STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JOYCE A. TREMBLAY, by its Personal Representative DEBORAH S. STRINE, and DEBORAH S. STRINE, Individually, DELORES A. HEMBOLT, SHARON L. SIZEMORE, BARBARA J. TREMBLAY, WINIFRED A. STEPHENS, and CAROL M. ALLRED,

Plaintiffs-Appellants,

v

ROBERT BURGIN, Individually and as Trustee of the J. GLEN BURGIN TRUST,

Defendant-Appellee.

UNPUBLISHED
June 22, 2010

No. 289480
Antrim Circuit Court
LC No. 2008-008394-CH

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

In this suit to reform a deed, declare the rights of the parties to real property, and for damages, plaintiffs Estate of Joyce A. Tremblay, Deborah S. Strine, Delores A. Hembolt, Sharon L. Sizemore, Barbara J. Tremblay, Winifred A. Stephens, and Carol M. Allred appeal as of right the trial court's order dismissing their claims against Robert Burgin and the J. Glen Burgin Trust as untimely. On appeal, the primary question is whether the 15-year period of limitations for claims concerning title to real property applied to plaintiffs' claims and whether the claims accrued more than 15 years before plaintiffs filed the present suit. We conclude that the trial court correctly determined that the 15-year period of limitations applied to all plaintiffs' claims and that the claims accrued in 1988. Because plaintiffs' filed the present suit more than 15 years after the date their claims accrued, the trial court properly dismissed the claims as untimely. For that reason, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In October 1971, Bernice Tremblay (Bernice), as the survivor of "herself and Napoleon J. Tremblay," deeded by quitclaim deed 120 acres of property to herself and her son, Wilfred J. Tremblay (Wilfred), as joint tenants with full rights of survivorship. The deed described property that was located in Custer Township in Antrim County and included the southern half of the north half of the southeast quarter of Section 22 and the entire northern half of the

southwest quarter of Section 23. Thus, the deed conveyed 40 acres from Section 22 and 80 acres from Section 23.

In June 1977, Bernice and Wilfred entered into a land contract with Northern Land Company (Northern), which was listed as a partnership on the deed. J. Glen Burgin (Burgin) signed as a partner on behalf of Northern. In the land contract, Bernice and Wilfred agreed to sell Northern the southern half of the north half of the southeast quarter of Section 22 and the northwest quarter of the southwest quarter of Section 23—that is, the 40 acre strip of land in Section 22 and the western half of the 80 acres in Section 23 for a total of 80 acres. However, the land contract provided that the sale only included one-half the oil and mineral rights. In addition, the land contract provided that Bernice and Wilfred would provide warranty deeds for portions of the land as Northern made payments according to a formula stated in the contract. The land contract was recorded in the same month.

At various times after entering into the land contract, Bernice and Wilfred executed deeds that conveyed some portion of the property covered by the land contract to Burgin individually. The deeds referred to parcels that were approximately 10 acres in size. Each of these deeds stated that the transfer included only one-half the gas, oil, and mineral rights. Bernice and Wilfred executed one such deed—covering three parcels and about 30 acres—in August 1988.

In 1988, Bernice and Wilfred also executed a warranty deed that purported to convey all the land covered by the land contract—including the parcels already conveyed—to Burgin. This deed did not include a reservation of any gas, oil, or mineral rights. Bernice and Wilfred "Signed" and "Delivered" the deed in the presence of Ross Hickman, Esquire, who also notarized the deed, and Jana Lanning.

In February 1992, Bernice died. Plaintiffs, who are Bernice's daughters, were the residual beneficiaries under Bernice's will. In March 1992, after Bernice died, someone recorded the 1988 deed that conveyed all 80 acres of the land described in the land contract to Burgin.

Beginning in 2001, two different drilling operators began to operate drilling units on the land at issue. One operator operated the drilling unit that encompassed the land in Section 22 and another operated the unit in Section 23. The operator of the unit in Section 22 has been paying one-half the royalties for the 40 acres purchased by Burgin to plaintiffs. However, the operator of the unit in Section 23 has paid 100% of the royalties for the 40 acres purchased by Burgin in that section directly to Burgin and his successors.

