S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

STONEHENGE CONDOMINIUM ASSOCIATION, Plaintiff/Counter Defendant-Appellant,	UNPUBLISHED July 24, 2018
v	No. 339106 Oakland Circuit Court LC No. 2016-155061-CH
BANK OF NEW YORK MELLON TRUST COMPANY, NA, Defendant/Counter Plaintiff-Appellee.	

Before: CAMERON, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Stonehenge Condominium Association ("Stonehenge"), appeals as of right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of defendant, Bank of New York Mellon Trust Company, NA ("BNY Mellon"), pursuant to MCR 2.116(I)(2) (opposing party entitled to judgment). The trial court quieted title of a disputed condominium unit in favor of BNY Mellon. We affirm.

I. FACTS AND PROCEEDINGS

This case involves a condominium unit located in the Stonehenge Condominium development in Novi, Michigan. Stonehenge is the owners' association of the condominium development. Frances Stuchell purchased the subject unit in 1989. Stuchell granted two mortgages against the property, a 2003 mortgage to Bank One, NA, and a 2007 mortgage to GMAC Mortgage, LLC, by its nominee, Mortgage Electronic Recording Systems, Inc. The 2003 mortgage was later assigned to JP Morgan Chase Bank ("JP Morgan"), and the 2007 mortgage was later assigned to BNY Mellon.

After Stuchell became delinquent in her association fees, Stonehenge recorded an assessment lien pursuant to MCL 559.208 in March 2015. Stuchell and Stonehenge entered into a settlement agreement in May 2015. Stonehenge agreed to release Stuchell from liability for the association fees. In exchange, Stuchell conveyed her interest in the subject unit to Stonehenge by quitclaim deed, which was recorded in June 2015.

BNY Mellon initiated proceedings to foreclose the 2007 mortgage in November 2015. On November 10, 2015, BNY Mellon purchased the property at a sheriff's sale and received a sheriff's deed, which was recorded on November 17, 2015. The sheriff's deed stated that the deadline for redemption was May 10, 2016, six months from the date of the sale, unless the premises was determined to be abandoned, in which case the redemption period would end 30 days from the date of notice of abandonment. BNY Mellon declared that the amount needed to redeem the property was $38,117.69, plus daily interest in the amount of $8.85.

In December 2015, JP Morgan's counsel gave notice to BNY Mellon and Stonehenge that it was foreclosing its senior mortgage, the 2003 mortgage. Before a foreclosure sale was held, BNY Mellon paid off the outstanding debt of $33,085.32 secured by the 2003 mortgage, and JP Morgan discharged the 2003 mortgage. In January 2016, BNY Mellon determined that the subject unit was abandoned, entitling it to shorten the redemption period to 30 days after notice of abandonment. BNY Mellon posted a Notice of Abandonment, dated January 7, 2016, at the premises and sent a copy of the notice to Stuchell by certified mail at her last known address. Stonehenge later filed a Notice of Non-Abandonment, dated February 19, 2016, and recorded on February 22, 2016. On May 10, 2016, Stonehenge tendered the redemption amount of $39,780.77 to the Oakland County Register of Deeds. BNY Mellon refused to accept the funds, maintaining that payment was untimely under the shortened redemption period.

Stonehenge brought this action to quiet title to the property. BNY Mellon filed a counterclaim asserting its own claim to quiet title, as well as claims for slander of title and unjust enrichment. BNY Mellon alleged that Stonehenge's assessment lien was merged into the quitclaim deed, thereby extinguishing Stonehenge's lien. Stonehenge moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim), (9) (failure to plead a valid defense), and (10) (no genuine issue of material fact). BNY Mellon opposed that motion and filed its own motion for summary disposition under MCR 2.116(I)(2). The trial court denied Stonehenge's motion for summary disposition and granted summary disposition in favor of BNY Mellon. The trial court quieted title to the property in favor of BNY Mellon and ordered Stonehenge to deliver to BNY Mellon all payments it had received from its lease of the property.

II. STANDARD OF REVIEW

We review a trial court's decision to grant summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Although the trial court did not specify which subrule it applied to rule on the motions for summary disposition, the parties submitted documentary evidence, and the trial court ruled that no factual basis supported Stonehenge's legal arguments. Accordingly, the motions are properly considered under subrule (C)(10). "A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-475; 776 NW2d 398 (2009). Under MCR 2.116(C)(10), summary disposition is appropriate if the evidence fails to establish a genuine issue of a material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 N W2d 861 (2016). A genuine issue of material fact exists if reasonable minds could differ on an issue, viewing the record in a light most favorable to the nonmoving party. *West*, 469 Mich at 183.

