IN THE SUPREME COURT OF IOWA

NO. 19-1689

WAYNE JOSEPH MLADY,
Appellant-Cross Appellee,

vs.

SUE ANN DOUGAN,
Appellee-Cross Appellant.

Appeal from the Iowa District Court for Howard County
The Honorable John J. Bauercamper
No. EQCV017058

APPELLANT'S REPLY/CROSS-APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES/RULES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

MAIN APPEAL

I. WHETHER THE DISTRICT COURT ERRED WHEN IT RULED DOUGAN REDEEMED IN A TIMELY MANNER WITHOUT RECORD SUPPORT; EQUITY DOES NOT DICTATE OTHERWISE.

Iowa Code § 628.13

Iowa Code § 628.21

Federal Land Bank of Omaha v. Bryant, 445 N.W.2d 761 (Iowa 1989)

Iowa Code § 654.16

Fed. Land Bank of Omaha v. Sleister, 444 N.W.2d 504 (Iowa 1989)

Waterloo Sav. Bank v. Carpenter, 9 N.W.2d 818 (Iowa 1943)

Iowa R. App. P. 6.904(3)(n)

Nw. Mut. Life Ins. Co. v. Hansen, 218 N.W. 502 (Iowa 1928)

Iowa Loan & Tr. Co. v. Kunsch, 135 N.W. 426 (Iowa 1912)

Gates v. Ives, 183 N.W. 406 (Iowa 1921)

Iowa R. Civ. P. 1.904

Tharp v. Kerr, 119 N.W. 267 (Iowa 1909)

SDG Macerich Properties, L.P. v. Stanek Inc., 648 N.W.2d 581 (Iowa 2002)

F.B. Fountain Co. v. Stein, 118 A. 47 (Conn. 1922)

Olson v. Sievert, 30 N.W.2d 157 (Iowa 1947)

Wakefield v. Rotherham, 25 N.W. 697 (Iowa 1885)

Case v. Fry, 59 N.W. 333 (Iowa 1894)

II. SHOULD THIS COURT DETERMINE EQUITY SUPPORTS ALLOWING DOUGAN TO UNTIMELY REDEEM, WHETHER THE COURT MUST ORDER THE SHERIFF'S DEED SET ASIDE, WHICH RETURNS MLADY TO HIS PRIOR STATUS AS THE HOLDER OF THE CERTIFICATE OF SALE AND THUS DOUGAN MUST PAY INTEREST THROUGH THE DATE OF ACTUAL REDEMPTION.

Iowa Code § 628.13

Copper v. Iowa Tr. & Sav. Bank, 128 N.W. 373 (Iowa 1910)

Olson v. Sievert, 30 N.W.2d 157 (Iowa 1947)

Wakefield v. Rotherham, 25 N.W. 697 (Iowa 1885)

Waterloo Sav. Bank v. Carpenter, 9 N.W.2d 818 (Iowa 1943)

Keefe v. Cropper, 194 N.W. 305 (Iowa 1923)

CROSS APPEAL

III. WHETHER THE DISTRICT COURT PROPERLY RULED THAT DOUGAN WAS REQUIRED TO REDEEM BY PAYING THE CONTRACT RATE OF 21 PERCENT ON THE CERTIFICATE OF PURCHASE.

Decorah State Bank v. Wangsness, 452 N.W.2d 438 (Iowa 1990)

Bank of Am., N.A. v. Schulte, 843 N.W.2d 876 (Iowa 2014)

Iowa Code § 628.13

Waterloo Sav. Bank v. Carpenter, 9 N.W.2d 818 (Iowa 1943)

Federal Land Bank of Omaha v. Bryant, 445 N.W.2d 761 (Iowa 1989)

Iowa Code § 535.2(2)(a)(5)

Federal Land Bank of Omaha v. Wilmarth, 252 N.W.2d 507 (Iowa 1934)

Olson v. Sievert, 30 N.W.2d 157 (Iowa 1947)

Iowa Code § 626.95

Royal Manor Apartments, LLC v. Federal Nat. Mortg. Ass'n., 614 F. App'x 228 (6th Cir. 2015)

Bank of Three Oaks v. Lakefront Properties, 444 N.W.2d 217 (Mich. 1989)

MCL § 600.3240(2)

ROUTING STATEMENT: CROSS APPEAL

Mlady disagrees with Dougan's routing statement. This case involves application of existing legal principles and thus should be routed to the Iowa Court of Appeals for consideration. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF FACTS: CROSS APPEAL

The underlying foreclosure in this matter was based on two unpaid promissory notes (the "Notes"). Notes (App. 603-606). The principal amount of note number 5701 was $1,219,000.00 and the principal amount of note number 5702 was $400,000.00. *Id.*

The Notes have identical interest rates and interest calculation language. *Id.*

The Notes provide, in pertinent part:

> INTEREST CALCULATION METHOD. Interest on this Note is computed on a 365/360 basis; that is by applying the ratio of interest rate over a year of 360 days multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. All Interest payable under this Note is computed using this method.
> . . .
> INTEREST AFTER DEFAULT. Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased to 21.000% per annum based on a year of 360 days. However, in no event will the interest rate

> exceed the maximum interest rate limitations under applicable law.

Id.

According to the terms of the Notes, the interest rate upon maturity or default is 21.000% per annum based on a year of 360 days with a resulting per diem interest of $933.33. *Id.*

On March 24, 2017, the foreclosure decree issued, providing for a one-year redemption following the sheriff's sale. Foreclosure Decree (App. 69-77). On April 19, 2017, a Notice of Sheriff's Levy and Sale ("Sheriff's Notice") was issued. Sheriff's Notice (App. 599). The Sheriff's Notice provides the per diem interest is $933. *Id.* On May 22, 2017, Mlady purchased the real estate at issue (the "Farm Land") at the sheriff's sale for $1,600,001.00. Certificate of Purchase (App. 595-597).

Dougan made a payment of $1,690,000.00 on March 30, 2018, to the Clerk of the District Court for Howard County (the "Clerk of Court") to redeem the Farm Land. Dougan First Payment (App. 601).

Dougan made a payment of $247,001.00 to the Clerk of Court on May 21, 2018, two days before the redemption period expired on May 23, 2018, "as a protective deposit in order to redeem if the Trial Court should eventually decide that the applicable rate of interest on the Certificate of Purchase was 21 percent instead of 4.25 percent."

Supplement to Brief in Support of Petition To: (a) Determine Applicable Rate of Interest on Purchase (App. 182-186); Dougan Second Payment (App. 602). Due to her attorney's negligence, the "protective deposit" did not fully cover the amount required to redeem prior to the expiration of the redemption period. *See* July 22, 2019 Hearing Transcript at 3:20-24 (App. 613) (acknowledging "her attorney miscalculated the second provisional payment of $247,001 deposited with the clerk on May 21, 2018, and underpaid that by $1,798.79") and Brief in Support of Sue Ann Dougan's Motion to Reconsider, Enlarge, and Explain Pursuant to I. R. Civ. P. 1.904(2) ("Dougan Rule 1.904 Brief in Support") (App. 370-375) (again admitting her attorney's error in computing interest).

ARGUMENT: REPLY IN SUPPORT OF APPEAL

I. THE DISTRICT COURT ERRED WHEN IT RULED DOUGAN REDEEMED IN A TIMELY MANNER WITHOUT RECORD SUPPORT; EQUITY DOES NOT DICTATE OTHERWISE.

Dougan does not dispute that Mlady preserved error. Dougan Brief, p. 19.

Regarding the timeliness of her redemption, Dougan first seeks to avoid the issue by presenting arguments regarding "the calculation of the interest due to redeem the assignor-debtor's foreclosed property" and

setting forth Dougan's "*attempts* to use the statutory procedure to redeem." Dougan Brief, p. 20 (emphasis added). Neither argument supports nor excuses the district court's failure to determine, as specifically directed by the Court of Appeals on remand, whether Dougan timely redeemed.

As set forth herein for this Court's de novo review, this Court should determine the record demonstrates that Dougan failed to timely tender the proper redemption amount and reject Dougan's arguments that her failure to timely redeem may be saved via equity.

A. Dougan's Arguments for Application of a Lower Interest Rate Neither Address nor Excuse Her Failure to Deposit Sufficient Tender for Timely Redemption.

It appears the heart of Dougan's argument on this point rests upon her misplaced disagreement with the district court's plain reading of the terms of the Promissory Note when determining the contract rate was the default rate agreed upon by the parties. Dougan argues:

> With respect to the applicable rate of interest for redemption the Court held that, "Section 628.13 provides that redemption is based upon the contract rate as on the certificate of sale from the sale date. The original note rate was contractually increased by the terms of the note to the default rate." *Id.* at unnumbered p. 3.
>
> This finding of fact by the District Court spoke to the interest rate to be computed on the default judgment in the

> foreclosure decree, but did not specifically deal with the "contract rate" to be computed on the Certificate of Purchase as requested in Dougan's Section 628.21 Petition.

Specifically, Dougan takes issue with the district court's use of *Federal Land Bank of Omaha v. Bryant*, 445 N.W.2d 761 (Iowa 1989) in support of its holding, stating:

> However, as stated in *Federal Land Bank of Omaha v. Bryant*, the interest under a variable rate loan should be computed in the same manner at the rate provided in the Note as if the debtor "were simply paying off the loan ... " *Federal Land Bank of Omaha*, 445 N.W.2d at 763. *This language does not require a calculation other than principal and interest due on the unpaid balance of the loan, or a determination that a default might exist as a prerequisite to the computation.*

Dougan Brief, p. 26 (emphasis added).

Dougan's argument is two-fold and confusing. She first implies that in order to redeem she need only pay as if she were paying the unpaid balance of the debtor's loan, prior to maturity or default. As set forth herein and previously, no Iowa case (including *Bryant*) supports this assertion.[1]

In *Bryant*, former owners of a family farm designated a portion of their land to be redeemed separately as their homestead pursuant to

[1] This does not make this a case of first impression, as alleged by Dougan. The district court's findings regarding the applicable contract rate involved the application of well-established and familiar rules of contract construction and interpretation, commonly utilized by Iowa's courts.

Iowa Code § 654.16, which provided that the district court determine the fair market value for redemption purposes. 445 N.W.2d at 761. The district court determined the fair market value to be $55,000 and also that the debtors would not be required to pay any additional costs in order to redeem. *Id.*

The sheriff's sale purchaser appealed. *Id.* On appeal, the Iowa Supreme Court addressed whether the debtors would have to pay additional costs as part of their homestead redemption, including, as relevant here: "accrued interest from the date of the sheriff's sale." *Id.* at 762. The court first noted that its holding in *Fed. Land Bank of Omaha v. Sleister*, 444 N.W.2d 504 (Iowa 1989) controlled and required the *Bryant* debtors pay the accrued interest "because section 628.13, which applies to redemptions in general, requires it." *Bryant*, 445 N.W.2d at 763.

Iowa Code § 628.13 dictates the applicable rate of interest to be: "interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on the holder's own judgment from the time of the credit, in each case including costs."

The note in *Bryant* provided for a variable, rather than fixed, rate. The court considered its holding in *Waterloo Sav. Bank v. Carpenter*, 9

N.W.2d 818 (Iowa 1943), stating: "In cases involving redemption after foreclosure of fixed-rate mortgages, we have held that the mortgage rate, not the statutory judgment rate of interest, prevailed, and a redeeming party was required to pay interest at that rate until the time of redemption." *Bryant*, 445 N.W.2d at 763.

The court found that the same principle applied in *Bryant*, holding:

> We believe there should be no difference whether a borrower redeemed under a variable rate loan or one with a fixed rate; interest runs from the date of the note until redemption at the rate provided for in the note. Interest should be computed in the same manner as it would if Bryants were simply paying off the loan; in other words, it should be computed at the variable rate until the date of redemption.

Id.

In the present case, the unpaid promissory notes that formed the basis for foreclosure contained identical language that provided for an initial variable interest rate of 4.25% that changed to a fixed rate of 21% *on the maturity date of September 25, 2016 or in the event of default*. Notes (App. 603-606).

The district court did not need to engage in a complicated analysis of the terms of the Notes when it properly determined: "The original note rate was contractually increased by the terms of the note to the default rate." Remand Ruling (App. 320). In the construction of written

contracts, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 6.904(3)(n). The Notes clearly and unambiguously provided for the contract rate to be 21% in the event of maturity and/or default. Notes (App. 603-606).

Dougan's argument that the district court's finding of fact did not "specifically deal with the 'contract rate' to be computed on the Certificate of Purchase as requested in Dougan's Section 628.21 Petition" is unavailing. Dougan Brief, pp. 25-26. As held in *Waterloo Savings Bank* and further clarified in *Bryant*, the applicable interest rate comes from the obligation that is the basis of the judgment, here, the Notes. *Bryant*, 445 N.W.2d at 763 ("We believe there should be no difference whether a borrower redeemed under a variable rate loan or one with a fixed rate; interest runs from the date of the note until redemption at the rate provided for in the note."). Redemption thus required payment of the underlying contract interest rate that was the basis of the judgment until the time of redemption.

Dougan's citation to the language from *Bryant* stating "interest should be computed in the same manner as if the debtor 'were simply paying off the loan…'" lends no support. Dougan Brief, p. 28. If Dougan

were simply paying of the loan, it would be post-maturity and post-default and the 21% interest rate applies per the Notes' express terms.

The second part of Dougan's interest rate argument appears to be that *Bryant* requires "a determination that a default might exist as a prerequisite to the computation." Here, it is undisputed maturity and default occurred. There was a determination of default and foreclosure based on the same. The 21% interest rate was set forth in the Foreclosure Decree and the accruing per diem of $933.94 per day was itemized on the Sheriff's Notice. Foreclosure Decree (App. 69-77); Sheriff's Notice (App. 599). Mlady purchased the property at the sheriff's sale for $1,600,001 and received the Certificate of Purchase when the Notes' interest rate was fixed at 21% per annum. Certificate of Purchase (App. 595-597); Notes (App. 603-606).

B. No Statutory Right Exists to Support a Later Payment.

Dougan argues that she "had a statutory right to make the payment in response to the court's Ruling pursuant to her Section 628.21 Petition to determine the applicable contract rate raised in the April 2, 2018, filing before the lapse of the redemption period and the appeal." No such right exists in Section 628.21. The statute requires:

> In case any question arises as to the right to redeem, or the amount of any lien, the person claiming such right may

> *deposit the necessary amount* therefor with the clerk, accompanied with the affidavit above required, and also stating therein the nature of such question or objection, which question or objection shall be submitted to the court as soon as practicable thereafter, upon such notice as it shall prescribe of the time and place of the hearing of the controversy, at which time and place the matter shall be tried upon such evidence and in such manner as may be prescribed, and the proper order made and entered of record in the cause in which execution issued, and the money so paid in shall be held by the clerk subject to the order made.

Emphasis added.

The Iowa Supreme Court considered a similar situation in *Nw. Mut. Life Ins. Co. v. Hansen*, 218 N.W. 502 (Iowa 1928). In that case, the plaintiff (the titleholder's grantee and guardian of two minor children) sought an adjudication under this process as against two junior lienholders who had properly redeemed, submitted the required affidavit, and deposited 2/3 of the amount required to redeem with the clerk.