In July 2007, Joyce Tremblay, Barbara Walker, Delores Helmbolt and Strine sued their brother Wilfred. In the complaint Strine alleged that she owned with Wilfred the 40 acres from Section 23 that Bernice and Wilfred did not sell to Burgin and that Wilfred was wrongfully excluding her from the property. Strine also requested her share of the gas, oil, and mineral royalties paid on that property and plaintiffs collectively sought recovery of the royalties paid on the one-half interest in the oil, gas, and mineral rights to the 40 acres in Section 23 that Bernice and Wilfred sold to Burgin. They alleged that there "was and is an agreement, express and implied, that [the plaintiffs] and their sisters would receive all revenues and other benefits from the 50% of the mineral rights to [the] additional acreage . . . in Custer Township."

Wilfred entered into a partial consent judgment with his sisters. In the consent judgment, Wilfred agreed that, since September 1977, the mineral interests in the 80 acres sold to Burgin belong to plaintiffs in equal shares "except whatever interest was intended to be sold or conveyed to [Burgin]." He also agreed that he "had and has no interest in same." He also agreed that he and Strine owned the mineral rights to the 40 acres that were not sold to Burgin in equal shares since May 1986. The trial court signed the consent judgment in October 2007.

In June 2008 plaintiffs sued defendant Robert Burgin, individually as the sole heir of J. Glen Burgin, and as the trustee of the J. Glen Burgin Trust. In their complaint, plaintiffs alleged that they were the successors in interest to the 1977 land contract entered into between Bernice, Wilfred, and Burgin on behalf of Northern. They further alleged that Bernice and Wilfred executed the 1988 deed but that, as a result of mutual mistake or scrivener's error, the deed did not contain the reservation of oil, gas, and mineral rights contemplated under the land contract. They indicated that defendants have been wrongfully accepting 100% of the royalty payments for the 40 acres sold to Burgin in Section 23 notwithstanding defendants' knowledge that plaintiffs were entitled to one-half the royalties. This, plaintiffs claimed, amounted to unjust enrichment and conversion. On the basis of these allegations, plaintiffs asked the trial court to reform the 1988 deed to include a reservation of the oil, gas, and mineral rights to the 40 acres in Section 23 that were sold by Bernice and Wilfred to Burgin in favor of plaintiffs. They also asked the trial court to declare that plaintiffs were entitled to one-half the royalties previously paid as well as one-half the royalties from any future royalty payments for that same property. Finally, they asked the trial court to order defendants to pay treble damages for the royalties that defendants wrongfully withheld.

Defendants moved for summary disposition under MCR 2.116(C)(7) in August 2008. In their motion, defendants argued that plaintiffs did not contest the validity of the 1988 deed; rather, they only argued that, as a result of mistake, the deed did not include a reservation of oil, gas, and mineral rights. Defendants argued that Bernice and Wilfred had 15 years from the date they executed the 1988 deed in order to reform the deed or otherwise reclaim their interest in the mineral rights. Because plaintiffs did not file the present suit within that time, their claims were untimely.

The trial court agreed with defendants' position and signed an opinion and order dismissing plaintiff's claims as untimely on October 9, 2008.

After the trial court denied their motion for reconsideration, plaintiffs appealed as of right.

II. PERIOD OF LIMITATIONS

A. STANDARDS OF REVIEW

Plaintiffs first argue that the trial court erred when it concluded that MCL 600.5801 barred plaintiffs' claims and, for that reason, granted defendants' motion for summary disposition under MCL 2.116(C)(7). Specifically, plaintiffs argue that, under the undisputed evidence, their claims did not accrue until they had notice that they had been deprived of their mineral rights, which did not occur until—at the earliest—2001. This Court reviews de novo a trial court's decision to grant summary disposition. *Johnson Family Ltd Partnership v White*

Pine Wireless, LLC, 281 Mich App 364, 371; 761 NW2d 353 (2008). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

B. MCR 2.116(C)(7)

A party is entitled to summary disposition under MCR 2.116(C)(7) if the opposing party's claim or claims are barred under the applicable statute of limitations. The parties may support or oppose a motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008); MCR 2.116(G). In reviewing motions under MCR 2.116(C)(7), this Court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom*, 482 Mich at 466. This Court will construe the parties' submission in the light most favorable to the non-moving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). However, if no material facts are in dispute and reasonable minds could not differ on the legal effect of those facts, whether the statute of limitations bars the plaintiff's claim is a matter of law for the Court. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

C. ACCRUAL OF CLAIMS

The parties agree that MCL 600.5801(4) is the applicable period of limitations for plaintiffs' claim to reform the 1988 deed and declare the parties' rights under that deed. See *Ross v Damm*, 271 Mich 474, 483; 260 NW 750 (1935) (noting that an action to reform a deed was not untimely because the 15 years period had not yet passed). This statute bars any action "for the recovery or possession of any lands or [to] make entry upon any lands" if the claim is not brought within 15 years after the claim first accrued. MCL 600.5801. The parties do not, however, agree about when plaintiffs' claims accrued. Defendants argue that plaintiffs' claims accrued in 1988 when Bernice and Wilfred executed and delivered the deed or when the deed was recorded in 1992. Plaintiffs argue that their claims did not accrue until, at the earliest, 2001, which is when defendants began to exercise the powers and privileges of ownership over the oil, gas, and mineral rights on the disputed parcel. Plaintiffs argue that this is the case because they were not disseised until that time.

