders, the county, et cetera, it could be

parcelled off, but it's still one project affecting everybody who has ownership papers?

MR. ORDWAY: That's exactly right, Your Honor. And what's more, what makes that especially important is these people all live in the same dunes, the same sand dunes that are protected.

THE COURT: So when -- in your brief, when you're talking about -- there's a whole section that you wrote about the schools and all of these other things -- I don't know, the property owners and the injuries and all of that -- it's because the citizens, the traffic, the habitat, the plants, whether or not they're touched and what will or will not be touched is going to affect the property as a whole, and that's really what the concern is, and everybody wants to have a voice.

MR. ORDWAY: That's right. And that's the whole purpose of the underlying statute that we're -- what's beneath what we're dealing with here is whether they should have permits under part 353 of MEPA, the sand dunes protection statute, and the whole point is to look at the dunes as a whole, not just might they affect the forest dune or what if they build one home in the wooded upper dune. One part relates to another. There's a lot of scientific

information out there.

One thing that's a challenge that also underlies this case, Your Honor, is part 353 never had regulations promulgated. There are a lot of environmental statutes; those, for example, dealing with wetlands, cleanups of contamination, underground tanks. There are a lot of environmental statutes with detailed regulations that provide definitions of things, like, what does the diversity of the sand dune mean? What does owner mean? What does immediately adjacent mean? There is none of that and that's -- one of the purposes of MEPA and why it's relevant below and it's relevant here, Your Honor, is that it requires that standards, if they're inadequate, be developed further, and it explicitly empowers this court to help promote the development of or even require the development of or even impose standards, so, for example, in the sand dune situation, even if it weren't all one big project, just to be in the same dunes, like the Schuhams and Schumanns to the south who are not immediately adjacent, the definition of that in a regulation or a standard could say, if you're in the same sand dunes, that's close enough.

Another -- may I shift, Your Honor?

THE COURT: You may.

MR. ORDWAY: Mr. Konwinski has argued and it's been put in the papers as well as orally today about these cases that talk about how agencies have only the power that was granted them by statute. I will confess I don't understand the argument for two reasons. One, the administrative law judge is not an agency. He or she, in this case he, is serving a function to provide a quasi judicial review to lead to a recommendation to the director of DEQ to make a final decision on the permits. There is no -- none of the cases they cite deal with the situation. They're all about agencies that, in fact, are promulgating rules, imposing standards on the population as a whole. All the administrative law judge is doing is applying the law in a limited fashion to a review of a permit so the director of DEQ can make a final decision. Those cases don't apply. There is no expansion of the ALJ's power to allow someone with a genuine issue standing under MEPA, standing under Lansing Schools, and/or standing under section 35305 to participate, so the argument just doesn't make any sense, and it should be rejected.

The other thing that concerns me about it,

Your Honor, is Lansing Schools is our Supreme Court's explanation of our common law of standing. It starts with the possibility maybe there's an explicit statutory basis. Here we have an explicit statutory basis, but even that does not use the language that the appellees have used that only such a person can have standing. It doesn't say that, but there is a statutory basis, but beyond that, there's a common law basis. If one accepts the argument Dune Ridge is making that no common law judgment can apply to what happens in a contested case, it's not only saying that whatever this court rules now can't apply, it's saying that Lansing School's explanation about the basis of standing, our history in Michigan and what it laid out, can't apply, it has got to be rejected, Your Honor. That's not a meaningful explanation about what can happen in a contested case.

Now, I can imagine a situation where perhaps the legislature might have written 353 in a different way and perhaps they would have said, look, if someone owns property, we don't care about the public interest, we don't want you to balance the public interest, we don't want you to protect the dunes, we want you to let them build whatever they want and we don't want anyone to challenge that

unless they live immediately adjacent, but the standing section of 353.05 doesn't say that only such a person has standing or that restricts the standing. The entire scheme of the statute is to promote a fair balancing. We want to respect private rights but we need to protect the public interest.

And the other reason I wanted to hold the map up, Your Honor, is, again, it's not one home, one driveway, one swimming pool. It's 20 or more. It's a large development that affects 130 acres of property that for a hundred years was a summer camp with nothing paved, no paved roads, no paved paths. It's a dramatic change. Clearly the intention of part 353 is that this needs to be reviewed carefully. It doesn't say they can't proceed in the end. It doesn't say they can only have three lots and not 20, but the way it was done, the way the applications went in serially, the way DEQ didn't look at the whole is contrary to the intention of the statute and it's contrary to MEPA, and we would ask that the case be remanded, that all of the members of Lakeshore Group be regarded as having standing, that the -- and if it would help for us to all brief what standard should apply under 353 and MEPA, we can do that, but there are a number of standards laid out in part 353

about requiring comprehensive scientific information, about evaluating the diversity of the dunes, the quality, the function of the dunes. We can address that further, but there should be a hearing on the scope of this proposed development.

