STATE OF MICHIGAN

COURT OF APPEALS

DELIA TOMEI, Individually and as Personal Representative of the ESTATE OF ANGELO TOMEI,

Plaintiff-Appellee,

v

DARIO MORTGAGES, INC.,

Defendant-Appellant.

UNPUBLISHED
May 23, 2024

No. 362648
Wayne Circuit Court
LC No. 18-007059-CB

Before: BORRELLO, P.J., and SWARTZLE and YOUNG, JJ.

PER CURIAM.

This case centers around the relationships between now-deceased brothers Dario Tomei and Angelo Tomei, Sr. (Angelo Sr.), and their respective families.[1] It particularly involves a purported mortgage and related monies loaned by Dario to Angelo Sr. Defendant, Dario Mortgages, Inc. (Dario Mortgages), appeals as of right a judgment entered after a bench trial awarding plaintiff, Delia Tomei (Angelo Sr.'s wife), as personal representative for Angelo Sr.'s estate, $1,063,926.54 on her claim for slander of title. This appeal also involves the trial court's earlier decision to grant summary disposition in favor of Delia on her claim of quiet title to real property. For the reasons provided below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

As relevant to this appeal, Dario has a son, Dino Tomei. The pertinent family members from Angelo Sr.'s side of the family are his son Nicola Tomei (Nick) from a prior relationship, his wife Delia, and their children Angelo Tomei, Jr. (Angelo Jr.), Perino Tomei (Perry), and Katarina

[1] Because this case involves several family members who share the same last name, subsequent references to the family members will be to their first names.

Tomei (Kathy). By all accounts, Dario had a good relationship with Angelo Sr.'s children, i.e., Dario's nephews and niece.

In 1958, Dario and Angelo Sr. founded Angelo Brothers Restaurant, which is located in Westland, Michigan. At some point, the brothers also started another business, the Coliseum Racquet Club. Angelo Sr. and Delia married in 1965. After coming to Michigan from Italy in 1966, Delia worked every day in the restaurant for more than 12 hours a day. The restaurant business was the primary source of Delia's income. Much of Delia and Angelo Sr.'s family also worked there, including Angelo Jr., Perry, Kathy, and Kathy's own children.

In the 1980s, Angelo Sr. and Dario had a falling out and split the properties, with Dario receiving the Coliseum and Angelo Sr. receiving the restaurant.[2] The brothers reconciled in the 2000s. Despite the brothers' reconciliation, Dino thought that the 1980s split of the properties was not fair to his father, Dario. Dino and Angelo Jr. were initially cordial, but around 2000 their relationship developed into abhorrence and progressively got worse.

In addition to whatever businesses Dario had, he also had a lending enterprise. He would primarily lend money to distressed homeowners. Dario kept hand-written records of the status of the loans, with a page dedicated to each loan. Starting in March 2008, Dario loaned funds to Angelo Sr. and Delia for debts related to the restaurant. From March 2008 through March 2009, Dario provided four different payments, totaling about $137,000.

In 2010, the restaurant was having financial difficulties, and Perry, who primarily handled the restaurant's finances, had unsuccessful meetings with banks to procure financing for new projects and current debts, including taxes, totaling in the range of the upper $600,000s to lower $700,000s. Perry consulted with Dario in March 2010 about his opinion on how to make a deal more appealing to the banks. According to Perry, Dario said, "You're not going through another bank. You're not gonna do that, because I'm gonna do it." Dario then said he was going to "write this up for [$750k] because something always comes up, and we'll start by cleaning up the taxes and paying off that mortgage, and then we'll switch to paying off whatever other debt is on the restaurant, and then we'll finish the project up." Perry maintained that the contemplated $750,000 was only for the items he mentioned to Dario and was not for any prior debt owed to Dario.

Although Perry negotiated the agreement with Dario, Angelo Sr. and Delia signed the note and mortgage on March 5, 2010. The note provided:

> For value received the undersigned promises to pay to the order of Dario Tomei the principal sum of Seven-Hundred Fifty Thousand & 00/100 ($750,000.00) Dollars together with interest from date hereof upon the unpaid principal at the rate of five (5%) percent, per annum until fully paid.

The note detailed that starting on April 5, 2010, the minimum monthly payment was $3,125, with a final unspecified balloon payment due on March 5, 2012. The mortgage stated that it was

[2] There are actually two restaurants: Angelo Brothers Restaurant and Ivory Room Billiards, which is on an adjacent lot to Angelo Brothers Restaurant and shares a common parking lot.

attaching to the Angelo Brothers Restaurant and Ivory Room Billiards properties. The mortgage stated that it was securing a debt of $750,000, at an interest rate of 5% per annum. However, there was never any $750,000 loan. The evidence showed that from March 5, 2010 forward, Dario supplied Angelo Sr. and Delia with about $388,000 in funds, but no payments were ever made on the $750,000 note.

Dino became more involved in Dario's mortgage enterprise in 2013. Shortly thereafter, Dario was diagnosed with terminal cancer. In 2014, Dario formed Dario Mortgages, with Dario and Dino as its only owners, each having about half the ownership. Dino was its president and Dario its vice-president. Dino and Dario argued occasionally about the status of the loans to Angelo Sr.'s side of the family. Dario would always respond that "they're family" and "you don't do that [foreclose] to family."

With respect to one of Dario and Dino's arguments, several witnesses described one meeting in particular. Angelo Jr. said that he went to see Dario at the Coliseum in November 2014, and Dino, Lucy Maceroni, and another man were also there. While Angelo Jr. and Dario were talking, Dino was getting more and more agitated. In response, Dario told Angelo Jr. that he wanted to talk to him in private in another room. When Dino heard this, he also ran into the other room. Dario told Dino that he was "the damn problem here" and that he needed to stop bothering the family about any money owed. Dino angrily yelled back, "Dad, you've been carrying this guy [meaning Angelo Sr.] his whole life and it's enough now" and "all you've done is helped and helped and helped." According to Angelo Jr., Dario at that point turned to him and said, "Angelo, do you understand that? You guys don't owe anything, it's all set." After that meeting, Dino never allowed anyone from the other side of the family to see Dario again. Lucy Maceroni described the same event, with Dino rushing into the other room to join Dario and Angelo Jr., but although she heard arguing between Dario and Dino, she could not comprehend what the actual words were. Dino, on the other hand, described the meeting as Angelo Jr. pestering Dario about "a loan on a house on Freemont"[3] and interest rates, which resulted in Dario getting more and more agitated, until Dino finally got Angelo Jr. to leave.

In January 2015, Dario and Angelo Sr. died one day apart. Following Angelo Sr.'s death, there were probate disputes in both Michigan and in Italy, where the family owned property and Angelo Sr.'s other son, Nick, lived. The disputes were between Nick and Delia. There was evidence that, in conjunction with the probate disputes, two "global resolution" mediations were held. Perry testified that one occurred in 2017, before any foreclosure proceedings had commenced. It primarily involved Nick and Delia, but Dino was also involved. One of the proposals was that Delia would sign all the Italy property over to Nick, and all of the Michigan property over to Dino. In return, Dino would lease the restaurant back to Delia for 15 years. Delia refused, and shortly thereafter, Dino, on behalf of Dario Mortgages, initiated a foreclosure on the restaurants. Notice of foreclosure was posted at the restaurants in December 2017. In the notice of foreclosure, Dario Mortgages asserted that the amount owed was $1,163,960.23. Dario Mortgages was the highest bidder at a January 2018 foreclosure sale.

[3] It is unclear from the record what the reference to "Freemont" meant.

Before the redemption period expired, Delia filed this action, alleging two counts: (1) quiet title and (2) slander of title. The trial court granted Delia's request to toll the redemption period while the case proceeded.

Delia subsequently moved for summary disposition under MCR 2.116(C)(10) on both counts. Related to the claim for quieting title, Delia argued that there was no question of fact that the mortgage was void for want of consideration. Specifically, she argued that it was undisputed that there never was a $750,000 loan. She also argued that the foreclosure was void because Dario Mortgages' credit bid of $1,170,947.81 was fraudulent when calculated using $750,000, which was never advanced, and compound interest, which was not provided for under the note. For the slander-of-title claim, Delia argued that there was no question of fact that Dario Mortgages recorded a sheriff's deed during foreclosure, knowing that it fraudulently submitted an overstated bid, in an effort to spite Delia's family.

The trial court granted Delia's motion on the quiet-title claim, ruling that the mortgage was void because there was no underlying $750,000 loan. While the trial court suggested that Dario Mortgages likely could recover money on some other legal theory, it could not do so under the March 5, 2010 mortgage. The trial court, however, denied Delia's motion for summary disposition with respect to her claim for slander of title. The trial court ruled that there was a question of fact whether Dino acted with the requisite malice.

Six business days (10 days total) before scheduled trial on the slander-of-title claim, Dario Mortgages filed a motion for leave to file a counterclaim raising claims of unjust enrichment and equitable mortgage.[4] Dario Mortgages recognized that the request was "on the eve of trial," but maintained that there would be no additional burden on any of the litigants. However, on the first day of trial, when the motion was heard, defense counsel conceded that an adjournment might be necessary if the motion was granted. The trial court denied the motion, finding it untimely and that, at first blush, the underlying counterclaims appeared futile. The court noted that although defense counsel was not the initial counsel on the case, he had been on the case for more than two years but waited until the eve of trial to seek leave to raise the counterclaims.