The applicable period of limitation runs from the time the claim accrues. MCL 600.5827. Under MCL 600.5829(1), a person's right to make entry on and claim to recover land accrues at the time of his or her disseisin. Generally, in cases involving an adverse deed, disseisin occurs when the record owner receives notice of the adverse deed. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007).

In the present case, it is undisputed that plaintiffs' claim to the oil, gas, and mineral rights derives from the ownership interests held in the disputed property by their predecessors, Bernice and Wilfred Tremblay. However, it is also undisputed that Bernice and Wilfred Tremblay

agreed to sell the land to Burgin under a land contract in 1977. Further, it is undisputed that Bernice and Wilfred executed a deed in 1988 that purported to transfer full title to the property at issue—including the oil, gas, and mineral rights—to Burgin and that he or his successors in interest had actual possession of all the land at issue since that time.[1] Thus, to the extent that the 1988 deed was a valid transfer, Bernice and Wilfred were disseised of any interest in the properties when they executed the 1988 deed with the intent to perfect a conveyance of title. Thus, whether they should be deemed to have been on constructive notice after the deed was recorded in 1992 is of no significance under the facts of this case, because—in the absence of any evidence of fraud—they clearly had *actual* notice of the 1988 deed when they executed it and caused it to be delivered. See *Adams*, 276 Mich App at 720. Because Bernice and Wilfred's right to reform the 1988 deed based on mistake accrued when they executed it, plaintiffs' claims concerning the 1988 deed necessarily accrued at the same time. See MCL 600.5801(1) (stating that a person's claim accrues when it "first accrued to himself or to someone through whom he claims."). Moreover, there is no basis for tolling the accrual until the time when plaintiffs' discovered the alleged mistake.

In cases involving mistakes in deeds, many jurisdictions follow the rule that a claim for reformation does not accrue until the party claiming the mistake discovers or should have discovered the alleged mistake. See Am Jur 2d, Reformation of Instruments, § 88, p 306. In contrast, other jurisdictions follow the rule that one who executes a deed is charged with knowledge of its content in the absence of fraud or other exceptional circumstances. See *Law v Law Co Bldg Associates*, 42 Kan App 2d 278, 288-290; 210 P3d 676 (2009) (stating that, with regard to the reformation of deeds, the action accrues when the deed is executed and not when the mistake is discovered); *Green Harbour Homeowners Ass'n, Inc v Ermiger*, 50 AD 3d 1199, 1200-1201; 855 NYS 2d 295 (NY App Div, 2008) (stating that an action to reform a deed must generally be commenced within six years of the time when the mistake was made except that the period does not run against one in actual possession of the land in the absence of actual notice); *Overholt v Independent School Dst No. 2*, 852 P2d 823, 826 (Okla App, 1993) (stating that the grantor was on notice of the mistake as of the recording of the deed he executed); *Troiano v Troiano*, 549 So2d 1053, 1056 (Fla App, 1989) (noting that fraudulent conduct will toll the period of limitations until the mistake is discovered); *Lee v Harris*, 219 SW2d 892, 893 (Tenn, 1942) (refusing to apply discovery rule to applicable period of limitations in reformation cases involving mistake because it "would be impossible under such circumstances for title to real estate to ever become absolute and secure."). Even in those states that have a discovery rule, the rule is often limited where the mistake is one that would be plainly evident to one reading the document; in such cases, the signatories are charged with knowledge of the mistake. See, e.g., *Veterans Land Bd v Lesley*, 281 SW3d 602, 624-625 (Tex App, 2009) (noting that Texas courts generally apply the discovery rule for reformation based on mistake, but holding that, because the mistakes were so plainly evident that the grantors should have known about the mistakes

[1] We reject plaintiffs' contention that Burgin and his successors could only be in possession of the oil, gas, and mineral rights through actual exploitation of those rights. Once Burgin or his successors took possession of the surface under color of a deed that purported to give them full title to the surface and subsurface rights, that possession was sufficient.

when they executed the deeds, the claim for reformation accrued when the deeds were executed). Although no Michigan courts appear to have directly addressed whether a discovery rule applies to actions to reform a deed based on mutual mistake, we are not at liberty to adopt any of these exceptions.