The plaintiff submitted a number of questions to the district court, but, as relevant here, asked: "The question as to the exact amount necessary for this affiant to pay." *Id.* at 504. Upon dismissal of his motion and after a later trial, the district court determined that the amount he paid into the clerk was insufficient. *Id.* The titleholder's grantee appealed. The court analyzed what rights the plaintiff possessed

where the junior lienholders had strictly complied with the statute in making redemption. The court noted: "It will be observed from the reading of said section that a deposit of the necessary amount to make redemption must be made with the clerk." *Id.* The court next cited from its holding in *Iowa Loan & Tr. Co. v. Kunsch*, 135 N.W. 426 (Iowa 1912):

> The printed record contains no showing that the amount necessary to redeem from the original sale was ever deposited with the clerk, and in the absence of such showing the judge properly refused to entertain appellant's application. * * * *We reach the conclusion that the plaintiff, proceeding summarily by motion to raise the question as to his right to make redemption and to have the clerk accept his offer to redeem, must do so in accordance with the provisions of Code*, § 4057 [now 11792 of the Code of 1924].[2] * * * *Even if under the sections relating to motions and orders above referred to the appellant was entitled to an order on the clerk, he certainly was not entitled to such order until he had complied with the statutory*

[2] The current (and applicable to this matter) version of this statute is found at Iowa Code § 628.21 and is titled "Contest determined":

> In case any question arises as to the right to redeem, or the amount of any lien, the person claiming such right may deposit the necessary amount therefor with the clerk, accompanied with the affidavit above required, and also stating therein the nature of such question or objection, which question or objection shall be submitted to the court as soon as practicable thereafter, upon such notice as it shall prescribe of the time and place of the hearing of the controversy, at which time and place the matter shall be tried upon such evidence and in such manner as may be prescribed, and the proper order made and entered of record in the cause in which execution issued, and the money so paid in shall be held by the clerk subject to the order made.

> *requirements including the payment into the clerk's office of the amount necessary to redeem.*

Hansen, 218 N.W. at 505–06 (emphasis added). Next turning to its holding in *Gates v. Ives*, 183 N.W. 406 (Iowa 1921), the court noted: "It would seem that the holding in the *Kunsch* Case, supra, is conclusive on the proposition that *plaintiff must actually deposit the requisite amount, and not merely tender it in his pleadings*." *Hansen*, 218 N.W. at 506 (emphasis added).

Having considered its prior holdings, the court affirmed the district court holding that the amount on deposit with the clerk: "is insufficient to make redemption, even had the redemption by applicant been attempted during the first six months after the sale. Had said redemption been attempted during said period, the applicant would have been compelled to pay the entire amount bid at the sale, with interest." *Id.* The court further emphasized: "[a]ny title holder seeking to redeem must also comply with the law." *Id.*

Here, Dougan could not and cannot claim ignorance of the amount in dispute that should have been deposited with the clerk. The foreclosure judgment and the sheriff's notice of sale specifically set the

per diem interest.[3] Foreclosure Judgment (App. 69-77); Sheriff's Notice (App. 599). The interest rate was also identified as disputed in Mlady's April 19, 2018 Answer to Dougan's initial petition. Answer (App. 92-95). In addition, *Dougan admitted her negligent failure to pay the amount necessary to redeem*. May 31, 2019 Hearing Transcript at 22:5-7 (App. 538).

In short, Iowa Code § 628.21 required a deposit of "the necessary amount" *prior* to any determination by the district court. Dougan cannot assert, in good faith, that the district court bore the responsibility to definitively determine the applicable contract rate and required redemption amount prior to the expiration of the statutory redemption period when, as set forth above, she was on notice of the same. The statute does not make an allowance for a later deposit and Iowa courts require actual tender of the required amount, not a partial tender with an offer to provide an additional amount later.

C. The Record Does Not Support a Finding of Timely Redemption Via Equity.

As an initial matter, Dougan does not fit the fact pattern for a typical redemption involving a landowner debtor seeking to redeem their

[3] The Foreclosure Judgment has a minor rounding error, stating $933.34 rather than $933.33 for the per diem interest.

land after foreclosure. Dougan was a sophisticated businessperson with a long history with the debtor. April 23, 2018 Hearing Transcript at 18:3-6 (App. 468) (testifying she and the debtor have been "friends for 40 years" and have "owned land together on and off."). She was also a creditor, having loaned him $600,000 on September 14, 2015 in order to "delay the sheriff's sale." *Id.* at 18:9-23 (App. 468). Dougan later secured the debt against the property (recorded after foreclosure). *Id.* at 18:24-19:20 (App. 468-469).

Dougan explained her purpose in accepting the assignment of the debtor's right of redemption: "I figured that it would be a way to get my 600,000 back, retrieve some of the loan that I gave to him." *Id.* at 20:23-21:1 (App. 470-471). She was advised by *two attorneys* as to applicable interest rate:

> Q [by Attorney Duffy] And did you -- were you advised by me, through Attorney Sween in Albert Lea, that the rate of interest might be an issue in terms of your redemption?
> A. Recently.
> Q. And that we would have to apply to the court to have the court decide that?
> A. Yes.

Id. at 21:6-12 (App. 471). Dougan confirmed that she wished to redeem "whether the court says 4 and a half percent or 21 percent?" *Id.* at 22:1-3 (App. 472).

After the April 23, 2018 hearing and two days before the redemption period expired on May 23, 2018, Dougan made a payment of $247,001.00 to the Clerk of Court "as a protective deposit in order to redeem if the Trial Court should eventually decide that the applicable rate of interest on the Certificate of Purchase was 21 percent instead of 4.25 percent." Supplement to Brief in Support of Petition To: (a) Determine Applicable Rate of Interest on Purchase (App. 182-186); Dougan Second Payment (App. 602).

Due to her attorney's negligence, the "protective deposit" did not fully cover the amount required to redeem prior to the expiration of the redemption period. *See* July 22, 2019 Hearing Transcript at 3:20-24 (App. 613) (acknowledging "her attorney miscalculated the second provisional payment of $247,001 deposited with the clerk on May 21, 2018, and underpaid that by $1,798.79") and Dougan Rule 1.904 Brief in Support (App. 371) (again admitting her attorney's error in computing interest).

In order to have timely redeemed, Dougan must have actually complied, not *attempted to comply*, with the statute's requirement that she pay the full redemption amount. Attempted compliance is, by any application of statutory interpretation, non-compliance. However, relying on *Tharp v. Kerr*, 119 N.W. 267, 268 (Iowa 1909), Dougan argues that she had the equitable right to make additional payments to bring her required deposit to the proper amount after the redemption period ended because "a court of equity may grant relief where a party has been prevented from making redemption by accident or mistake." Dougan Brief, pp. 30-31. Dougan's invocation of equity to support her untimely redemption fails.

The Iowa Supreme Court has explained the type of mistake for which a court of equity may relieve a party from the consequences of not strictly complying with a legal duty:

> A mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time.

SDG Macerich Properties, L.P. v. Stanek Inc., 648 N.W.2d 581, 587 (Iowa 2002) (citations omitted).

In *SDG Macerich Properties, L.P.*, the court reversed and remanded the lower court's grant of equitable relief to a plaintiff who forgot to timely exercise an option to renew a lease agreement. The court determined the district court improperly applied a test set forth in *F.B. Fountain Co. v. Stein*, 118 A. 47, 49–50 (Conn. 1922) ("*Fountain* test"), which analyzed whether equity should intervene where the plaintiff's action was mere negligence. Under the *Fountain* test, the district court considered: (1) whether the plaintiff's conduct was "the result of an honest mistake or oversight and not intentional, willful, or grossly negligent conduct; (2) whether the [defendant] has changed positions or been damaged by the delay; (3) the extent of the delay; and (4) whether the delay would work an unconscionable hardship on the [defendant]. *SDG Macerich Properties, L.P.*, 648 N.W.2d at 585. In other words, the district court determined that mere negligence would not bar equity relief to the plaintiff. The Iowa Supreme Court disagreed, finding the plaintiff admitted it forgot to exercise its option "because of a mere oversight." *Id.* at 587. The court declined to "use equitable principles to save a party from the circumstances it created." *Id*.

Iowa courts similarly strictly limit the use of equitable principles when evaluating a redeemer's negligent failure to timely pay the required

redemption amount. No Iowa case supports a finding of equitable compliance with the statutory requirement that the full redemption amount be deposited in the case of the redeemer's attorney's negligence.

Turning to the case upon which Dougan initially relies, in *Tharp* the court declined to accept plaintiff's assertion that equity should intervene and allow a later redemption where plaintiff alleged he mis-read a letter from the clerk and sheriff setting forth the expiration date of the redemption period. 119 N.W. at 269. Analogously to the present facts, the *Tharp* plaintiff alleged he had been and was still willing to pay the necessary amount to redeem. *Id.* at 267.

The court emphasized that the statute provided: "whenever any question arises with reference to the right of redemption the party claiming the right may deposit with the clerk the amount necessary to redeem and file an affidavit which shall become the foundation of a hearing before the court or judge." *Id.* at 268. The court further noted: "Whether it can be said that the averments of fact in this case show such a mistake as a court of equity may take cognizance of, and whether it can be said that such mistake was without fault of the plaintiff, and whether it can be said that such mistake caused the failure of redemption, are questions of grave doubt to say the least." *Id.*

Ultimately, the court rejected the plaintiff's arguments, stating: "The plaintiff could not speculate upon his right to equitable relief against the mistake, and could not keep it as a continuing right to be exercised or abandoned in the future as he might see fit without first committing himself unreservedly to an offer and tender of redemption." *Id.* The court noted:

> Although equity will always seek to relieve against the consequences of accident or mistake, it must guard itself that it offer no premium to neglect or default. Nor can it make too light of the statutory rights of the adverse party. We see no ground in this case upon which we can properly interpose our equitable jurisdiction against the operation of the statute.

Id. at 269.

The other cases upon which Dougan relies are equally unavailing. In both cases, the court equitably allowed late redemption where the error or mistake was made by the clerk, rather than the redeemer. *Olson v. Sievert,* 30 N.W.2d 157, 159 (Iowa 1947) (allowing late redemption where error made by deputy clerk rather than the redeemer and redeemer's failure to discover the clerk's error was not negligent); *Wakefield v. Rotherham*, 25 N.W. 697, 698 (Iowa 1885) (allowing late redemption where error made by clerk and redeemer "was guilty of no negligence in the matter").

An examination of additional Iowa cases considering whether equity should apply to save an untimely redemption holds the same. In *Case v. Fry*, the defendant paid less than the amount required to redeem by depositing an amount sufficient to redeem two of five parcels where, in order to redeem, the defendant was required to pay the lien owed as to all five parcels. 59 N.W. 333, 335 (Iowa 1894). The Iowa Supreme Court declined to apply equitable relief, finding: "[t]he equities in favor of the defendant are not shown to be sufficient to warrant the giving of any relief to defendant." *Id.* The court acknowledged:

> It is true that he offers to make such further payment as may be required to complete the redemption, but no mistake of fact was made, in paying less than the amount required to redeem. The defendant knew it was not enough to satisfy the judgment of plaintiff, but proceeded on the theory that the law did not require him to satisfy it, to make the redemption attempted. He was not misled by the plaintiff, but, on the contrary, was told that he did not regard the amount as sufficient, and would not accept it. The mistake made was one of law, and does not furnish any basis for relief.

Id.