At the conclusion of trial, the parties submitted proposed findings of fact and conclusions of law. In its final order, the trial court in large part adopted verbatim Delia's proposed findings of fact and conclusions of law. The trial court therefore ruled that Dario Mortgages made a false statement about Delia's title by recording the sheriff's deed. The deed was false because it stated that the mortgage was valid when it was not, and that it secured a debt of $1,170,947.81 when it did not. The trial court further found that Dario Mortgages did not act in good faith and in fact filed the deed knowing that it was false, with an intent to cause Delia injury. The trial court awarded Delia damages as follows:

[4] The claim for unjust enrichment was in relation to a $49,455.31 property-tax payment Dario made in March 2014 for the benefit of Angelo Sr. and Delia. The claim for an equitable mortgage was to impose an equitable mortgage on the property that would secure a $225,000 loan, plus "other advances."

- Special damages in the form of litigation costs: $172,671.15
- Special damages in the form of actual damages: $211,055.39
- Exemplary damages: $700,000.00
- Total damages: $1,063,926.54[5]

Dario Mortgages filed two postjudgment motions on January 5, 2022. One was a motion to set aside the judgment, for judgment notwithstanding the verdict (JNOV), to dismiss the complaint, and for sanctions. The other was a motion to set aside the judgment, grant a new trial, or for remittitur. In the motion for JNOV, Dario Mortgages argued that Delia committed perjury and a fraud on the court because she admitted in the Michigan probate case that the $750,000 mortgage was valid, but she "falsely argued in this court that the note and mortgage were invalid."

In that probate case, Delia, as personal representative for Angelo Sr.'s estate, initially prepared an inventory, which listed the restaurant properties as having no encumbrances, except for some past-due taxes, and a combined equity value of $1,172,557.66. Nick thereafter filed a petition in the Michigan probate case and the parties agreed to a stipulated order for an updated inventory. Delia then produced an additional response, which contained the following:

> Personal Representative Delia Tomei attaches the March 10, 2010 Mortgage and Assignment of Mortgage of the aforementioned 33550 and 33500 Ford Road properties. The total principal and interest on the outstanding loan is $1,012,500.
>
> The approximate aggregate value of both properties (including outstanding debt) is $1,172,557.66. After subtracting the total amount of principal and interest owed on the mortgage, the total equity of both properties is **$160,057.66**.

Dario Mortgages argued that this admission showed that Delia believed the mortgage was valid. It also argued that she should be judicially estopped from claiming otherwise.

Delia responded that the additional response was only produced after Dino became involved in the probate proceeding and began demanding payments under the mortgage. Delia averred that Dario Mortgages' motion should be denied because the inventory and response were not newly discovered evidence when Dino was fully involved in the probate proceedings. Delia also argued that the additional response was not evidence of fraud because the statement did not address whether the mortgage was void or otherwise invalid. Delia maintained that she was required to list any encumbrances on the property, which is what she did because, at that time,

[5] There are clerical errors in the trial court's order. One error is that the sum of the listed categories is $1,083,726.54, not $1,063,926.54. Another error involves the $211,055.39 for special damages, which is the sum of other particular damages, but the sum of the list the trial court provided does not equal $211,055.39. The damages included in this total are for Bank Penalties ($68,215.39), Tax Penalties (13,000), Unrepaired Roof ($20,000), Lost Revenue ($50,000), and Unrepaired Parking Lot ($40,000). The sum of these items is $191,215.39.

there had not been any adjudication that the mortgage was invalid. Delia further argued that judicial estoppel was inapplicable because the probate court never accepted the response as true. Indeed, according to Delia, it could not have done so because the response was never filed in the probate court.

In its motion for a new trial, Dario Mortgages argued that (1) the trial court erred by ruling on summary disposition that the mortgage was void, (2) the judgment was clearly erroneous because a sheriff's deed cannot give rise to a claim for slander of title, (3) the award of damages was speculative and contrary to law, and (4) the court's findings relied on inadmissible hearsay and were otherwise unsupported by the record. Dario Mortgages also reiterated that newly discovered evidence in the form of Delia's disclosure in the probate case warranted a new trial if the trial court did not outright dismiss the action.

The trial court denied both of Dario Mortgages' motions. Regarding the motion for JNOV, the court ruled that Delia's discovery response in the probate case did not constitute newly discovered evidence:

> Well, the Court doesn't believe that it rises to the level of newly discovered evidence. I think your prior counsel was certainly aware—[and] this is something that's a matter of public record. . . . [F]or the extraordinary relief of setting aside judgment, I don't think it meets that level. And certainly . . . there may be some inconsistencies but they don't—you know, that's something during cross-examination th[at] could have been [addressed] . . . , so given all that the Court is denying the Motion For [JNOV] For Newly Discovered Evidence.

Notably, defense counsel argued at the motion hearing that the JNOV motion "is based upon essentially newly discovered evidence," and the court never explicitly addressed whether Delia committed perjury or fraud given her disclosure in the probate case.

Regarding the motion for a new trial, the trial court ruled—without addressing any of Dario Mortgages' other asserted bases for a new trial[6]—that the award of damages was supported by admissible evidence. While the court believed its damage award was "equitable," "right," and "legal" and that Dario Mortgages did not meet the "high standard" for a new trial, it acknowledged the possibility it made a mistake and said, "That's what the Court of Appeals is, is for." We now turn to Dario Mortgage's claims of error on appeal.

[6] At the outset of the hearing, the trial court told defense counsel, "You could assume that I've read [both motions] . . . [,] so you don't have to go through everything . . . . I'm not going to let you go through the whole motion." As such, the parties and trial court only addressed the limited issues described in the main text. The trial court did, however, offer defense counsel an opportunity—after ruling on the limited issues concerning each motion—to raise any additional points. The trial court's orders denying the two motions said each denial was for the reasons stated on the record.

II. DELIA'S STATEMENT IN PROBATE COURT

Dario Mortgages argues that the trial court erred by not entering judgment in its favor—or alternatively, by not granting a new trial—in light of Delia's disclosure in the probate case. It relatedly argues that Delia, given the earlier disclosure, should have been judicially estopped in this case from asserting that the note and mortgage were void. We disagree.

The application of judicial estoppel is an equitable doctrine that we review de novo. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012). We also review de novo a trial court's decision on a motion for JNOV. *Dorsey v Surgical Institute of Mich, LLC*, 338 Mich App 199, 223; 979 NW2d 681 (2021). However, a trial court's decision on a motion for a new trial or a motion to set aside a prior judgment, i.e., for relief from judgment, is reviewed for an abuse of discretion. *Id.*; *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Dario Mortgages filed two postjudgment motions in the trial court. The second in the record was titled as a "motion to set aside the judgment, for JNOV, to dismiss the complaint, and for sanctions." However, the gist of the motion was to set aside the judgment for Delia and enter judgment in favor of Dario Mortgages on the basis of Delia's statements related to the probate proceedings, and her allegedly contrary representations in this case.

A motion for JNOV examines all of the evidence *presented at trial* to determine if, while taking all legitimate inferences in a light most favorable to the plaintiff, the defendant nonetheless is entitled to judgment as a matter of law. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999); see also *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 283; 602 NW2d 854 (1999) ("[I]n ruling on [the] defendants' motion for JNOV[,] the court was required to examine the evidence presented at trial in the light most favorable to [the] plaintiff . . . and state whether the evidence presented at trial was legally sufficient to support [the] plaintiff's claim . . . ."). Because Dario Mortgages does not challenge the sufficiency of the evidence presented at trial and instead relies solely on materials that were *not part of trial*, it necessarily does not implicate JNOV concepts. Dario Mortgages motion is more accurately described as a motion to set aside the judgment under MCR 2.612.

MCR 2.612(C)(1) authorizes a court to set aside a judgment on the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.

> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

Further, under MCR 2.612(C)(3), the trial court has the power "to set aside a judgment for fraud on the court."

In its motion, Dario Mortgages never specified under which ground it was seeking relief. Instead, it generally stated that "MCR 2.612(C) allows a party to seek relief from judgment for various reasons including," grounds (b), (c), (d), and (f). However, Dario Mortgages also attached to its motion an affidavit from its attorney asserting that the attorney could not have, with reasonable diligence, discovered the produced Delia disclosure before trial. Thus, Dario Mortgages implied that it was relying on the newly-discovered-evidence ground (b). Dario Mortgages also argued extensively that relief was warranted because Delia perpetrated a fraud on the court, implicating MCR 2.612(C)(3), and it asserted that "[t]he fraud perpetrated" was "intrinsic to the judgment," implicating ground (c). Dario Mortgages relatedly argued that Delia's representations contrary to her earlier disclosure constituted perjury, which is intrinsic fraud. See *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995) ("An example of intrinsic fraud would be perjury[.] . . . [T]he remedy in the intrinsic fraud circumstance is exclusively in a motion for relief from judgment pursuant to MCR 2.612(C)."). The trial court ultimately ruled that the evidence was not newly discovered and denied the motion on that basis.[7]

We acknowledge that Dario Mortgages on appeal argues for the first time that there is no requirement that evidence be newly discovered, such that the evidence could not have been discovered by due diligence, to set aside a judgment on the basis of fraud. This particular argument is thus unpreserved and waived given Dario Mortgages' ample opportunity but failure to raise it before the trial court.[8] Nevertheless, because Dario Mortgages generally raised objections to the judgment under each of the grounds it asserts on appeal, we address Dario Mortgages' contentions under this issue in full. See *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 585-586; 918 NW2d 545 (2018) ("[A]ppellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal. We prefer to resolve issues on their merits when possible . . . ."). We now address these contentions.

A. FRAUD

As an initial matter, Dario Mortgages is correct that evidence need not be newly discovered to constitute fraud under MCR 2.612(C)(1)(c). Specifically, MCR 2.612(C)(1) provides separate categories clearly distinguishing fraud from newly discovered evidence, and the due-diligence

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[7] The trial court even called the motion, "the Motion for Judgment Notwithstanding the Verdict For Newly Discovered Evidence."

[8] See *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___NW3d ___ (2023) (Docket No. 359090); slip op at 4-5.

requirement is only found in MCR 2.612(C)(1)(b), not in MCR 2.612(C)(1)(c). See also *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 359082 & 359811), lv pending; slip op at 6-7 ("Regardless of whether it is newly discovered, however, evidence of fraud is given a distinct category under the court rule delineating it from evidence that is merely newly discovered . . . . [W]e hold that MCR 2.612(C)(1)(c) does not impose a requirement of due diligence on a party seeking relief from judgment on the basis of fraud, misrepresentation, or other misconduct of an adverse party.")

Nonetheless, Delia's representations in this case, compared to her disclosure in the probate court—particularly, her additional response that she was attaching the March 2010[9] mortgage and assignment, and that the total principal and interest on the outstanding loan was $1,012.50—did not constitute fraud.

A fraud upon the court occurs "when some material fact is concealed from the court or some material misrepresentation is made to the court." *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000) (quotation marks and citations omitted). Similarly, intrinsic fraud via perjury occurs when "a party conceals a material fact from the court or makes a material misrepresentation to the court within a case."[10] *Zattlin v Alden State Bank*, unpublished[11] per curiam opinion of the Court of Appeals, issued January 24, 2012 (Docket No. 299919), p 2, citing *Matley (On Remand)*, 242 Mich App at 101. "[F]raud on the court cannot be committed in an adversary proceeding with respect to facts not known by the court, but known by both parties." *Matley (On Remand)*, 242 Mich App at 102.

Here, Delia's mere acknowledgement of the March 2010 mortgage document and statement that the amount owing on the mortgage was $1,012,500 is not a statement that the mortgage is *legally valid* and that a $750,000 loan was provided in exchange for that mortgage and note. Nor does Delia's isolated disclosure contradict, or even reference, any specific facts or theories on which Delia relied in this case. Further, the statement seems to be correct. At the time the response was made, a mortgage was indeed recorded against the property, and no payments had been made to satisfy it. Thus, without any legal adjudication voiding the mortgage, it was reasonable to say that the full amount, plus interest, was owed.[12] Only after a court voided the mortgage would Delia be able to say that the property was not encumbered. And given that the mortgage's validity was the primary legal dispute in this case, any contrary representation on this

[9] Delia stated in her response in the probate court that the mortgage in question was a "March 10, 2010" mortgage. The mortgage at issue in the present case is dated March 5, 2010.

[10] In the context of criminal cases, "[p]erjury has been defined as 'a willfully false statement regarding any matter or thing, if an oath is authorized or required.' " *People v Loew*, 340 Mich App 100, 128; 985 NW2d 255 (2022) (citation omitted).

[11] "Unpublished opinions are . . . not binding authority but may be persuasive or instructive." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5, 957 NW2d 858 (2020).

[12] Delia presented evidence that the $1,012,500 was derived using simple interest calculations over a seven-year period.

ultimate issue could not constitute fraud. See *Cummins v Robinson Twp*, 283 Mich App 677, 697; 770 NW2d 421 (2009) ("[L]egal opinions . . . are not false representations concerning an existing or past fact and cannot constitute fraud.").[13] Consequently, it was reasonable to deny the motion on the basis that the probate response was not untrue and was not so contrary to Delia's position in the trial court in this case to constitute fraud.

We acknowledge Dario Mortgages' additional argument that the trial court, at a minimum, abused its discretion by not holding an evidentiary hearing on the allegation of fraud. "Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." See *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). "An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is of the highest order." *Id*. (quotation marks and citation marks omitted). "[W]here there are conflicting allegations and affidavits with respect to the question whether there has been a fraud perpetrated upon the court, the trial court is required to conduct an evidentiary hearing in order to ascertain if the fraud existed." *Id*. See also *Williams v Williams*, 214 Mich App 391, 394; 542 NW2d 892 (1995) ("Longstanding Michigan [caselaw]" requires an evidentiary hearing "when a party makes a motion alleging that fraud has been committed on the court . . . .").

However, the Court in *Williams, id*. at 394-399, recognized an exception to this rule under MCR 2.119(E)(2), which provides:

> When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

After distinguishing *Kiefer* because "no depositions were taken and considered by the court" and "the defendant in *Kiefer* was denied entirely an opportunity to respond to the plaintiff's allegations [of fraud]," the *Williams* Court stated:

> While recognizing that the level of proof relating to allegations of fraud is 'of the highest order,' we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which 'swearing contests' between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be

[13] Although *Cummins* involved a plaintiff's claim for common-law fraud, we find this principle equally applicable to allegations of fraud when seeking relief from judgment.

> determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing. [*Id*. at 399.]

In the instant case, because the allegation of fraud was based on facts outside the record, the trial court had discretion under MCR 2.119(E)(2) to hear the motion on affidavits. See *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990),[14] citing MCR 2.119(E)(2) ("When all of the facts necessary to decide the motion are not of record the court has discretion to hear the motion on affidavits, or it may direct that the motion be heard on oral testimony or deposition."). Further, we conclude it was unnecessary to conduct a hearing to determine the material facts relating to Delia's disclosure in the probate case. The disclosure itself was undisputed and provided to the trial court, and both parties provided affidavits supporting their positions regarding the disclosure. Also, Dario Mortgages does not explain in any way what additional information may have been elicited at an evidentiary hearing. Under these circumstances, the trial court did not abuse its discretion by not holding an evidentiary hearing before denying the JNOV motion.

B. NEWLY DISCOVERED EVIDENCE

Dario Mortgages also asserts that the trial court erred when it denied the motion on the basis that Delia's responses in the probate court did not constitute newly discovered evidence under ground (b). It particularly argues that this evidence could not have been discovered earlier with reasonable diligence.

This is a close call, which generally cannot constitute an abuse of discretion. See *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (stating that "a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion"). Neither Dario Mortgages nor Dino was a party in the probate case, which would tend to show they lacked knowledge or reason to know what occurred in that proceeding. However, the evidence showed that Dino nonetheless was fully aware of that case, personally became involved in the case, and sought to procure a settlement in that case in favor of Nick. It is hard to imagine that Dino or Dario Mortgages did not realize that Delia, as personal representative of Angelo Sr.'s estate, would have had to—and did—submit an inventory for the restaurant real property, including a list of any encumbrances on that property. And it is quite reasonable to think that seeing what Delia said about any debts on the property would have been highly pertinent to the present case.

Dario Mortgages largely relies on the postjudgment affidavit of its trial counsel, who substituted for different counsel earlier in the case and said he could not have discovered the

[14] Although we are not required to follow cases decided before November 1, 1990, see MCR 7.215(J)(1), a published case decided by this Court "has precedential effect under the rule of stare decisis," MCR 7.215(C)(2). See also *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018) (stating that although this Court is not "strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990," those opinions are nonetheless "considered to be precedent and entitled to significantly greater deference than are unpublished cases.").

disclosure earlier because (1) discovery was completed by the time he started on the case and, (2) he never knew the probate case would become such a key issue because it was never mentioned in Delia's complaint. However, this counsel started on the case almost two full years before trial, and there was ample evidence by this point establishing the probate proceeding's relevance to this case. And while it does not appear that the disclosure was ever made a public record in the probate case, Delia correctly notes that it took a mere six days for Dario Mortgages' counsel to "discover" it after the court's final judgment in this case. These facts support that the disclosure could have been discovered with reasonable diligence before trial. For these reasons, although arguably a close call, the trial court did not abuse its discretion by denying relief from judgment under ground (b).

C. REMAINING SUBISSUES

Dario Mortgages' claim that Delia was judicially estopped from taking a contrary position from that in the probate court is similarly unpersuasive. "For judicial estoppel to apply, a party must have successfully and 'unequivocally' asserted a position in a prior proceeding that is 'wholly inconsistent' with the position now taken." *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012), citing *Paschke v Retool Indus*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). As previously explained, Delia's positions in the probate court and the trial court here were not "wholly inconsistent." Further, it is not clear that Delia "successfully" asserted the position in the probate court. "Under the 'prior success' model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Paschke*, 445 Mich at 510. The parties do not dispute that the probate response was never filed in the probate court. Thus, there is no indication that the probate court knew about Delia's position, let alone accepted it. Accordingly, judicial estoppel is inapplicable here.

Dario Mortgages alternatively argues that the trial court should have granted a new trial on this issue. But this request was premised on the evidence being newly discovered. MCR 2.611, which governs motions for a new trial, allows for a new trial based on "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." MCR 2.611(A)(1)(f). Having already concluded that the trial court did not abuse its discretion related to the JNOV motion because evidence supported that the disclosure could have been discovered with reasonable diligence, the trial court likewise did not err when it denied the motion for a new trial.

III. QUIET TITLE CLAIM

Dario Mortgages argues that the trial court erred when it voided the mortgage and granted summary disposition in favor of Delia on her claim to quiet title. We disagree.

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). Actions to quiet title are equitable in nature and are also reviewed de novo. *Houston v Mint Group, LLC*, 335 Mich App 545, 557; 968 NW2d 9 (2021). Whether a mortgage is a future advance mortgage, as argued by Dario Mortgages here, is a question of law, which we review de novo. *Citizens State Bank v Nakash*, 287 Mich App 289, 292; 788 NW2d 839 (2010).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The motion should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006).

As explained in *1373 Moulin, LLC v Wolf*, 341 Mich App 652, 664-665; 992 NW2d 314 (2022):

> An action to quiet title is equitable in nature and is available to a party in possession of real property who seeks to clear the property's title as against the world. In a quiet-title action, the plaintiff has the initial burden of establishing a prima facie case of title. If the plaintiff establishes a prima facie case of title, the burden shifts to the defendant to prove superior right or title. [Cleaned up.]

Here, Delia sought a declaration that she held title to the restaurant property free from the purported March 5, 2010 mortgage. Delia alleged that although the mortgage note referenced a $750,000 loan, that loan was never provided, thereby voiding the mortgage. She relatedly alleged that any debt related to the mortgage had been forgiven.