In *Trentadue v Buckler Sprinkler*, 479 Mich 378, 386-394; 738 NW2d 664 (2007), our Supreme Court examined the Revised Judicature Act and determined that only those tolling methods codified in the act could be employed to toll the various periods of limitation:

> Because the statutory scheme here is comprehensive, the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit. This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the permissible legislative objective of protecting defendants from stale or fraudulent claims. Accordingly, the lower courts erred when they applied an extrastatutory discovery rule to allow plaintiff to bring her claims . . . . [*Id.* at 392-393 (citation omitted).]

Here, plaintiffs do not allege that Bernice and Wilfred were induced to execute the deed through fraudulent or inequitable conduct or that defendants' otherwise fraudulently concealed the existence of the claim or the identity of any person who was liable. See MCL 600.5855. And, as already noted, Bernice and Wilfred were on notice of the existence of the 1988 deed after they executed it and caused it to be delivered—even if they were unaware of the alleged mistake. Consequently, plaintiffs' claim for reformation accrued when it accrued to their predecessor's in interest—that is, when Bernice and Wilfred executed the 1988 deed and caused it to be delivered. MCL 600.5829(1).

D. DELIVERY

Plaintiffs also argue that the trial court erred to the extent that it determined that the 1988 deed was valid. Plaintiffs contend that there is no evidence that the deed was delivered in Bernice's lifetime and, therefore, it was void.

A deed takes effect from the time of its delivery, not from the date of its execution or recording. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). As plaintiffs correctly note, a deed must be delivered within the lifetime of the grantors in order to be effective. *Hynes v Halstead*, 282 Mich 627, 634; 276 NW 578 (1937). "The purpose of the delivery requirement is to show the grantor's intent to convey the property described in the deed." *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). In order to show delivery, there must be some evidence that the parties intended "that the deed should operate presently to convey title." *Wandel v Wandel*, 336 Mich 126, 132; 57 NW2d 468 (1953). However, delivery does not necessarily require the transfer of physical possession of the deed; rather, "it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his use and benefit." *Schmidt v Jennings*, 359 Mich 376, 381; 102 NW2d 589 (1960), citing *Hynes*, 282 Mich 627. In examining whether deeds were delivered, courts will look to the totality of the circumstances to determine whether the grantor intended the

deed to convey the property. See *Schultz v Silver*, 323 Mich 454, 461; 35 NW2d 383 (1949); *Power v Palmer*, 214 Mich 551, 559-561; 183 NW 199 (1921).

In this case, the undisputed evidence shows that plaintiffs' predecessors in interest agreed to sell the land at issue on land contract. Under the terms of that land contract, Bernice and Wilfred Tremblay repeatedly executed and delivered deeds to portions of the property as defendants' predecessor in interest completed performance under the land contract. This process apparently culminated in the execution of the final 1988 deed, which specifically transferred all the property described in the land contract. The evidence that Bernice and Wilfred executed the deed as part of this land contract is evidence that they did so with the intent to actually convey the land at issue. Further, when Bernice and Wilfred executed the 1988 deed, Ross Hickman, Esquire and Jana Lanning witnessed the deed under a caption noting that the deed was "Signed and Delivered in [their] Presence." Hence, this too is evidence that the 1988 deed was actually delivered. Finally, although it is unclear who recorded the deed in 1992, the fact that the deed was recorded permits an inference that it was either physically delivered to defendants' predecessor in interest before Bernice died or that Bernice and Wilfred made arrangements for it to be recorded prior to Bernice's death.[2] See *Energetics*, 442 Mich at 53 (stating that the recording of a deed creates a presumption of delivery). Thus, the totality of this evidence strongly supports the conclusion that Bernice and Wilfred executed and delivered the 1988 deed.