We also review matters of statutory interpretation de novo. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. [*Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 259; 827 NW2d 379 (2012) (citation and quotation marks omitted).]

III. PRIORITY OF LIENS

Preliminarily, we agree with Stonehenge that the 2007 mortgage did not attain priority over its assessment lien when the 2003 mortgage was discharged. Stonehenge relies on MCL 559.208(1) to argue that its assessment lien had priority over BNY Mellon's mortgage lien because BNY Mellon held only a second mortgage. Conversely, BNY Mellon argues that the 2007 mortgage was elevated to a first mortgage when the 2003 mortgage was extinguished after JP Morgan began foreclosure proceedings.

The Condominium Act, MCL 559.101 *et seq*., generally prioritizes an assessment lien over all liens other than tax liens and a first mortgage of record, "except that past due assessments that are evidenced by a notice of lien recorded as set forth in subsection (3) have priority over a first mortgage recorded subsequent to the recording of the notice of lien." MCL 559.208(1). Construing this provision and noting that the statute does not define the phrase "first mortgage of record," this Court defined it to mean "the mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds." *Coventry Parkhomes Condo Ass'n*, 298 Mich App at 260. Accordingly, the *Coventry* Court held that the first mortgage of record assigned to a new mortgagee *after* the recording of an assessment lien retained its status as the first mortgage of record because the assignment of the mortgage did not alter the effect of the timing of the recording of the mortgage. *Id*. The *Coventry* Court further noted that MCL 559.208(1) prioritizes an assessment lien over a second mortgage even if the second mortgage is recorded before the assessment lien. *Id*. at 259.

This case is distinguishable from *Coventry* because BNY Mellon was not assigned the 2003 mortgage. Instead, BNY Mellon paid the outstanding debt, resulting in a discharge of the mortgage. Therefore, BNY Mellon did not step into JP Morgan's shoes as a first mortgagee. Moreover, we disagree with BNY Mellon that the 2007 mortgage became the "first mortgage of record" when the 2003 mortgage was discharged. Neither *Coventry* nor the statutory language supports this conclusion. Nevertheless, our conclusion that Stonehenge's assessment lien had priority over BNY Mellon's second mortgage does not affect the outcome of this case because we conclude in the following section that the assessment lien was merged into the quitclaim deed, thereby extinguishing Stonehenge's lien. Therefore, Stonehenge no longer held a lien that could be given priority.

IV. DOCTRINE OF MERGER

Stonehenge disputes that its assessment lien was merged into the fee simple estate it acquired when Stuchell conveyed the property to Stonehenge by quitclaim deed, thereby extinguishing its lien.[1] Stonehenge emphasizes that neither the settlement agreement nor the quitclaim deed provided that the lien would be cancelled. Stonehenge also argues that the merger doctrine does not apply to assessment liens under MCL 559.208 because an assessment is imposed pursuant to the Condominium Act, unlike a mortgage, which arises by contract. Whether the merger doctrine applies to the parties' transaction is a question of law, which we review de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 374; 761 NW2d 353 (2008).

The merger doctrine recognizes that

> when the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter. This rule is, however, subject to the exception that when it is to the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby. [*Anderson v Thompson*, 225 Mich 155, 159; 195 NW 689 (1923).]

The "purpose of declining to find a merger is to allow a mortgagee/lender to protect itself from the claims of junior lienholders of the mortgagor/borrower." *The Reserve at Heritage Village Ass'n v Warren Fin Acquisition, LLC*, 305 Mich App 92, 107; 850 NW2d 649 (2014) (citation and quotation marks omitted). "Under Michigan law, a mortgage is not an estate in land; it is a lien on real property intended to secure performance or payment of an obligation." *Prime Fin Servs LLC v Vinton,* 279 Mich App 245, 256; 761 NW2d 694 (2008) (citation omitted). Payment or release of the underlying debt "extinguishes the mortgage." *Ginsberg v Capitol City Wrecking Co,* 300 Mich 712, 717; 2 NW2d 892 (1942).

Stonehenge invokes the exception to the merger doctrine and argues that there is no evidence that it intended merger when it received the quitclaim deed from Stuchell. The primary flaw in this argument is the absence of any objective evidence of Stonehenge's continuing need for a lien to protect its interest to support its stated subjective intent. The flaw in this argument is evident in caselaw applying the merger doctrine and its exception.