I would, if I may, just to go back to the standing issue of Hoyt and Reininga, who are right here, we unduly complicated that issue in our brief, Your Honor. We were trying to deal with their focus on title by saying they have equitable title. They cited back the Slatterly versus Madiol case in which the court, as they properly quoted, said there are limitations. The statutory authority for an association like that doesn't give legal title to Ms. Hoyt and Mr. Reininga, but what they didn't do in their brief is explain to you, Your Honor, that that same decision then goes on it says, well, in addition to the statute, we have to look at the bylaws, and the bylaws of Shorewood Association -- we've provided those and we've cited from them -- the bylaws make it very clear that in layperson's terms, Ms. Hoyt and Mr. Reininga have an exclusive right to possess that property. No one else can use it. It's that simple.

The dictionary definition of owner, the term, the technical term in this standing provision,

section 353.05, the dictionary definition of owner is the right to possess and they, Ms. Hoyt and Mr. Reininga, have a right to possess. They're the only ones with the right to possess that property. They're owners. The fact that they're part of an association shouldn't have anything to do with their standing, so they should also be reinstated.

It's a little surprising to us, Your Honor, that this in some ways seems to be a case of first impression in that the other side are not citing to sand dune cases under parts 353 saying, look, here's how it has to be, here's what can be done, this is allowed, that's not allowed. There's a real need to have a close look taken at how part 353 is implemented, how membership applies to it. The use of the Preserve the Dunes case in three different situations, arguing below that MEPA doesn't apply to the contested case, arguing in a motion for reconsideration on venue that there's no issue because a court can never review a DEQ decision, and then in the related case where DEQ is seeking dismissal, again, arguing under that Supreme Court decision that a court can never review their permit authority, those are all misreadings and misapplications of that decision. Just like the

effort to ignore Lansing Schools on standing and the breadth of the grounds for standing, they're trying to take a decision where there was a reversal because a challenge was time barred on non-environmental grounds and take language out of that case. Admittedly, the language makes it sound like a court can't review what DEQ does, but the key term is eligibility. It is a decision about eligibility and that was a narrow grandfathering issue that was going to be reviewed once in a mining permit situation. It has nothing to do with this sand dune statute.

The court went on to cite other Supreme Court authority that explains how MEPA is a statute that was specifically promulgated by the legislature under the constitution to promote the development of common law environmental protection, and yet they're arguing that this court has no ability even to review what happened. It's directly contrary to the Preserve the Dunes decision. That judge, that panel, that court, the Supreme Court actually sent the case back to the Court of Appeals and said, look, the trial judge in our case did a seven day MEPA hearing, seven day hearing on the environmental impacts. MEPA is part of this case. We need you, Court of Appeals, to review that. We need you to confirm whether or

not there was a violation of MEPA, and yet the language out of that decision is -- there is an attempt to use -- to say MEPA can never apply and the court has no authority. It's completely wrong. It's important for the future of these kinds of cases, Your Honor, for the court to reject that limiting attempt by the appellees. Thank you. I would be happy to answer any questions.

THE COURT: I think I've got it. Anything else?

MR. KONWINSKI: A couple things, Your Honor --

THE COURT: Briefly.

MR. KONWINSKI: -- that I was hoping to correct. There was a question posed and also as it was used in the petitioners' briefing that it was 130 acre development. That's just not true. They purchased a large piece of parcel. They purchased a large parcel. It all came together. They never intended to develop the whole thing, so to call it a 130 development is wrong from the start, I think gives the wrong impression of what occurred.

The next aspect of that is going to the questions about, well, where -- where was the use located in relation to where these people were

located and, again, the statute says they have to be immediately adjacent to the proposed use. This doesn't say immediately adjacent to all the property owned by Dune Ridge.

There was another question from this court to opposing counsel about, well, is this meant to protect, you know, anyone who wants to have a voice in it or concerned about those types of things? That's a very adequate consideration but that's an entirely different part of the same statute. If you actually keep reading that statute it says the owner of the property immediately adjacent to the proposed use is aggrieved by a decision. It's rather clear under case law what aggrieved means and that's those exact considerations that you were asking about, so you not only have to live immediately adjacent to the proposed use, you have to also be aggrieved, which is considerations about the natural habitat around you and whatnot.

THE COURT: So, sir, do you --

MR. KONWINSKI: Yes.

THE COURT: -- when you look at this diagram that was provided to us, whether it's the top one or the bottom one, are you suggesting that there's not one large parcel with a lot of interests

in it or are these very separate interests? Do you know what I'm saying?

MR. KONWINSKI: I'm not a hundred percent clear. I think I'm getting there.