In contrast to this evidence, plaintiffs merely note that the 1988 deed does not reserve any oil, gas, or mineral interests as required under the land contract. But this does not establish a question of fact as to whether the 1988 deed was actually delivered. Rather, the parties may have later orally agreed that Bernice and Wilfred would convey the property at issue without a reservation of oil, gas, or mineral rights upon full completion of the land contract. In the alternative, the parties may have intended to finalize their land contract with a warranty deed covering the whole property, but inadvertently omitted the reservation. In either case, the fact that there is no reservation in the 1988 deed does not permit an inference that Bernice and Wilfred did not execute and deliver the deed. For the same reasons, plaintiffs' speculation that there was no need for a final transfer given that Bernice and Wilfred already transferred all the individual lots also does not create a question of fact as to whether the 1988 deed was delivered; the parties may have intended to execute a master deed to cover the entire transaction after Burgin completed performance under the land contract and, indeed, may have intended to transfer the rights now in dispute.

Plaintiffs failed to establish a question of fact concerning whether the 1988 deed was actually delivered.

---

[2] Even if the 1988 deed were delivered after Bernice's death, it would still be effective as to Wilfred. See, e.g., *Thomson v Flint & Pere Marquette RR Co*, 131 Mich 95; 90 NW 1037 (1902). Therefore, to the extent that Wilfred obtained full title to the property at issue as Bernice's survivor, the delivery of the deed after Bernice's death was still effective to transfer full title to the property at issue to Burgin and his successors, including the oil, gas, and mineral rights.

E. DECLARATORY RELIEF, UNJUST ENRICHMENT, AND CONVERSION

Plaintiffs also argue that their claims for unjust enrichment and conversion are not covered by the period of limitations set forth in MCL 600.5801(4) and that the respective six and three year periods of limitation applicable to these claims did not accrue until the drilling operators began to make payments in 2001.

Unjust enrichment is an implied contract to pay a plaintiff for a benefit received by a defendant where it would be inequitable not to pay. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "Conversion is any distinct act of dominion wrongfully exerted over another's personal property. It occurs at the point that such wrongful dominion is asserted." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). However, "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams*, 276 Mich App at 710-711. In this case, plaintiffs seek to reform the deed to reserve to themselves and their predecessors in interest one-half of the oil and mineral rights attributable to the 40 acres in Section 23. The unjust enrichment and conversion claims, which seek to recover past and future proceeds from the mineral rights, are merely incidental and not determinative of the nature of the action. See *id.* at 719. The gravamen of the complaint was to reform the 1988 deed and effectively quiet title to the oil and mineral rights in Section 23. Thus, the 15-year period of limitations applies and accrued when plaintiffs' predecessors in interest executed the 1988 deed.[3]

F. ESTOPPEL

Finally, we disagree with plaintiffs' contention that the trial court erred when it failed to address their argument that defendants should be precluded from asserting the period of limitations under estoppel. This Court reviews de novo the proper application of legal doctrines, including estoppel. See *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). Even if we were to conclude that estoppel could apply to bar defendants from asserting the period of limitations, plaintiffs would not be entitled to any relief because they failed to present any admissible evidence to support their estoppel argument. The only evidence plaintiffs submitted in support of their estoppel argument was an affidavit apparently made by someone from plaintiffs' lawyer's office. Because the content of this affidavit was inadmissible, it cannot be considered on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 373. Plaintiffs also argue that the fact that the 1988 deed was not recorded until 1992 supports their estoppel argument. However, there is no record evidence detailing who recorded the 1988

---

[3] We note that, even if plaintiffs' claims for unjust enrichment and conversion could be said to be timely, given that plaintiffs cannot now reform the 1988 deed, those claims must fail. When Bernice and Wilfred executed and delivered the 1988 deed, they divested themselves of the oil, gas, and mineral rights to the property at issue. As such, plaintiffs never had the right to *any* royalties from either the Section 22 or Section 23 properties. Therefore, plaintiffs cannot establish—as a matter of law—that defendants converted their property or were otherwise unjustly enriched. See *Belle Isle Grill*, 256 Mich App at 478; *Trail Clinic*, 114 Mich App at 705.

deed. Therefore, whatever inferences one might draw from the late recording, those inferences cannot on the present record be attributed to defendants.

The trial court did not err in failing to consider plaintiffs' estoppel argument.

G. CONCLUSION

The undisputed facts showed that Bernice and Wilfred executed the deed at issue in 1988 and that the deed was delivered at around that time. Because they had actual notice of the 1988 deed and there is no evidence of fraud, any claim that they or their successors may have had to reform the deed based on mutual mistake accrued at the time they executed the deed. Here, plaintiffs did not file their claims based on the mistaken omission of a reservation in the 1988 deed until 2008; hence, their claims were plainly barred under MCL 600.5801(4). The trial court did not err when it dismissed their claims as untimely.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly