

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HOWELL PARK PROPERTIES, LLC,  
Plaintiff-Appellant,

UNPUBLISHED  
May 28, 2013

v

No. 301534  
Wayne Circuit Court  
LC No. 08-121542-CH

CITY OF DETROIT,

Defendant-Appellee,

and

FRIENDS OF ELIZA HOWELL PARK, INC,

Intervening Defendant-Appellee.

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Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In this action to quiet title, plaintiff appeals by right the trial court's October 26, 2010, order granting summary disposition in favor of defendant and intervening defendant under MCR 2.116(C)(8), and denying plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

**I. SUMMARY OF FACTS AND PROCEEDINGS**

Plaintiff asserts title under a reversionary interest to approximately 158 acres that Charles Howell deeded to the city of Detroit in 1936 that contained a condition subsequent providing that the property be used "for park and recreation purposes only[.]" Specifically, the reversionary clause in the deed provides:

It is a condition of this deed that the property herein conveyed be used by the City of Detroit for park and recreation purposes only; that the City of Detroit officially name said park, Eliza Howell Park and that said name shall not be changed; that no intoxicating liquor shall ever be stored, manufactured or sold on said premises; that said City of Detroit shall commence to improve the property by laying out drives and planting trees and shrubbery within one year from the date hereof and that said city shall not spend less than Two thousand (\$2,000.00) Dollars each succeeding year thereafter for improving said park until the same is completed. It is further provided that in the event of a breach of any of the

forgoing conditions above enumerated then the property herein conveyed is to revert to the within named grantor and his heirs. It is further provided that a waiver of any breach of the forgoing conditions shall not be construed as a waiver of any succeeding breach thereof.

Plaintiff, Howell Park Properties, LLC, became the successor in interest of the grantor's reversionary interest in the property by quit-claim deed from the sole surviving heir of Charles Howell, