STATE OF MICHIGAN

COURT OF APPEALS

N & T PROPERTIES, INC,

Plaintiff-Appellant,

v

SURPLUS PROCEEDS OF FORECLOSURE SALE, MICHAEL PONTONI and LAURIE PONTONI,

Defendants-Appellees.

UNPUBLISHED

No. 196507
Allegan Circuit Court
LC No. 96-019347

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

WHITBECK, J. (dissenting).

I respectfully – and quite reluctantly – dissent. While I sympathize with the majority's inclination to avoid an unfair result, I conclude that the legally proper result in this case is to affirm the trial court.

As the majority all but acknowledges, application of the plain language of MCL 600.3252; MSA 27A.3252 would require that the disputed portion of the "surplus funds" at issue be paid over to the Pontonis. "[W]here a statute is clear and unambiguous on its face, we will follow the clear language as written without engaging in judicial construction." *Chmielewski v Xermac, Inc*, 457 Mich 593, 606; ___ NW2d ___ (1998). Accordingly, the Pontonis are legally entitled to the disputed funds.

With the most honorable intentions, the majority has departed from the clear and unambiguous – and highly detailed – statutory scheme governing mortgage sales and replaced it with an ad hoc "fair" resolution. I recognize the doctrine that statutes should be construed "to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v General Motors Corp,* 457 Mich 513, 518; 578 NW2d 282 (1998). However, that doctrine of judicial construction should not be reached in this context, where the detailed requirements of a quite elaborate statutory scheme are clear. *Cf. Chmielewski, supra*. It is troubling that a proper application of the law would result in the Pontonis receiving a large windfall that would have been avoided if plaintiff had behaved in a fashion even remotely approaching that of a "rational" economic actor at the foreclosure sale. It would certainly be desirable if this Court could apply a doctrine in the nature of reformation or estoppel to "correct" the

amount of plaintiff's bid. However, I see no reasonable way to do so because this would require us to determine the amount that plaintiff *should* have bid for the property, a matter beyond judicial competence. Indeed, the basic point of having an auction would seem to be allowing the amount to be paid for the foreclosed property to be determined, or at least influenced, by market forces. I am concerned that the approach of the majority opinion, if followed in other cases, could lead to instability in the law and commercial dealings by encouraging litigation over the validity of successful bids at foreclosure sales.

It is noteworthy that plaintiff is apparently a company focused on real estate dealing. It seems reasonable to expect such a company to be commercially sophisticated enough to be familiar with statutes governing mortgage foreclosures and the like. While I too sense injustice in a result that would allow the Pontonis a large windfall due to plaintiff's evident mistake in overbidding at the mortgage foreclosure sale, I nevertheless conclude that we should apply the clear and unambiguous language of MCL 600.3252; MSA 27A.3252. As the often repeated saying goes, hard cases may indeed make bad law. Indeed, as I have commented in another dissent, what may be one judge's compassionate attempt to be fair, may well be the next judge's caprice. I respectfully dissent.

/s/ William C. Whitbeck