Similarly here, Dougan improperly seeks to have her later payment complete the redemption. As noted previously, Dougan was well aware that the full redemption amount could, and the district court so held, include accrued interest at the contract rate of 21%.

In *Gates v. Ives*, the plaintiff attempted to redeem land from an execution sale but was not able to because he did not deposit enough money to redeem. 183 N.W. 406, 409 (Iowa 1921). The plaintiff alleged the clerk gave him the wrong redemption amount. The court stated:

> We think the record shows, as before indicated, that plaintiff did not tender a sufficient amount to effect redemption. We said in *Iowa Loan & Trust Co. v. Kunsch*, 156 Iowa, 91, 94, 135 N. W. 426, that the statute contemplates, not merely a tender and offer to pay, which might be sufficient in an action in equity, but an actual deposit of the amount necessary to make redemption.

Id.

This Court should reject Dougan's insistence that equity should serve to excuse her negligent failure to timely redeem. Dougan should not be able to invoke equity to deprive Mlady of a property for which he properly followed the statute's dictates.

II. SHOULD THIS COURT DETERMINE EQUITY SUPPORTS ALLOWING DOUGAN TO UNTIMELY REDEEM, THE COURT MUST ORDER THE SHERIFF'S DEED SET ASIDE, WHICH RETURNS MLADY TO HIS PRIOR STATUS AS THE HOLDER OF THE CERTIFICATE OF SALE AND THUS DOUGAN MUST PAY INTEREST THROUGH THE DATE OF ACTUAL REDEMPTION.

Dougan does not dispute that Mlady preserved error on this issue. Dougan Brief, p. 34.

Dougan argues that because Mlady is no longer the holder of the Certificate of Purchase he is not entitled to interest as of the date he obtained the Sheriff's Deed. Dougan Brief, pp. 35-36. She relies on this argument to attempt to distinguish the authority in Mlady's Brief affirming the statutory requirement that interest be paid until time of redemption. *Id.* Her position is mistaken.

In order for any obligation for Dougan to pay interest to come into play, the court would have to rule she be allowed to untimely redeem and set aside Mlady's Sheriff's Deed. At that point, Mlady's interest would revert from legal titleholder to equitable titleholder, i.e. the holder of the Certificate of Purchase, and Mlady would be entitled to payment of his lien, plus interests and costs pursuant to Iowa Code § 628.13.

For example, in *Copper v. Iowa Tr. & Sav. Bank*, the plaintiff sought to have the sheriff's sale and deed set aside where plaintiff alleged she was the equitable owner and her husband, upon whose debt the land was foreclosed, only held her legal title in trust. 128 N.W. 373 (Iowa 1910). Under the facts, the district court agreed that "full equity" required the plaintiff "pay the amount of the bid at sheriff's sale with all interest and costs and other disbursements." *Id.* at 373-374.

The *Copper* Court found multiple irregularities supported setting aside the sale and deed, including the plaintiff's innocent ignorance of the proceedings, gross inadequacy of price, failure to publish notice, sale en masse, and withholding of execution past the time for redemption and noting: "[i]f she had actually known of the proceedings in advance of the issue of the sheriff's deed, a different question might be presented." *Id*. at 375. Feeling "constrained to sustain this finding upon the record before" it, the court affirmed, agreeing that the decree provided for full reimbursement, with interest, and equated to "full equity" to the defendant. *Id.* at 376.

Similar circumstances to support setting aside Mlady's deed are not present here. Dougan does not claim the sheriff's sale is void or voidable. Here, Dougan hangs her hat on the fact that although she did not deposit the correct amount prior to the end of the redemption period due to her attorney's negligence, equity should now allow her to make the additional deposit. Dougan Brief, pp. 28-31.

The cases upon which Dougan relies are neither on point nor supportive except to the extent that they implicitly acknowledge Dougan's failure to timely redeem under the statute. *See* Dougan Brief,

pp. 39-41 and p. 42 (acknowledging "[h]ere, Dougan has sought since April 2, 2018, to pay the necessary amount to redeem…").

In *Olson*, the Iowa Supreme Court agreed with the district court that untimely redemption should be allowed where the incorrect amount deposited was due to the clerk's mistake rather than the redeemer's mistake. 30 N.W.2d at 158. Dougan neglects to mention that the district court ordered the party who had acquired the property through foreclosure "to accept the amount held by the clerk *plus additional interest*" to the date of the final adjudication of redemption rights. *Id.* (emphasis added).

Considering analogous circumstances in *Wakefield*, the Iowa Supreme Court similarly affirmed and remanded for modification of the district court judgment setting aside the deed to provide for payment of the additional amount along with "interest thereon up to the time of final payment." 25 N.W. at 699.

Dougan's attempt to distinguish her obligation to pay interest from the obligation imposed in *Waterloo Sav. Bank v. Carpenter*, 9 N.W.2d 818 (Iowa 1943) similarly fails. Dougan Brief, p. 42. Dougan claims that Mlady should not receive accrued interest because Mlady has had the use and benefit of the property. *Id.* This argument ignores the fact that

Mlady has been deprived of the use of his money and the full use of the property as he has been obligated to pay rent on the land in order to continue farming while this dispute continues. May 31, 2019 Hearing Transcript at 75:11-15 (App. 591). Further, Dougan avoids the portion of the opinion where the court further supports the payment of accrued interest by the party "legally in the wrong" and that the party not holding such position "should not be penalized." *Waterloo Sav. Bank*, 9 N.W.2d at 821. The party legally in the wrong here, is Dougan.