At the outset, we reject Dario Mortgages' argument that it was improper for the trial court to consider parol evidence on this matter. While parol evidence is generally not admissible to show that parties had a different intent from what is provided in a written contract, see *Hamade v Sonoco Inc (R&M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006), it is always admissible to show that a contract is void or unenforceable, *Rood v Midwest Matrix Mart, Inc*, 350 Mich 559, 564; 87 NW2d 186 (1957). In this instance, Delia was not offering extrinsic evidence to show that the contract meant something other than what it said, but rather to show that the contract was void, which is permissible.

We also reject Dario Mortgages argument that the trial court's ruling runs afoul of the statute of frauds. The applicable statute of frauds, MCL 566.1, states that an "agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge." Dario Mortgages suggests that the trial court granted summary disposition because it found that Dario had orally forgiven the loan. But the trial court's ruling was not predicated on that basis. The court determined there was no question of fact that no $750,000 loan was ever provided, not that a loan had been given and later forgiven. Thus, Dario Mortgages' argument pertaining to the statute of frauds is meritless.[15]

[15] In its brief on appeal, Dario Mortgages cites one of the trial court's findings that Dario had told Angelo Jr. he did not expect repayment, but that finding was related to the subsequent trial on the slander-of-title claim, not the summary-disposition proceeding where the quiet-title claim was

We now address whether the trial court erred by voiding the mortgage, and doing so in its entirety, as a matter of law. The March 5, 2010 mortgage at issue states that according to the accompanying note, it was securing a sum of $750,000, and Dario Mortgages never disputed that the mortgage contemplated providing $750,000 to Angelo Sr. and Delia. Dario Mortgages also admits that $750,000 was never provided to, or for the benefit of, Angelo Sr. and Delia at the time the note and mortgage were executed.

In the trial court, Dario Mortgages took the position that the mortgage covered $750,000 because Dario had loaned Angelo Sr. and Delia $154,300 in 1990, and another $137,016.39 from 2008 through 2009. Dario Mortgages argued that when adding in $255,762.50 in interest on the 1990 loan, there was a total amount owed of $547,078.89 just before the execution of the March 2010 mortgage. Thus, according to Dario Mortgages, when the $225,000 is factored in that was paid on the date of the March 5, 2010 mortgage, one arrives at the "aggregate amount of $750,000" reflected in the 2010 note and mortgage. There are many problems with this theory.

First, using Dario Mortgages' own numbers, the amount owed after March 5, 2010, would be $772,078.89, not $750,000. This discrepancy weakens Dario Mortgages' theory that the March 2010 loan was a "refinance" or consolidation. Second, there is nothing in the language of the March 2010 note or mortgage to show that it was encompassing any past debts, let alone debts from 20 years earlier. Relatedly, according to the 1990 note that Dario Mortgages submitted, it was secured by a first mortgage already. There would be no reason to secure that debt on another mortgage. Third, while Dario's ledger for loans related to the restaurants includes amounts dated from 2008 to 2009 (listed separately from the March 5, 2010 amount and other subsequent amounts listed), there is no mention of the 1990 loan anywhere. Given these inconsistencies, the trial court did not err by rejecting Dario Mortgages' argument that the 2010 transaction somehow included or encompassed prior transactions.

On appeal, Dario Mortgages takes a different position. Dario Mortgages argues that the mortgage operated like a line of credit or a future advance mortgage. Because Dario Mortgages never raised this argument in the summary-disposition proceeding, it is waived. See *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 4-5. Regardless, Dario Mortgages' position is without merit.

A "future advance mortgage" secures a future advance. MCL 565.901(b). MCL 565.901(b) further states that "[i]f a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded." Although the statute only addresses "amendments" of mortgages, the intent is clear: a future advance mortgage must explicitly mention that it is securing future advances. Consistent with this principle, this Court has held that a recorded instrument not containing any future-advance language fails to meet the requirements for the creation of a future advance mortgage. *Citizens State Bank*, 287 Mich App at 294-295. For this reason, the mortgagee in *Citizens State Bank* was unable to secure any future advances. *Id*. at 292, 295. Here, Dario Mortgages does not dispute that the March 2010 mortgage does not contain

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resolved. Indeed, findings of fact are not permitted when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

any language showing that it was a future advance mortgage. Therefore, as a matter of law, the mortgage is not a future advance mortgage. See *id*. at 294-295.

Because the mortgage was not for past debts and was not for future advances, the question is whether $750,000 was provided to Angelo Sr. and Delia at the time they executed the mortgage. There was no dispute that $750,000 was never provided. Indeed, Dario Mortgages admitted that there never was a $750,000 loan provided when the mortgage was executed. With no $750,000 loan provided, the trial court properly deemed the mortgage void, thereby precluding Dario Mortgages from recovering on the security. See *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942); *In re Claim for Surplus Funds*, 328 Mich App 313, 319; 937 NW2d 394 (2019) (both cases stating that a mortgage is merely security for a debt, and when the underlying debt is extinguished, the mortgage also becomes extinguished). Specifically, given this principle, the absence of any actual $750,000 loan and associated debt necessarily precludes the existence of a valid, $750,000 mortgage securing it.

Dario Mortgages briefly suggests on appeal that under equitable grounds pursuant to *Ginsberg*, 300 Mich 712, the March 2010 mortgage should be deemed to have secured the amount of credit actually provided. However, Dario Mortgages did not make this argument anywhere in its response to plaintiff's motion for summary disposition. Dario Mortgages only mentioned this concept at the motion hearing, *after* the court indicated it was ruling in Delia's favor, and did so without supplying any authority for its position. Only in its motion for reconsideration did Dario Mortgages finally provide a more-detailed analysis on this equitable theory. Under these circumstances, we deem the issue waived. See *Tolas Oil & Gas*, ___ Mich App at ___; slip op at 4-5 (stating that unpreserved issues are waived); *Johnson v Johnson*, 329 Mich App 110, 126; 940 NW2d 807 (2019) (stating that the failure to support a position with legal authority results it the issue being abandoned); *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) (stating that issues raised for the first time in a motion for reconsideration are not preserved).[16] We affirm the grant of summary disposition in favor of Delia on her quiet-title claim.

IV. SLANDER-OF-TITLE CLAIM

Dario Mortgages raises numerous challenges regarding Delia's claim for slander of title. We address each in turn.

[16] In any event, we note that the Supreme Court in *Ginsberg* was not relying on principles of equity when it ruled that the at-issue mortgage was valid for an amount less than the $5,500 amount noted on its face. The Court simply was recognizing that the plaintiffs had admitted their liability for $2,750 in the trial court and withdrawn their cross-appeal. *Ginsberg*, 300 Mich at 716-717. This legal framework left the Court with no option other than to keep the trial court's ruling in place with respect to the $2,750 owed on the mortgage. *Id*. at 720. Ultimately, Dario Mortgages' single sentence arguing for an equitable mortgage and its associated citation to *Ginsberg* does not persuade us that such relief is warranted.

A. WHETHER A SHERIFF'S DEED IS AN ENCUMBRANCE

Dario Mortgages argues that the slander-of-title claim fails as a matter of law because a sheriff's deed—the recorded document at the heart of the claim—is not an encumbrance. We disagree.

Whether a document is an encumbrance under MCL 565.25 and MCL 600.2907a involves statutory interpretation, which we review de novo. See *Galvan v Poon*, 511 Mich 206, 211; 999 NW2d 351 (2023); *Lakes of the North Ass'n v TWIGA Ltd Partnership*, 241 Mich App 91, 96; 614 NW2d 682 (2000).

MCL 600.2907a(1) states that "[a] person who violates [MCL 565.25] by encumbering property though the recording of a document without lawful cause with the intent to harass or intimidate any person is liable to the owner of the property encumbered." The question therefore is whether the recorded sheriff's deed encumbered the property. Under well-established Michigan law, an encumbrance is "anything" that "constitutes a burden upon the title." *Post v Campau*, 42 Mich 90, 94; 3 NW 272 (1879); see also *Darr v First Fed S & L Ass'n*, 426 Mich 11, 20; 393 NW2d 152 (1986).

The sheriff's deed recorded in this case states that the property was sold and conveyed to Dario Mortgages on January 4, 2018. Dario Mortgages maintains that because the instrument reflected a conveyance, it is not an encumbrance. However, this contingent conveyance arguably is the most burdensome encumbrance that could be placed on one's title. Under MCL 600.3236, if no redemption occurs, then the foreclosing party gains "all right, title, and interest which the mortgagor had." Thus, this document constituted a burden on Delia's title. Dario Mortgages' reliance on MCL 565.25's reference to "sheriff's certificate" rather than "sheriff's deed" is misplaced. MCL 565.25(1) lists the following instruments: "a levy, attachment, lien, lis pendens, sheriff's certificate, marshal's certificate, *or other instrument of encumbrance*." (Emphasis added.) Dario Mortgages ignores the "or other instrument of encumbrance" language. This language plainly shows that the Legislature did not intend for the enumerated items to be an exclusive list of contemplated instruments. Therefore, under the plain language of the statute, *any* instrument, as long as it encumbers the property, qualifies under MCL 565.25(1). The trial court therefore did not err when it ruled that the sheriff's deed was an encumbrance.

B. CHALLENGES TO PARTICULAR FINDINGS AND CONCLUSIONS

We now turn to Dario Mortgages' challenges regarding the trial court's findings and conclusions from trial. A trial court's findings of fact in a bench trial are reviewed for clear error, and its conclusions of law are reviewed de novo. *Charles A Murray Trust v Futrell*, 303 Mich App 28, 50; 840 NW2d 775 (2013). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. The reason for this deference is that trial courts are "in a better position to examine the facts" of a case, *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010), and are in a "superior position to assess the credibility of the witnesses appearing before [them]," *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011); see also MCR 2.613(C).