THE COURT: So what opposing counsel is saying is that this is really one dunes project and it affects a lot of different people who want a voice. What I hear you saying is whoever is affected, they have to be adjacent, they have to be -- they're together but they're really separated. What is this in your book? Is it one project? Is it several projects? What is it?

MR. KONWINSKI: The best I can answer is Dune Ridge owned all of this property. Now, can you classify something in development when they owned it and then sold it to a preservation society? I'd say no. Depending on how you characterize it, he'd say yes, but whether it's a development or not, I don't know if that matters under the statute, and same with parcel B. That property was sold to someone else. Just because you sell a piece of parcel it becomes a development? I guess I disagree with that, and I would also then say even if it was, the statute says you have to be next to a proposed use.

THE COURT: Well, was it meant to be part

of the overall community yet it was sold because that's going to be a non-developed part so a non-profit is going to take care of that part?

MR. KONWINSKI: For parcel C, that's my understanding.

THE COURT: So it's part of the dunes and it's just going to be preserved in a different way.

MR. KONWINSKI: Right. It's going to be preserved in their natural state, which is precisely why Ms. Underwood, who is immediately adjacent now to a preserved area, doesn't have standing under the statute, right? I mean, that's the whole purpose of what the legislators said. You have to be immediately adjacent to the proposed use. They're not using parcel C. That's the whole point of the statute, if you're next to something being developed, then, yeah, you have standing, but parcel C, you don't.

THE COURT: Because they sold it for what they wanted it to be developed as, which is nothing. They want it to be maintained as a natural habitat, right? So isn't that part of their use and plan of that dunes development? I mean, they wouldn't have sold it to a used car salesman.

MR. KONWINSKI: It's never changed. It's

not like it was something before that it is now. I mean, I don't know how you could classify development as something that has remained unchanged. That's -- that's what parcel C is. It is something that has never changed and will never change.

THE COURT: Because part of the overall development plan, scheme, and design of that dunes area -- it's a word game, counsel. We all play it as lawyers.

MR. KONWINSKI: Yeah. I guess I'm not sure, Your Honor -- again, the statute says immediately adjacent to the proposed use. I'm not seeing development anywhere in the statute. I see proposed use. They've only proposed -- Dune Ridge has only proposed to use parcel A. That's the bottom line. They haven't proposed to use C.

Let me back up because something just hit me. The below proceeding is a part 353 proceeding. That's to develop on sand dunes. You don't need a permit to sell a piece of land to the Oval Beach Preservation Society, which is what they did to parcel C. Parcel C has nothing to do with part 353. They're only developing under part 353. What they're using is the stuff on A, so, again, I know maybe we're just disagreeing at this point, Your Honor,

but --
THE COURT: No. We're just clarifying --
MR. KONWINSKI: Yeah.
THE COURT: -- which piece of this property is because it seems to be a problem except it is part of the overall development of one project. It's just a question of now it has different owners, which ultimately there will be multiple owners in dunes project, because that's what it is, it is a development.
MR. KONWINSKI: And I guess I'd say if Oval Beach Preservation Society ever decides to actually use that parcel, then Ms. Underwood would have standing under part 353, but no one is seeking a part 353 permit as it pertains to any of the land that you see on parcel C. Part 353 has nothing to do with that land and so we shouldn't even be -- I don't even know how the two are related as far as whether someone has standing under part 353. Even though she lives next to land, that has nothing to do with part 353.
THE COURT: Okay.
MR. BOCK: I'll be real quick, Your Honor, I promise.
MR. KONWINSKI: I had one other thing.

MR. BOCK: Sorry.
MR. KONWINSKI: On this whole Hoyt and Reininga property, the other property, I guess, down on what appears to be the south side of the property here, opposing counsel said there's bylaws relating to Shorewood Drive that also apply, and I agree. The Court of Appeals actually also quoted the bylaws as well and said that the people that lived in Shorewood had no present real property interest. That case is a published case. Opposing counsel has no cases distinguishing it or cases -- -- or saying the opposite and there's -- I think that's a binding case that should apply here.
One other thing that I had to correct, he said the ALJ here wasn't an agency and, therefore, all that law about agency doesn't apply. My understanding is that's a complete misstatement of the law. The Michigan administrative -- Michigan administrative hearing system is merely a function of the administrative agencies, and I think the law is clear as day that they're simply part of those agencies and, therefore, all that about no common law powers and that the Michigan administrative hearing system can only act to the powers that are plainly and affirmatively granted, I think all of those