For example, our Supreme Court inferred from a defendant's actions, in addition to his testimony, the defendant's intent not to merge his rights under a first mortgage into the title

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[1] During oral argument at the motion hearing, BNY Mellon's attorney mentioned a conversation he had with Stuchell's attorney. Although Stonehenge complains that any statements made during this conversation were inadmissible hearsay, there is no indication that counsel intended to use the statements as evidentiary support for BNY Mellon's motion. Similarly, there is no indication that the trial court took these statements into consideration in deciding the parties' motions. Likewise, we have not considered the statements in our de novo review.

acquired through the foreclosure of a third mortgage. *Anderson*, 225 Mich at 160. The defendant held a first mortgage on a 40-acre parcel of land and a third mortgage on a 52-acre parcel, which consisted of the original 40-acre parcel and an additional 12-acre parcel, while the plaintiff held a second mortgage on the 40-acre parcel. *Id*. at 156-157. When an owner defaulted on the third mortgage, the defendant foreclosed and purchased the 52-acre parcel at a foreclosure sale, and the plaintiff foreclosed and purchased the 40-acre parcel at a foreclosure sale. *Id*. at 157. The Supreme Court determined that the defendant's rights to the 40-acre parcel encumbered by the first mortgage had not merged when he foreclosed on the third mortgage because the defendant's purpose in foreclosing on the third mortgage was to secure title to the 12-acre parcel that was not subject to the first or second mortgage. *Id*. at 160. The titles remained separate, as the defendant testified he intended, and the plaintiff's deed to the 40-acre parcel was subject to the first mortgage held by the defendant. *Id*.

Similarly, this Court concluded that a question of fact remained whether a plaintiff intended merger when she purchased property at a foreclosure sale that she initiated, even though the property remained subject to federal tax liens, because the plaintiff had not joined the IRS as a party or given the IRS notice of the foreclosure proceeding. *Byerlein v Shipp*, 182 Mich App 39, 41-42, 49; 451 NW2d 565 (1990). The defendant later purchased the interest in the property at a public auction held by the IRS, who had given the plaintiff notice of the auction, but the Court noted that the defendant's interest in the property may have been subject to the plaintiff's mortgage lien, depending on the plaintiff's intent. *Id*. at 42, 45-49. If the plaintiff did not intend to merge her senior mortgage lien with the fee, then the defendant's title would be subject to the plaintiff's lien. *Id*. at 49. The grantees in *Anderson* and *Byerlein* had continuing enforceable interests that would have been impaired if merger were found.

By contrast, the Supreme Court determined that bank correspondence showed that a plaintiff bank did not intend to keep the mortgage alive when the defendant owner, who defaulted on the mortgage payments, quitclaimed his interest in the property to the bank to avoid the hassle of foreclosure. *First Nat'l Bank of Utica v Ramm*, 256 Mich 573, 574-577; 240 NW 32 (1932). The Supreme Court held that legal title and equitable title had merged, extinguishing the mortgage and preventing the plaintiff bank from seeking to foreclose on the mortgagor who conveyed the land to the defendant, who had assumed the mortgage. *Id*. at 177.

Similarly, the Supreme Court determined that a plaintiff's rights were merged into and extinguished by a quitclaim deed when the property owners quitclaimed their interest in the property to the plaintiff to satisfy a consent judgment in an independent action. *Ruby & Assoc, PC v Shore Fin Servs*, 480 Mich 1107; 745 NW2d 752 (2008), vacating in part *Ruby & Assoc, PC v Shore Fin Servs*, 276 Mich App 110, 111-112; 741 NW2d 72 (2007). Accordingly, the defendant's purchase of the property at a sheriff's sale after it foreclosed on the property was not subject to the plaintiff's prior interest, which was extinguished when the statutory redemption period following the foreclosure expired. *Id*.

Additionally, this Court has concluded that "there was a merger of the mortgage and the fee title" despite an expressed intention of nonmerger because nonmerger would have permitted a defendant, Warren, to avoid paying a debt that it still owed to the plaintiff. *The Reserve at Heritage Village Ass'n v Warren Fin Acquisition, LLC*, 305 Mich App 92, 108-110; 850 NW2d 649 (2014). Warren acquired ownership of 76 condominium units through a covenant deed,

which stated that the transfer was made without merger of the mortgage, and was assigned the mortgage for these 76 units. *Id.* at 96-97. The plaintiff later recorded a lien for unpaid assessments and sued Warren to recover those unpaid assessments. *Id.* at 97. Warren then assigned the mortgage to another company, Reserve, who initiated foreclosure proceedings and purchased the 76 units by sheriff's deed. *Id.* Even though there were no unpaid assessments at the time of the original conveyance containing the nonmerger clause, this Court explained, applying that nonmerger clause to Warren "would allow Warren to avoid paying the debt it incurred to plaintiff." *Id.* at 108-109. Accordingly, this Court disagreed with the trial court's determination that the plaintiff was not adversely affected by the nonmerger provision. *Id.*

In sum, a lien has already served its purpose once the lienholder has obtained fee simple title to the property that secured the obligation. There is no rational basis for declining to apply this principle to Stuchell's quitclaim deed to Stonehenge. Stonehenge has cited no objective evidence that merger was not intended. Therefore, we conclude that Stonehenge's assessment lien was merged into, and extinguished by, the quitclaim deed.

V. SLANDER OF TITLE

Stonehenge argues that the trial court erred in granting summary disposition for BNY Mellon with respect to BNY Mellon's counterclaim for slander of title because there can be no slander of title when a lien was valid when filed. MCL 565.108 prohibits "us[ing] the privilege of filing notices . . . for the purpose of slandering the title to land[.]" A trial court shall award damages, costs, and attorney fees to the aggrieved party in an action to quiet title if the sole purpose of the action was to slander the title. MCL 565.108. To prove slander of title, the "claimant must show falsity, malice, and pecuniary damages or special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 595; 848 NW2d 425 (2014) (citation, quotation marks, and alteration omitted). Regarding the element of malice, the Court stated:

> The crucial element is malice. A slander of title claimant must show some act of express malice, which implies a desire or intention to injure. Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. A plaintiff may not maintain a slander of title claim if the defendant's claim under the mortgage or lien was asserted in good faith upon probable cause or was prompted by a reasonable belief that the defendant had rights in the real estate in question . . . ." [*Wells Fargo Bank*, 304 Mich App at 596 (citations, quotation marks, and alterations omitted).]

Stonehenge argues that BNY Mellon failed to plead a valid claim for slander of title because BNY Mellon based its claim on Stonehenge's failure to discharge the lien after it received Stuchell's quitclaim deed, not Stonehenge's recording of the lien. Stonehenge asserts that it recorded the lien in good faith pursuant to MCL 559.208 and the condominium documents, implying that a slander of title claim cannot be based on failure to discharge a lien that was recorded in good faith at the time it was recorded.

The conduct that triggers a claim for slander of title is not the filing of a notice, but the "use of the privilege of filing notices" for the malicious purpose of slandering the title. See MCL 565.108. The statutory language indicates that a properly recorded lien can support a claim for slander of title if the claimant leaves the lien in place when it no longer secures a valid claim and when another party's right to the property is thereby impaired. A knowing continuation of a lien that is no longer valid can constitute slander of title. For example, in *Anton, Sowerby & Assoc, Inc v Mr. C's Lake Orion, LLC*, 309 Mich App 535, 548-550; 872 NW2d 699 (2015), this Court held that the plaintiff's failure to release a once-valid lien and its pursuit of a misdirected lawsuit to enforce that lien contributed to a successful slander-of-title claim. Similarly, in this case, there is no apparent basis for allowing Stonehenge to continue to assert an invalid lien.

Additionally, BNY Mellon established malice. The assessment lien ceased to protect any enforceable interest of Stonehenge following conveyance of the property by quitclaim deed. By keeping the lien in place while also asserting ownership under the quitclaim deed, Stonehenge prevented BNY Mellon from asserting its ownership of the property that it properly acquired by discharging the 2003 mortgage and foreclosing on the 2007 mortgage. If Stonehenge had a valid lien, it could have initiated foreclosure proceedings or an action to recover unpaid assessments under MCL 559.208. BNY Mellon would then have had the opportunity to bid at a foreclosure sale. By maintaining the lien without exercising any of its options under the lien, Stonehenge effectively blocked BNY Mellon from recouping any benefit from its expenditures on the unit. Moreover, by attempting to redeem the property instead of asserting the lien, Stonehenge showed that it did indeed realize that the lien was no longer valid. Therefore, the trial court did not err in granting summary disposition in favor of BNY Mellon on the slander of title claim.