Despite this well-established principle, Dario Mortgages on appeal argues that we should implement a de novo standard of review because the trial court purportedly failed to conduct an "independent" analysis and merely adopted Delia's proposed findings of facts and conclusions of law. But Dario Mortgages fails to provide any authority for this position.[17] See *Gubin v Lodisev*, 197 Mich App 84, 92; 494 NW2d 782 (1992) ("The failure to cite legal authority for an issue waives that issue for appellate review.").

In any event, there is no rational reason to adopt Dario Mortgages' position. Dario Mortgages' main objection to the trial court's findings of fact and conclusions of law is that the court "cut and paste" verbatim essentially all of the proposed findings and conclusions that Delia submitted to the court. A trial court's adoption of one party's proposed findings does not demonstrate an unwillingness to make an independent determination, but signifies the court's agreement with that party's proposed findings. Notably, Dario Mortgages had the opportunity to, and did, submit its own proposed findings and conclusions of law. It seems clear that the purpose of having each party submit proposed findings is to make it easier for the court to determine the disputed factual issues and prepare a final order, opinion, or judgment. In this case, the trial court found that the evidence supported Delia's views instead of Dario Mortgages'. There is nothing inherently wrong with this, even if the trial court's ultimate findings were taken directly from Delia's submission. Those findings are still subject to review for clear error, which we now undertake.

1. FINDING OF MALICE

Dario Mortgages argues that the trial court erred by finding that it acted with malice when it recorded the sheriff's deed. We disagree.

"To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *B&B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). As this Court observed in *Fed Nat'l Mtg Ass'n v Lagoons Forest Condo Ass'n*, 305 Mich App 258, 270; 852 NW2d 258 (2014):

> The crucial element is malice. A slander-of-title claimant is required to show some act of express malice by the defendant, 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 prevail on a slander-of-title claim if the defendant's claim under the mortgage or lien was asserted in good

[17] It only cites *People v McSwain*, 259 Mich App 654, 682-683; 676 NW2d 236 (2003), for the proposition that factual findings of trial judges are given less deference than the findings of juries. Nowhere does *McSwain* suggest that a trial court's findings should be reviewed de novo. Indeed, *McSwain* holds that "the clear error standard of review" applies and "is highly deferential to the trial court." *Id*. at 683. All *McSwain* cautions is that reviewing courts must scrutinize a trial court's factual findings, while "according those findings deference as required by [MCR 2.613(C)]," without endorsing obvious errors or omissions under the guise of that deference. *Id*.

faith upon probable cause or was prompted by a reasonable belief that the defendant had rights in the real estate in question. [Cleaned up.]

Where an actor's state of mind is at issue, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); see also *Romeos v Salvation Army*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2014 (Docket No. 312713) ("An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.") (cleaned up).

Dario Mortgages focuses on the following underlying findings made by the trial court:

47. The Court has declared the Sheriff's Deed null and Void Dario Mortgages Recorded the Sheriff's Deed with Malice.

48 Unlike his father, who cared deeply for Delia's family, Dino despised his aunt and cousins, particularly Little Angelo.

49. Dino also held a grudge against his uncle, Angelo, Sr., and Delia because of the business separation that occurred between Dario and Angelo, Sr. in the 1980's.

50. He further did not like his aunt, Delia, because he felt she looked down at his mother, brother, wife, and him, and he even called her "two-faced."

51. While Dino inherited a lending business worth millions of dollars after Dario's death, Delia found herself in a probate dispute after the death of Angelo, Sr. with her step-son, Nick Tomei . . . that included two separate probate proceedings—one in Italy and the other in the United States.

52. In 2017, Dino became involved in the dispute to help Nick.

53. Even though Dario and Dino had never attempted to collect a penny under the Note and Mortgage in 7 years, Dino tried to use that alleged debt, among other things, to force Delia into an unfavorable settlement with Nick, which she refused.

54. In fact, one of Dino's proposals would have required Delia to give everything in Italy to Nick Tomei and all of her properties in the United States to Dino.

55. To intimidate, harass, and otherwise punish Delia and her family for refusing to capitulate to Nick and Dino's demands in the probate proceeding, Dino, on behalf of Dario Mortgages, foreclosed the Mortgage and mortgages on properties owned by Perry and Little Angelo.

56. After the foreclosure and recording of the Sheriff's Deed, Dino participated in formal mediation with Nick and Delia.

57. Again, because Delia refused to capitulate to Nick and his demands, Dino decided that he would evict her . . . .

Dario Mortgages does not directly challenge these findings, instead arguing that "[n]one of these findings . . . show an act indicative of malice." That assertion is without merit because Finding 55 clearly states that Dario Mortgages foreclosed "[t]o intimidate, harass, and otherwise punish Delia and her family for refusing to capitulate to Nick and Dino's demands in the probate proceeding." Thus, it foreclosed with the requisite desire or intention to injure Delia and her family.

In a footnote, Dario Mortgages claims that this finding is unfounded because the foreclosure occurred in December 2017 and Dino did not attend mediation until April 2018. But in one of Dino's admissions, which was admitted into evidence, Dino said that he decided to foreclose after global mediation did not work. This is consistent with Perry's and Angelo Jr.'s testimony that foreclosure occurred *after* failed mediation. Dino testified that he thought Delia was being unfair to Nick in the probate proceedings. Dino also admitted that after Dario passed away, the first time he discussed collecting on the debt was at the global mediation. For Dino's comment to make any sense, it would seem to have taken place at the 2017 mediation that preceded the foreclosure and not at the 2018 mediation, which took place after the foreclosure. With this evidence, we are not left with a definite and firm conviction that the trial court made a mistake when it found that Dino acted with an intent to "punish" Delia after the failure to procure a favorable probate settlement in Nick's favor, which constitutes malice.

Dario Mortgages also ignores the following other pertinent findings made by the trial court:

35. . . . Dario Mortgages Knew that the Information in the Sheriff's Deed was False.

* * *

40. Because [Dino] had access to [Dario's ledger], Dino knew that Dario never made the $750,000 loan stated in the Note and Mortgage.

41. In fact, Dino knew there was no $750,000 loan, testifying that it was "about $750,000," even though the ledger only showed a $225,000 loan made on the date of the Note and Mortgage and the total amount of the ledger for all loans made between 2008 and 2014 was less than $550,000.

42. Because Dino had access to the Note, Dino also knew that it did not state that interest was to be compounded.

* * *

44. Despite his knowledge that there was never a $750,000 loan, no compound interest, and no intention to collect under the Note and Mortgage, [Dino] falsely claim[ed] that there was a principal amount owing of $750,000 and 5% interest compounded for a total amount of $1,170,947.81.

* * *

74. The Court finds that Dario Mortgages filed the Sheriff's Deed knowing that it was false with the intent to cause Delia injury, which constitutes malice . . . .

* * *

83. . . . Dino, acting on behalf of Dario Mortgages, knew he was trying to destroy his aunt Delia and uncle Angelo, Sr.'s family legacy when he chose to foreclose.

Even though these other findings, especially Finding 74, relate to malice, Dario Mortgages does not directly challenge or address them. Dario Mortgages merely suggests that there was no malice because Dino testified that he honestly believed he held a valid mortgage. But the trial court was in a superior position to judge the credibility of the witnesses appearing before it. We defer to the trial court's credibility determinations in Delia's favor because of its superior ability to make those judgments. *Shann*, 293 Mich App at 305; *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004); see also MCR 2.613(C) (stating that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it").

There was evidence presented that Dino strongly disliked or hated Delia and her family. While this strong dislike, acting alone, is insufficient to establish malice, there also is evidence that Dino knew Dario's records were clear that there had been no $750,000 loan. Further, as already mentioned, Dino admitted that he only foreclosed after the mediation failed. It was reasonable for the trial court to infer from this evidence that Dino sought to harm or "punish" Delia by knowingly filing an invalid sheriff's deed. Therefore, we are not left with a definite and firm conviction that the trial court made a mistake with respect to its finding of malice.

2. FINDINGS PREMISED ON HEARSAY

Dario Mortgages also argues that some of the trial court's findings are impermissibly premised on hearsay. We disagree.

Dario Mortgages takes exception to Findings 32, 34, 59g, and 59i, which provide:

32. In fact, Dario had indicated that he did not want anybody to foreclose on the family, and Dino was aware that his father said that "families don't do that to family."

34. Shortly before his death in January 2015, Dario met with Dino and Little Angelo during which Dario told Little Angelo that he did not expect repayment of any amounts that he had given Little Angelo's family members. This was the last time Little Angelo saw his uncle because Dino forbade it.

* * *

59. . . .

* * *

g. [Dino] refused to answer whether Dario told him "to be nice" to Little Angelo, which conflicted with his prior testimony at deposition and which he later acknowledged as a witness on behalf of the defense.

* * *

i. [Dino] attempted to overstate the relationship between him and his father, which conflicted with the testimony of Lucy Maceroni, who testified that Dino had disagreements with Dario, criticized Dario's business practices, and fought with Dario about collecting from family, as well as Angelo, Jr's testimony regarding Dario's conflict with Dino.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Regarding Findings 32 and 34, Dario's statements that "families don't do that to family" and that he did not expect repayment were not offered to prove the truth of the matters asserted. In other words, the first statement was not offered to prove that "families don't do that to family," but instead was offered to show how Dino was aware of Dario's desire or intent, which does not run afoul of the hearsay rule. See also *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998) ("Statements offered to show that they were made or to show their effect on the listener are not hearsay."), abrogated in part on other grounds by *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001). The same reasoning applies to Finding 34. Dario's statement to Angelo Jr. that he did not expect repayment was made in the presence of Dino and was offered to show that Dino had this knowledge.