apply.
If you have any other questions, Your Honor --
THE COURT: Not at this time.
MR. KONWINSKI: Otherwise, I think Mr. Bock has comments.
MR. BOCK: I promise to be very quick, Your Honor.
THE COURT: Thank you.
MR. BOCK: Just wanted to clear up some things Mr. Ordway said that I believe were not accurate characterizations of the law.
First of all, something Mr. Konwinski was getting at just now, when we're talking about what is the proposed use the people have to live next to, it's what you're getting the permits for. If you're applying for a part 353 permit to build something here, that's the proposed use. So Mr. Ordway was referring to the entire dune being affected. Not what the statute says. You have to live immediately adjacent, which means next to the proposed use, meaning where -- what's getting built where.
Mr. Ordway talked about the fact that there's no administrative rules enacted under part 353. It's actually very common. There are hundreds

of parts of the Natural Resource Environmental Protection Act, some have administrative rules that define the terms, some don't. Michigan law is very clear -- and, again, I would have briefed this had it been brought up in the initial brief that I could respond to -- Michigan law is very clear that when there's no definition of a term, you use the commonly understood dictionary definition.
THE COURT: I'm aware.
MR. BOCK: So here immediately adjacent is right next to. The proposed use is the project that's getting permitted by the DEQ.
To back up what Mr. Konwinski said just now, Mr. Ordway says the administrative law judge is not an administrative agent. He happens to be part of the administrative hearing system which here is systems for the DEQ, two administrative agencies governed by the laws that Mr. Konwinski and I cited
Mr. Ordway talked about how the Lansing Schools case applies. Again, as we set forth in our brief pretty thoroughly I think, when the legislature creates a statutory cause of action, it can limit standing and make it more strict than what is provided for in common law standing.
Mr. Ordway talked about MEPA, which the ALJ

was absolutely correct, MEPA does not in any way convey standing to somebody to hold a part 353 permit. That's just not an accurate statement.

And finally, Mr. Ordway was talking about Shorewood Association and how Ms. Hoyt and Mr. Reininga are members of Shorewood Association and so he made the argument that they have equitable title to property that's actually owned by Shorewood Association. Well, we pointed out on page 12 of our brief, Shorewood Association is the owner of the property that he's referring to

Shorewood Association was a party to this contested case hearing originally and they settled it with Dune Ridge and they were dismissed with prejudice. Now what's happened is two of their members have said, well, we're part of Shorewood Association and Shorewood Association owns this property that's immediately adjacent to the proposed use and we're allowed to use it so we should be allowed to sue. No, no, no. Shorewood Association is the owner. They settled out and dismissed with prejudice, and so I think it's -- I'm kind of shocked that they're arguing that even though they can't sue anymore, two of their members can claim the right to sue by belonging to this association when it's the

association that owns the property.

That's all I have. I assume the court has no questions at this point. Thank you.

THE COURT: Final word, your motion.

MR. ORDWAY: Your Honor, I think we addressed most of them already.

THE COURT: I think so.

MR. ORDWAY: I will point out that at the time the Shorewood Association as an association whose goal was to get this property and paid for it as part of the settlement, before they settled out Hoyt and Reininga had already intervened and already been found by the ALJ to have standing because they were immediately adjacent, and their focus is not what -- their concern is not the concern of what the association as a whole had. It's their personal concern because they have a right to possess this property that's immediately adjacent.

If we were to compare all the language in the briefs and what Mr. Bock just said, I think the term owner is being thrown around pretty loosely. The word in the statute, owner of property, there's no definition. The dictionary definition is very simple, right to possess. They're the only ones that have the right to possess it. It's attempting to go

back over Lansing Schools and standing and all the other broad issues. I think we've addressed them. I would just emphasize we feel it's a very important case. There is obviously a pending request for reconsideration on one-half of the related case and the DEQ's motion to dismiss the related case against it under MEPA in the Court of Claims is still pending as far as we know. Our position is that all of those should be brought together in one court so we can make sure we don't have inconsistent decisions and so that we can apply MEPA and its mandates in a fair way, to have 353 applied the way it was intended to be applied. Thank you, Your Honor.

THE COURT: All right. Although when I came out I was prepared to rule and through much of this I was prepared to rule, I think that with the complexities of this I'm going to go through the case law again and what you had to say. I'm going to order a transcript so I can review what you've said again from Ms. Hamlin and you'll have a written opinion. Thank you. That's all for this record

(Whereupon hearing concluded at 3:41 p.m.)

* * *

STATE OF MICHIGAN)
) SS
COUNTY OF EATON)

I, GENEVIEVE A. HAMLIN, Certified Shorthand Reporter and Notary Public in and for the County of Eaton, (Acting in Ingham County) State of Michigan, do hereby certify that the foregoing was taken before me at the time and place hereinbefore set forth.

I FURTHER CERTIFY THAT said witness was duly sworn in said cause; that the testimony then given was reported by me stenographically; subsequently with computer-aided transcription, produced under my direction and supervision; and that the foregoing is a true and correct transcript of my original shorthand notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of August, 2017.

_____
Genevieve A. Hamlin
RPR-CM/CSR-3218