In any event, should this Court determine equity supports allowing Dougan to untimely redeem, equity also supports an award of interest to judgment, as detailed in Mlady's Appellant Brief. Mlady Appellant Brief, p. 37. Dougan's attorney's negligence caused her untimely redemption; Mlady fully complied with the statutory requirements. If Dougan seeks equity, she should also be required to do equity. *See Keefe v. Cropper*, 194 N.W. 305, 308 (Iowa 1923) (Iowa courts acknowledge the maxim that "when a loss occurs and one of two persons must sustain that loss, it must be borne by the one whose act of omission or commission made the loss possible.").

As set forth herein and previously, Mlady respectfully requests that should this Court allow Dougan to untimely redeem, that it also hold

that Dougan's interest obligation continues through the date she fully redeems.

ARGUMENT: RESPONSE TO CROSS APPEAL

III. THE DISTRICT COURT PROPERLY RULED THAT DOUGAN WAS REQUIRED TO REDEEM BY PAYING THE CONTRACT RATE OF 21 PERCENT ON THE CERTIFICATE OF PURCHASE.

A. Preservation of Error and Scope of Review.

Mlady agrees Dougan preserved error on this issue. Review of a case tried in equity is de novo. *Decorah State Bank v. Wangsness*, 452 N.W.2d 438, 439 (Iowa 1990) (citation omitted). To the extent issues of statutory construction are raised on appeal, the standard of review is for the correction of errors at law. *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014).

B. The Promissory Notes Clearly Set Forth The Applicable Contract Rate of 21%.

In order to redeem, Iowa Code § 628.13 requires Dougan pay "into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of the holder's own lien, or the amount the holder has credited on the lien, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from

date of payment, and upon the amount credited on the holder's own judgment from the time of the credit, in each case including costs."

Dougan focuses on Iowa Code § 628.13's requirement that a redeemer pay "interest at contract rate on the certificate of sale from its date." Dougan Brief, p. 47. Dougan's argument on this point is convoluted and nonsensical. She states:

> First, as in all foreclosure cases, the Promissory Notes sued on were in default at the time of filing the foreclosure lawsuit and entry of judgment. Otherwise, a foreclosure petition would not have been filed in either case. The Supreme Court, in both *Waterloo Sav. Bank* and *Federal Land Bank*, could have said that the contract rate was the default rate used to compute the judgment amount. Neither Court so stated.

While all foreclosures are a result of default, there is no requirement that parties include a default rate in the underlying contract. Lenders and borrowers may "agree in writing to pay *any* rate of interest." Iowa Code § 535.2(2)(a)(5). Inclusion of the descriptor "any" includes a fixed rate, variable rate, or any other rate subject to terms or conditions as agreed upon the parties in writing.

The parties could have, but did not, provide that the base rate continued even in case of default. Parties may contract for any rate of interest, including different interest rates because of change of

circumstances between a lender and a borrower. *Federal Land Bank of Omaha v. Wilmarth*, 252 N.W.2d 507, 510 (Iowa 1934).

For example, in *Wilmarth* the Iowa Supreme Court stated:

> When a loan is made which is evidenced by a promissory note and secured by a mortgage, the parties have a right to contract in reference to the rate of interest. Everywhere it is realized that a note not in default is more desirable than a note in default. *It is well known that a note not in default can be financed at a lower rate of interest than the rate at which a note can be financed when the same is in default. So the lender and the borrower, in contemplation of this fact, when the note is made, provide for the contingency.* By so doing, the borrower and lender simply agree, consistent with business principles, that, when the note is not in default, it shall bear the interest rate applicable to that situation, and *they agree that, when the same is in default, it shall bear the added interest rate consistent with business principles relating to that event.*

Id. (emphasis added).

The court concluded a default was a change of event that caused a new interest rate for the promissory note. *Id*. Applying the *Wilmarth* case to the case at bar, the initial interest rate was a variable rate of 4.25% that was *subject to change to a fixed rate* under the occurrence of either of two conditions: (1) the event of maturity on September 25, 2016; or (2) default. Dougan cannot dispute that *both conditions are present here*. Even had no default occurred, the parties expressly contracted for a 21% fixed

interest rate as of the Notes' maturity on September 25, 2016. Notes (App. 603-606).

Dougan next argues:

> Second, the statutory scheme to entice the debtor to redeem as well as the well established common law holding that "the right of redemption is favored by the law" (would be frustrated by imposing a default rate of interest in every foreclosure case). See *Olson v. Sievert*, 30 N.W.2d 157, 159 (Iowa 1947).

Again, Dougan misstates the language of the Iowa Code § 628.13 by implying that courts impose a default rate of interest in every foreclosure case. A debtor, or individual possessing the debtor's right to redeem, must pay the contract rate. The contract rate may or may not be a default rate. *Olson* does not hold to the contrary.

As applied here and explained previously, *Olson* affirmed the allowance of untimely redemption by a redeemer *who acted without negligence* when depositing the wrong amount with the clerk. 30 N.W.2d at 159. *Olson* does not address nor challenge the statutory requirement that a redeemer pay an express rate of interest set forth by an underlying contract upon maturity or default.

Dougan next argues:

> Thirdly, and most importantly, Mlady's Certificate of Purchase was never in default. The Certificate of Purchase

> did not provide a rate of interest. Mlady purchased the real estate at sheriff's sale on May 22, 2017, for $1,600,001. Mlady exchanged this Certificate of Purchase, unchanged in amount, for the Sheriff's Deed on May 23, 2018.