VI. ABANDONMENT

Stonehenge argues that BNY Mellon failed to meet the requirements of MCL 600.3241a to shorten the redemption period on the basis of abandonment of the subject unit. Stonehenge maintains that it timely redeemed the property by tendering the redemption amount within the six-month redemption period stated in the sheriff's deed for the 2007 mortgage foreclosure. We disagree. MCL 600.3241a describes the procedure to shorten the redemption period for foreclosed property if the property has been abandoned. First, the mortgagee must personally inspect the property, and that inspection must "not reveal that the mortgagor or persons claiming under the mortgagor are presently occupying or will occupy the premises." MCL 600.3241a(a). The mortgagee must also post a notice at the time of inspection and mail a notice of abandonment to the mortgagor at his or her last known address, using certified mail with return receipt requested. MCL 600.3241a(b). Within fifteen days of posting and mailing notices of abandonment, the mortgagee may presume the property abandoned if the mortgagor, or someone acting on his or her behalf, has not provided "written notice by first-class mail to the mortgagee . . . stating that the premises are not abandoned." MCL 600.3241a(c).

Stonehenge argues that BNY Mellon's notice of abandonment was defective because there was no proof that Stuchell received the notice, because BNY Mellon provided insufficient information regarding the inspection of the premises, and because BNY Mellon did not provide notice to Stonehenge. On the contrary, BNY Mellon provided certified mail receipts showing that notices were sent to Stuchell at two addresses on January 5, 2016, in addition to a return receipt showing that someone signed for delivery at the second address. The notice sent to

Stuchell's last known address was returned to BNY Mellon. The statute does not require proof that the mortgagor received the notice, only that the notice was mailed to the last known address by certified mail. Therefore, we reject this attack on BNY Mellon's compliance with the statute.

BNY Mellon also submitted the affidavit of Brian Coon, who averred that he inspected the property and saw no signs that Stuchell or persons claiming under Stuchell "were occupying the Property, or would be occupying the Property." Stonehenge questions whether Coon was an agent of BNY Mellon charged with inspecting the subject unit. Coon's affidavit avers that he was retained by BNY Mellon's law firm to inspect the property. Stonehenge's unsupported speculation that Coon might not be who BNY Mellon represented him to be is spurious and insufficient to avoid summary disposition.

Stonehenge emphasizes that BNY Mellon failed to provide it with notice of abandonment even though BNY Mellon had Stonehenge's contact information and notice of Stonehenge's interest. MCL 600.3241a does not require notice to any party other than the mortgagor, however. Stonehenge cites a footnote in *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 143-144 n 5; 863 NW2d 344 (2014), that refers to the state's obligation to attempt to provide notice to the property owner of a tax sale. As in this case, the *Trademark* Court noted that "the present case does not involve state action in a foreclosure by a governmental entity," which rendered it "questionable whether the same due process concerns apply." *Id*. Because the *Trademark* Court was not making a general pronouncement about all types of foreclosures, this footnote does not expand the notice requirements of MCL 600.3421a beyond those expressly stated. Accordingly, we reject Stonehenge's challenge to BNY Mellon's compliance with statutory procedures for shortening the redemption period. Stonehenge did not tender the redemption funds within the applicable redemption period, so BNY Mellon had no obligation to accept the tendered funds.

VII. UNJUST ENRICHMENT

Stonehenge argues that the trial court erred in ruling in favor of BNY Mellon on its claim for unjust enrichment and awarding BNY Mellon damages in the amount of the rental payments that Stonehenge received from leasing the subject unit. We disagree. Under the equitable doctrine of unjust enrichment, the law implies a contract to prevent enrichment "if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74, 78; 980 NW2d 313 (2017) (citation and quotation marks omitted). The elements of an unjust enrichment claim are "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). An unjust enrichment claim "involves a situation in which the contract is an implied one imposed by the court in the interests of equity rather than an express contract entered into by the parties." *Genesee Co Drain Comm'r*, 321 Mich App at 78.

In this case, BNY Mellon became the fee simple owner of the subject unit upon the expiration of the redemption period. Stonehenge's formerly superior lien had been extinguished upon Stonehenge's receipt of Stuchell's quitclaim deed. Stonehenge failed to redeem the subject unit within the redemption period, as effectively shortened pursuant to MCL 600.3241a. Consequently, Stonehenge's lease of the property constituted a benefit for Stonehenge that it

cannot equitably retain because Stonehenge had no interest in the property owned by BNY Mellon. The circumstances of Stonehenge's lease agreement with the tenant supported the award of damages to BNY Mellon on an unjust enrichment claim. Therefore, the trial court did not err in awarding the payments that Stonehenge wrongfully received.[2]

We affirm.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

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[2] Stonehenge's argument that BNY Mellon was never a party to the rental agreement is misguided because BNY Mellon alleged a claim for unjust enrichment, not breach of contract. Stonehenge's argument that it should retain a share of the rental payments to compensate it for its management of the common areas of the development has no evidentiary support because Stonehenge did not provide any breakdown of the tenant's rental payment.