For Finding 59g, Dario Mortgages argues that Dario's statement to Dino to "be nice" is impermissible hearsay. This is incorrect. The statement for Dino to "be nice" is a command, and commands are not hearsay because they do not contain assertions of fact. *People v Bennett*, 290 Mich App 465, 483; 802 NW2d 627 (2010); *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998), mod in part on other grounds 458 Mich 862 (1998).

Regarding Finding 59i, one of the bases for this finding is found in Maceroni's testimony. Maceroni testified that she witnessed Dino and Dario disagreeing about business practices, with Dino saying that Dario was "doing it all wrong." Again, the statement was not offered to prove the truth of the matter asserted, i.e., that Dario was indeed conducting his business "all wrong," and therefore was not hearsay. And Maceroni was nevertheless permitted to generally describe events she personally witnessed without running afoul of hearsay rules. The other basis for Finding 59i is from Angelo Jr.'s testimony describing how Dario voiced his displeasure to Dino about attempting to collect from family. As noted before, these types of statements were offered to show that Dino was aware that Dario did not expect repayment, not that Dario in fact did not intend to collect.

Indeed, essentially the only issues remaining in dispute at trial were *Dino*'s intent and knowledge of the validity of the purported debt, and whether he exhibited the requisite malice for

slander of title. What Dario believed or intended, in contrast, was irrelevant. Therefore, Dario Mortgages' hearsay arguments are without merit.

3. FINDINGS AND CONCLUSIONS UNSUPPORTED BY THE RECORD

Dario Mortgages next challenges many of the trial court's findings and conclusions as being unsupported by the record evidence. We largely disagree. Although the trial court clearly erred concerning one of its findings, this error was harmless and does not warrant reversal.

Dario Mortgages first alleges error with respect to Findings 22 and 23, which provide:

> 22. Dario maintained a ledger page for loans that were made to Angelo Brothers and the Ivory room.
>
> 23. The loans were made on various dates beginning on March 31, 2008 through March 28, 2014.

For Finding 22, Dario Mortgages asserts that "[o]ther than the single notation at the top of the ledger page . . . , there is no evidence that Angelo Brothers Restaurant and the Ivory [Room] were obligated on the loans. The ledger relates to the mortgage and note." For Finding 23, Dario Mortgages points out that Dario also paid the $225,000 to Bank of America on March 5, 2010, so Angelo Sr. and Delia could redeem the property after it had been foreclosed. Assuming there is any error, Dario Mortgages does not explain how these errors require reversal or otherwise affected the trial court's judgment. Thus, any argument with respect to these findings is abandoned.[18] See *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019) (failure to adequately brief an issue constitutes abandonment).

Dario Mortgages also challenges the trial court's Findings 42 and 44 to 46, and Conclusions 70 to 72, 76, and 78, which provide:

> 42. Because Dino had access to the Note, Dino also knew that it did not state that interest was to be compounded.
>
> * * *
>
> 44. Despite his knowledge that there was never a $750,000 loan, no compound interest, and no intention to collect under the Note and Mortgage, Dino, on behalf of Dario Mortgages, directed the foreclosure of the Mortgage, falsely

[18] Dario Mortgages, in its brief on appeal, provides just one or two sentences related to each finding that do not clearly explain the nature of the alleged errors. Moreover, with respect to Finding 23, Dario Mortgages acknowledges that the trial court for Finding 27 found that the $225,000 loan occurred on March 5, 2010. Defendant's "challenge" to Finding 23 is particularly perplexing. With the March 5, 2010 loan squarely falling between the listed dates of March 31, 2008, and March 28, 2014, there is nothing incorrect about Finding 23.

claiming that there was a principal amount owing of $750,000 and 5% interest compounded for a total amount of $1,170,947.81.

45. Dario Mortgages then purchased Property at the foreclosure sale on January 4, 2018 by making a credit bid in the false amount.

46. Dario Mortgages then had a sheriff's deed (the "Sheriff's Deed") evidencing the sale, which included the false amount, recorded with the Wayne County Register of Deeds at Liber 54171, Page 1041.

* * *

70. Dario Mortgages made a false statement about Delia's title to the Property by recording the Sheriff's Deed.

71. The Sheriff's Deed was false because it stated: (1) the Mortgage was valid; (2) the Mortgage secured a debt for $1,170,947.81; (3) Dario Mortgages bid $1,170,947.81; and (4) the amount necessary to redeem the Property was $1,170,947.81.

72. Interest under the note was to be calculated on the basis of simple interest. *Norman v Norman*, 201 Mich App 182, 187; 506 NW2d 254 (1993) ("in the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, the rule in this state is that interest shall be calculated on the basis of simple interest rather than compound interest").

* * *

76. Dario Mortgages slandered Delia's title to the Property and violated MCL 565.108.

* * *

78. The Sheriff's Deed on Mortgage Sale constitutes a burden on Delia's title and is an "instrument of encumbrance" under MCL 565.25(1)., [sic] Order re Delia's Request for Exemplary Damages under MCL 565.25 and 600.2907a dated July 22, 2021.

The gist of Dario Mortgages' argument appears to be that these findings and conclusions are all erroneous because there is no evidence that Dino had actual knowledge that there was no $750,000 loan and that interest was to be calculated as simple interest. For the former, the court did not clearly err. Maceroni testified that she showed the bookkeeping system, which included Dario's handwritten ledgers, to Dino and that Dino was familiar with the system. Dino further testified that he was aware of the books and had specifically talked to his father about the ledger page pertaining to the loans to Angelo Sr. and Delia. Accordingly, there is nothing to suggest that Dino, as sole owner of Dario Mortgages after Dario died, did not view and have access to those ledgers. Indeed, he would necessarily need to view that ledger to know what, if any, payments had been made. As mentioned, that ledger shows there never was a $750,000 loan.

Dario Mortgages does not challenge Finding 41, in which the court explains the rationale for its findings:

> 41. In fact, Dino knew there was no $750,000 loan, testifying that it was "about $750,000," even though the ledger only showed a $225,000 loan made on the date of the Note and Mortgage and the total amount of the ledger for all loans made between 2008 and 2014 was less than $550,000.

And this finding is supported by the record. The ledger shows that the sum of the loans listed from the beginning (March 31, 2008) through March 5, 2010 (the date of the note and mortgage), is about $362,000, and if one sums up the entire list spanning from March 2008 through March 2014, the sum is about $525,000. Therefore, the trial court did not clearly err by finding that Dino was aware no $750,000 loan had been given.

The court's finding that Dino knew that interest was to be calculated as simple interest instead of compound interest is a different matter. The trial court cited *Norman*, 201 Mich App 182, for the proposition that interest is calculated as simple interest as a matter of law, unless otherwise agreed on. But there is no finding that Dino was aware of this legal principle, and we are not aware of any evidence showing he had this knowledge,[19] nor any other evidence to infer knowledge that the mortgage note contemplated simple interest. Thus, the trial court's Finding 42 with respect to Dino having knowledge that interest was to be simple interest is clearly erroneous.

However, this error does not require reversal because the ultimate finding of malice was premised on Dino initiating foreclosure to punish Delia, all while knowing that there was *no* underlying $750,000 amount of principal owed and consequently *no* interest owed. Thus, the fact that Dino attempted to collect compound interest as opposed to simple interest is immaterial. Dino initiated foreclosure proceedings to collect a debt (including interest of any kind) that he knew was not owed. Therefore, any error with regard to Dino having actual knowledge that compounded interest was not recoverable is not a basis to reverse the trial court's judgment. See *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481 (2007) ("[W]e conclude that any error in this respect was not decisive to the outcome, and we will not reverse on the basis of harmless error."); MCR 2.613(A) (harmless error rule).

C. DAMAGES

Dario Mortgages also challenges many aspects of the damages the trial court awarded to Delia and the trial court's related denial of its request for remittitur. "In bench trials, this Court

[19] We acknowledge the general legal principle that individuals are presumed to know the law, but stress that the issue here is whether Dino had *factual knowledge* sufficient to establish malice. See *Glieberman v Fine*, 248 Mich 8, 13; 226 NW2d 669 (1929) (concerning whether the defendant bank acted with express malice when recording a mortgage interest: although the defendant bank "is presumed to know the law[] because . . . ignorance of the law [is] no[] excuse," "[this] presumption is of little aid when the question of *actual knowledge as a matter of fact* is concerned.") (emphasis added).

reviews the award of damages under the clearly erroneous standard." *Meek v Dep't of Transp*, 240 Mich App 105, 121; 610 NW2d 250 (2000), overruled in part on other grounds by *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006). A trial court's decision regarding remittitur is reviewed for an abuse of discretion. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 231; 755 NW2d 686 (2008). When reviewing whether remittitur is appropriate, the evidence is viewed in a light most favorable to the nonmoving party. *Id*. A court abuses its discretion when it selects an outcome falling outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

1. EXEMPLARY DAMAGES

Dario Mortgages argues that the amount of exemplary damages is excessive and contrary to law. We find no clear error in the trial court's calculation.

MCL 600.2907a(1) states that a person who violates MCL 565.25 by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable for, among other things, exemplary damages. MCL 600.2907a(1)(c). "Exemplary damages are recoverable only for intangible injuries or injuries to feelings, which are not quantifiable in monetary terms." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 630; 769 NW2d 911 (2009). "An award of exemplary damages is considered proper if it compensates a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant." *Id*. (quotation marks and citation omitted).