Dougan Brief, pp. 52-53.

This argument is the most confusing where, most importantly, a certificate of purchase cannot be in default. It is merely evidence of purchase of foreclosed property at a sheriff's sale. The certificate sets forth: "a description of the property and the amount of money paid by such purchaser, and stating that, unless redemption is made within one year thereafter, or such other time as may be specifically provided for particular actions according to law, the purchaser or the purchaser's heirs or assigns will be entitled to a deed for the same." Iowa Code § 626.95.

Dougan complains that the certificate does not contain a rate of interest. This complaint, however, is based upon Dougan's fundamental and continuing misinterpretation of Iowa Code § 628.13's requirement that the redeemer pay "interest at contract rate on the certificate of sale from its date." Inexplicably, Dougan argues "contract rate" is a rate set by the Certificate of Purchase rather than a rate negotiated by the parties and set forth in writing in the foreclosed Notes. The certificate of purchase simply sets forth the beginning amount in the redemption

equation. *See* Iowa Code § 628.13 (requiring Dougan pay "into the clerk's office of the amount of the certificate, and…").

Here, the foreclosure judgment and the sheriff's notice of sale specifically set the per diem interest at $933.33[4] (representing application of 21% interest) and Mlady properly relied upon the same. Foreclosure Judgment (App. 69-77); Sheriff's Notice (App. 599). Mlady purchased the foreclosed property with the Sheriff's Notice stating that the per diem interest is $933.33. Sheriff's Notice (App. 599). He relied on that statement in making his bid and purchasing the property. May 31, 2019 Hearing Transcript at 70:3-9 (App. 586). At the time he purchased the property and based on this representation, Mlady knew that if the property were redeemed within the year Mlady would receive the full amount of his purchase back, plus a $933.33 per diem. *Id.* Under these facts, equity favors Mlady--the innocent purchaser.

C. This Court Should Reject Dougan's Argument that the Reasoning of an Unpublished Sixth Circuit Decision Applying Michigan Law Should Persuade this Court to Allow Application of the Notes' Base Rate of 4.25%.

Dougan relies upon an unpublished decision issued by the Sixth Circuit to support her argument that she need only pay 4.25% in order to redeem. Dougan Brief, p. 55 (citing *Royal Manor Apartments, LLC v.*

[4] Minor rounding error in foreclosure judgment.

Federal Nat. Mortg. Ass'n., 614 F. App'x 228 (6th Cir. 2015)). Even if the cited decision were authoritative, it is neither on point nor persuasive.

In *Royal Manor Apartments, LLC*, the purchaser paid an amount at the foreclosure sale *equal to the entire amount due on mortgage*. *Id.* at 230. Under Michigan law, *if the entire amount due is paid then the mortgage is extinguished*. *Id.* at 236 (citing *Bank of Three Oaks v. Lakefront Properties*, 444 N.W.2d 217, 219 (Mich. 1989)) (noting that Michigan case law provides that property purchased at a foreclosure sale *for an amount equal to the amount due on the mortgage* satisfies the debt and extinguishes the mortgage). The Sixth Circuit determined under the facts:

> Thus, upon foreclosure, no payments from Royal Manor to Fannie Mae remained past due; indeed, no payments were due at all. Under the terms of the note, the default interest rate of 9.74% applies only so long as payments remain past due for 30 days or more; otherwise, the rate of 5.74% applies. Therefore the "interest rate provided for by the mortgage" for purposes of MCL § 600.3240(2) should be the baseline rate of 5.74% as specified in the note.

Royal Manor Apartments, LLC, 614 F. App'x at 236.

Even if Michigan law applied here by analogy, the facts are not the same. Here, a deficiency judgment remains in the amount of $250,198.36. Certificate of Purchase (App. 595-597). In other words, the property was not purchased for an amount *equal to the amount due* on the

mortgage. Dougan's attempt to apply *Royal Manor's* interpretation of Michigan law to provide for payment of the baseline interest rate where the purchaser *fully paid the mortgage debt* should be found inapposite.

In short, Dougan's reliance on *Royal Manor Apartments, LLC* is misplaced and inapplicable to the facts before this Court. The applicable contract rate in this case was fixed at 21% as of September 25, 2016. No authority exists via Iowa statutory or common law to support reversion to the baseline (variable) rate of 4.25%. This Court should reject Dougan's arguments for adoption of the reasoning of the unpublished Sixth Circuit decision as neither persuasive nor analogous to the facts before it.

CONCLUSION

WHEREFORE, Mlady respectfully requests this Court (1) reverse the district court's unsupported finding that Dougan timely and validly redeemed and enter an Order confirming Mlady's entitlement to the Sheriff's Deed or remand to the district court for entry of the same, or in the event this Court allows Dougan to untimely redeem (2) reverse the district court's unsupported finding that Dougan's obligation to pay accruing interest on the redemption balance ended as of May 23, 2018 and order Dougan to pay the statutorily proscribed amount, which

includes per diem interest and costs through the date Dougan fully redeems or remand for entry of judgment as to the same.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(i), Wayne Joseph Mlady, Appellant-Cross Appellee, requests oral argument.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on May 5, 2020, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of IOWA RS. APP. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Calisto MT and contains 7,474 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(*g*)(1).

/s/ Dawn M. Gibson — May 5, 2020
Date