Dario Mortgages does not dispute that there was evidence that Delia was emotionally harmed. Dario Mortgages instead avers that the harm was from the *foreclosure*, not the *filing of the sheriff's deed*. Delia counters that the filing of the sheriff's deed is part of the foreclosure process itself. See MCL 600.3232 (stating that a sheriff's deed "as soon as practicable, and within 20 days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated"). The court's finding related to the emotional harm Delia suffered is found in Finding 68:

> 68. Because Dario Mortgages recorded the Sheriff's Deed, Delia has lived with the fear and anxiety that she may lose her family business and husband's legacy for years, causing her children and grandchildren to lose their jobs. It has caused her to cry and lose sleep. In fact, when asked by Dario Mortgage's counsel whether she has "gone and spoken with a doctor about [her] anxiety," she responded, "Yes, I do." She has also suffered humiliation from having to turn away customers because she was uncertain whether she would be able to operate the business. She has further suffered humiliation because she has had to address concerns from her staff and customers about the potential closure of the business if she lost the property under the Sheriff's Deed. She has lived with this constant feeling of fear and humiliation every second for more than three years.

There is no doubt that the emotional pain and humiliation Delia suffered was from the prospect of losing the property to foreclosure. Indeed, the court's finding makes this point ("Delia has lived with the fear and anxiety that she may lose her family business . . . ."). The trial court

also found that this anxiety arose from the filing of the sheriff's deed ("Because Dario Mortgages recorded the Sheriff's Deed . . . ."). Given the record, we do not have a definite and firm conviction that the trial court made a mistake in this regard. The deed, along with the accompanying affidavit, provides a deadline to redeem the property and lists the redemption amount of $1,170,947.81. The looming deadline and high redemption amount caused Delia's fear and anxiety. Accordingly, with that information being conveyed exclusively through the recorded documents, the trial court did not clearly err by attributing Delia's emotional harm to the recording of the sheriff's deed.

Dario Mortgages also argues that the $700,000 award for exemplary damages is excessive, implicating Dario Mortgages' request for remittitur. Remittitur is a reduction of the amount awarded by the verdict. See *Anderson v Progressive Marathon Ins Co*, 322 Mich App 76, 84; 910 NW2d 691 (2017). When determining whether remittitur is appropriate, a court must decide whether the award was supported by the evidence. *Id*.

In the context of noneconomic damages, the determination whether damages are excessive "is no simple task." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763; 685 NW2d 391 (2004). Because of the difficulty and imprecision in calculating such damages, that calculation typically belongs to the fact-finder. *Id*. at 763-764; see also *Peterson v Dep't of Transp*, 154 Mich App 790, 799; 399 NW2d 414 (1986) (stating that awards for noneconomic damages rest with the sound judgment of the trier of fact and that there is no absolute standard by which to measure such awards).

> The difficulty of reviewing damage awards, however, does not undermine the judicial obligation to do so . . . . A reviewing court is therefore faced with the task of ensuring that a verdict is not "excessive" without concomitantly usurping the jury's authority to determine the amount necessary to compensate an injured party. Given the impossibility of using a simple algorithm for this task, judicial review of compensatory awards must rely on the fundamental principle behind compensatory damages—that of recompensing the injured party for losses proven in the record. [*Gilbert*, 470 Mich at 764.]

Consequently, judicial review of purportedly excessive verdicts should focus on the following objective factors:

> "[1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [and 3] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions." [*Id*., quoting *Palenkas v Beaumont Hosp*, 432 Mich 527, 532-533; 443 NW2d 354 (1989) (alterations in *Gilbert*).]

Additionally, when analyzing a verdict according to these factors, courts must be mindful of the fact that punitive damages are only available when expressly authorized by the Legislature. *Gilbert*, 470 Mich at 765. Here, under the pertinent statutory framework, punitive damages are not available. See MCL 600.2907a.

Concerning the first factor, we have not identified any instances of the verdict in this case being "the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact." *Palenkas*, 432 Mich at 532. Consequently, this weighs in favor of upholding the verdict. For the second *Palenkas* factor, we must determine "whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained." *Id*. at 532. But as noted earlier, because of the noneconomic nature of the damages at issue, "this determination is extremely problematic." *Gilbert*, 470 Mich at 767. While there may be some cases in which it is possible to determine objectively that an award for emotional distress is or is not supported by the record, in general, it is not possible to do so. *Id*. Notably, Dario Mortgages does not substantively address the first two factors apart from conclusively stating that its comparison under the third factor—which we address next—"shows that the $700,000 exemplary damages award is far beyond the range of what reasonable minds would deem just compensation, and resulted from prejudice, partiality, sympathy, or mistake. The award clearly exceeds the highest amount the evidence could support."

For the third factor, Dario Mortgages argues that the $700,000 award is substantially higher than other awards in comparable cases.[20] Dario Mortgages has collected cases showing damages in slander-of-title cases ranging from $1,854 up to $47,667. Delia does not dispute the amounts from these cases and instead argues they are not applicable because, in those cases, the amount of exemplary damages were consistent with the amount of the slanderous liens or actual damages, which are a lot less than the $1.1 million lien claimed in this case. We agree that this case is distinguishable. The sheriff's deed showed that $1.1 million was owed by Delia, and her actual awarded damages were around $200,000. The lien and actual damages here far exceed the values in the cases relied on by Dario Mortgages. Delia was confronted with the prospect of not only losing her business and income, but losing the source of income for her children and grandchildren, as well as the family's legacy. It is reasonable to conclude that mental anguish under those circumstances would be much more than in typical cases.

While we may not have arrived at the same amount of damages as the trial court, that is not the standard of appellate review. "A reviewing court may not set aside a nonjury award merely on the basis of a difference of opinion." *Meek*, 240 Mich App at 121. Given the highly deferential standard of review, the trial court did not clearly err in its award of exemplary damages.

2. ACTUAL DAMAGES

Dario Mortgages raises numerous challenges concerning actual (or special) damages. As explained, some have merit, and others do not.

The trial court awarded Delia special damages in the amounts of $68,215.39 for bank-penalty fees, $13,000 for tax penalties, $50,000 for lost revenue, $20,000 for roof repairs, and

[20] Although Dario Mortgages did not, in its motion for remittitur, rely on the fact that the $700,000 award was inconsistent with other slander-of-title awards, it did generally argue that the verdict was excessive. A party is free to "make a more sophisticated or fully developed argument on appeal than was made in the trial court." *Glasker-Davis*, 333 Mich App at 228.

$40,000 for parking lot repairs. The trial court's pertinent findings regarding these damages are as follows:

> 62. Because [Delia] had to pay legal fees to bring this action to quiet title and remove the Sheriff's Deed, Delia had to divert her resources from paying other bills.
>
> 63. Those bills included paying property taxes on various properties that she owns, which ultimately cost her $26,222.67 in tax penalties.
>
> 64. She also suffered $68,215.39 in bank penalties.
>
> * * *
>
> 66. Delia was further unable to obtain financing to undertake necessary repairs to the parking lot and roof, causing her additional damages in the amount of about $100,000 ($60,000 for the parking lot and $40,000 for the roof, if Delia has her sons provide labor for free).
>
> 67. Because the Sheriff's Deed caused Delia to fear the loss of the Property, Angelo Brothers turned away banquet hall and catering customers, causing a loss of profit in the amount of about $100,000, which would have been paid to Delia.[21]

Dario Mortgages argues that these damages are not recoverable because the diversion of funds from other needs to pay litigation costs are not damages resulting from the recording of the sheriff's deed. We disagree. Delia bringing this action to clear title is a natural consequence of Dario Mortgages filing the sheriff's deed. And a natural consequence from bringing this action is that it will tie up substantial amounts of money that would have been spent on other matters, thereby causing damages. Accordingly, we reject Dario Mortgages' argument.

However, Dario Mortgages' other arguments have merit. Dario Mortgages also avers that any diversion of funds to pay any probate litigation expenses should not be considered when calculating damages in the instant case. We agree in principle. It should be clear that any expenses incurred in the probate cases were not a result of Dario Mortgages filing the sheriff's deed. But as noted above, the trial court did not use as a basis for awarding damages the diversion of funds to cover any probate litigation expenses. The trial court instead relied on Delia having "to pay legal fees to bring *this action to quiet title and remove the Sheriff's Deed*." (Emphasis added.)

The only evidence related to this diversion of funds came from the testimony of Angelo Jr. Angelo Jr. described how Delia was diverting resources into litigating "three suits," being the

[21] Despite these findings, the trial court later reduced the amount of damages for the tax penalties, parking-lot repairs, roof repairs, and lost revenue by roughly half—to $13,000, $40,000, $20,000, and $50,000, respectively. For its rationale, the trial court cited the lack of documentary evidence in support of these damage amounts.

probate dispute in Italy, the probate dispute in Michigan, and the present case. Angelo Jr. then described the various bills Delia could not pay during "this period of time." Thus, the direct implication is that it was the diverting of funds into the three lawsuits that caused Delia to be unable to pay other bills. Later, however, when asked if the diversion of funds "to fund the litigation in this case" was the reason Delia was unable to repair the parking lot, Angelo Jr. answered, "That's correct." And on redirect, Angelo Jr. was asked, "So again your mother was diverting resources to paying the tax fees for those parcels to deal with this litigation?" Angelo Jr. answered, "This is correct."

Angelo Jr. clearly described that it was the pressure of litigating *all three cases* that was the cause of Delia not being able to pay certain expenses. It was only when responding to counsel's leading questions that Angelo Jr. stated that it was the instant litigation that caused damages related to the parking lot and tax fees. Even then, when viewing Angelo Jr.'s overall testimony, it is clear that he was not saying that the instant litigation was the *sole* cause for the parking-lot and tax-fee damages, but rather, *a* cause. Dario Mortgages also points out that there was no evidence that fees were actually paid by Delia to fund any litigation, let alone in the instant case. Aside from Angelo Jr.'s general testimony saying that Delia had diverted funds for litigation purposes, there is no evidence that such payments or diversion of funds occurred. While invoices were admitted into evidence at trial that litigation expenses were owed for the present case, there was no documentary evidence that any payments had actually occurred.

As noted earlier, when determining whether remittitur is appropriate, a court must decide whether the award was supported by the evidence. *Anderson*, 322 Mich App at 84. "In bench trials, this Court reviews the award of damages under the clearly erroneous standard." *Meek*, 240 Mich App at 121. The evidence shows that it was the financial pressure from litigating *three cases* that was responsible for the failure to pay other bills and tend to other matters. There also was no evidence that Delia actually paid any attorney fees in conjunction with the instant litigation. The submitted documentation consisted of invoices, with no evidence of payment. If there was no payment, there necessarily was no diversion of funds. Therefore, looking at the evidence as a whole, we are left with a definite and firm conviction that the trial court made a mistake when it awarded damages based on Delia's diversion of funds to pay litigation expenses.

We note that this analysis does not apply to the repairs and lost-revenue damages. That is because in its findings, the trial court premised the parking lot and roof repairs on Delia not being able to obtain financing on account of the sheriff's deed being recorded. And the lost revenue was predicated on the fear of losing the property and turning away customers. Thus, we reverse under this reasoning only the tax penalties and bank penalties awarded on the basis of diversion of funds.

Nevertheless, we also agree with Dario Mortgages that the trial court erroneously awarded the bank-fee damages and lost-revenue damages to Delia because those damages were incurred by nonparty corporate entities and not Delia personally. Because we have already determined that

the bank-penalty fees were not causally related to the filing of the sheriff's deed, this is an alternate ground for our reversal of those damages.[22]

As noted, a corporation must prosecute an action in its own name. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 473-474; 666 NW2d 271 (2003); *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989) ("In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee.").

Given this principle, the trial court clearly erred by awarding, and abused its discretion when it denied Dario Mortgages' motion for remittitur related to, the $50,000 for lost revenue. While evidence was presented that Angelo Brothers Restaurant, Inc., lost a minimum of $100,000 in revenue as a result of the foreclosure process because of not being able to accept banquet reservations far into the future, there was no evidence that the lost revenue could be passed through directly to Delia.[23] The trial court's decision to award Delia half of the amount of lost revenue she sought does not cure the underlying evidentiary deficiency. Indeed, the reduction had nothing to do with any corporate boundaries and instead was because the trial court thought that "other than testimony[,] there was no sufficient documentary evidence" to support the requested amount. The trial court went on to say that Dario Mortgages' "slanderous actions directly caused *all* of the damages." (Emphasis added.) But with no evidence showing that Delia personally suffered these damages, the award is clearly erroneous.[24]

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[22] "In 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). Consequently, a corporation must prosecute an action in its own name. See *id.*; *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989) ("In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee."). Regarding the bank penalties, Delia offered bank statements spanning the period from January 2018 through May 2021 showing a total of overdraft fees in the amount of $68,215.39. However, the bank accounts were in the name of "Angelo Brothers Restaurant, Inc.," "Tome Inc. DBA The Ivory Room," and "Tomei Inc. DBA The Ivory Room." Thus, it is clear that the corporate entities, at least initially, incurred these fees.

[23] Generally, there was evidence that Delia "gets revenue from both [corporations]," but there was no evidence regarding what percentage of the corporations' revenue she personally receives.

[24] Elsewhere in its brief on appeal, Dario Mortgages challenges the trial court's Finding 67, which states: "Because the Sheriff's Deed caused Delia to fear the loss of the Property, Angelo Brothers turned away banquet hall and catering customers, causing a loss of profit in the amount of about $100,000, which would have been paid to Delia." The finding is clearly erroneous for two reasons. First, Kathy testified that the $100,000 was lost revenue, not lost profits. Second, as already discussed, there is no evidence that Delia would receive the entirety of any business revenue or profits. Dario Mortgages also challenges the award of $50,000 in lost revenue on the basis that

Dario Mortgages next challenges the awards of $20,000 for roof repairs and $40,000 for parking lot repairs. Dario Mortgages argues that the amounts are not supported by the evidence. Specifically, Dario Mortgages claims that the trial court could not rely on the testimony of Angelo Jr. for any amounts of damages because he was not a licensed builder or otherwise an expert witness.[25] However, Angelo Jr. testified that he had 25 years of experience doing residential and commercial construction and specializes in commercial roofing. Accordingly, the trial court did not abuse its discretion by relying on Angelo Jr.'s testimony. Even if he was never qualified as an expert, MRE 701 allows lay witnesses to testify regarding opinions that are "rationally based on the perception of the witness." Given Angelo Jr.'s significant experience in construction and with the property at issue, whether licensed or not, his opinion on how much it would cost to make certain repairs was rationally based on his perceptions. Therefore, this argument is not persuasive.

3. ATTORNEY FEES

Dario Mortgages next argues that the award of attorney fees was improper. We disagree.

Dario Mortgages specifically argues that attorney fees are only allowed under MCL 565.108 if the sheriff's deed was *solely* filed for the purpose of slandering title to the land. MCL 565.108 states:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim *for that reason only*, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff . . . . [Emphasis added.]

However, when awarding attorney fees, the trial court relied on three different authorities: "common law slander of title, MCL 565.108, and MCL 600.2907a." On appeal, Dario Mortgages only challenges MCL 565.108. When a party fails to address the basis of the trial court's ruling, this Court need not even consider granting the appellant the relief it seeks. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Accordingly, we consider this issue abandoned.

In any event, MCL 600.2907a(1)(a) states that attorney fees are recoverable if the defendant violated MCL 565.25 "by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person." As previously discussed, the trial court did not err when it ruled that the sheriff's deed constituted an encumbrance and did not clearly err when it found that Dario Mortgages acted without lawful cause and with the intent to harass. Consequently, Dario Mortgages' argument is without merit.

Kathy's testimony on this subject was too speculative. However, because we are reversing the award on other grounds, we need not address this argument.

[25] Angelo Jr. testified that, at the time of trial, it would cost at least $120,000 to fix the parking lot and another $120,000 to fix the roof.

V. MOTION FOR LEAVE TO FILE COUNTERCLAIM

Dario Mortgages argues that the trial court abused its discretion when it denied its motion for leave to file a counterclaim. We disagree.

We review a trial court's decision whether to allow leave to file an amended pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court abuses its discretion when it selects an outcome falling outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388. A court necessarily abuses its discretion when it commits an error of law. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

Delia filed the complaint in this case in June 2018. The cutoff for discovery was May 3, 2019. Plaintiff filed her motion for summary disposition in August 2019, and the trial court ruled on the motion in November 2019. Ten days before the August 2, 2021 trial date, Dario Mortgages moved for leave to file a counterclaim. Dario Mortgages sought to bring claims of unjust enrichment and equitable mortgage against Delia. The trial court denied the motion primarily because it was too "late."

"A counterclaim or cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118." MCR 2.203(E). Under MCR 2.118(A)(2), without consent from Delia, Dario Mortgages had to seek leave of the trial court to file the amended pleading. Under that provision, "[l]eave shall be freely given when justice so requires." MCR 2.118(A)(2). However, motions seeking leave to amend can be denied for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Although "[d]elay, alone, does not warrant denial of a motion to amend," denial is appropriate if the delay was done in bad faith or the opposing party suffered actual prejudice as a result. *Weymers*, 454 Mich at 659. " 'Prejudice' in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. Rather, 'prejudice' exists if the amendment would prevent the opposing party from receiving a fair trial . . . ." *Id*. (citation omitted). However, our Supreme Court clarified that

> a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. We recognize that parties ought to be afforded great latitude in amending their pleading before trial, however, that interest must be weighed against the parties' and the public's interest in the speedy resolution of disputes. [*Id*. at 659-660.]

In this instance, Dario Mortgages candidly admitted in its motion for leave that the request was "on the eve of trial." Dario Mortgages claimed, however, that there was no prejudice because "no additional evidence or preparation is necessary beyond what the parties have contemplated for the witnesses[']testimony on the day of trial" and "there is no additional burden to any of the

litigants with respect to the proofs already stipulated to for trial as well as the witnesses already going to be in attendance." But on the morning of trial when this motion was heard, defense counsel conceded that adjournment "[p]ossibly" might be necessary if the motion were granted and that he did not believe that "it would require *that much* additional effort or testimony or discovery." (Emphasis added.) When asked why Dario Mortgages was attempting to bring the counterclaims now instead of anytime in the previous three years the case had been pending, defense counsel offered no explanation other than to say that "it occurred to [him] that the counterclaims" were viable.

With the request taking place on the eve of trial, the trial court did not abuse its discretion by denying Dario Mortgages' motion. Delia did not have "reasonable notice, from any source, that [Dario Mortgages] would rely on the new claim[s] or theor[ies] at trial." See *Weymers*, 454 Mich at 659. Further, Dario Mortgages fully acknowledged that an adjournment, which Delia's counsel said would be needed, would likely be necessary and that there would not be "that much additional . . . discovery." While Dario Mortgages has an interest in amending its pleadings, that right can give away to other interests, such as the speedy resolution of disputes. Accordingly, the trial court's denial was a reasonable and principled decision.

VI. CONCLUSION

In sum, the trial court did not err when denying the motions for JNOV and a new trial on the basis of Delia's disclosure in the probate case, nor by voiding the mortgage and granting summary disposition in favor of Delia on her claim to quiet title. The trial court also properly ruled that the sheriff's deed constituted an encumbrance concerning Delia's slander-of-title claim, and it did not abuse its discretion when denying the motion for leave to file a counterclaim. While the trial court did clearly err by finding that Dario knew the mortgage note contemplated simple interest, the error was harmless. However, we remand because the trial court clearly erred by awarding special damages of $13,000 for tax penalties, $68,215.39 for bank-penalty fees, and $50,000 for lost revenue. The court therefore also abused its discretion when denying Dario Mortgages' motion for remittitur as related to these damages. The remaining damages are otherwise affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Brock A. Swartzle
/s/ Adrienne N. Young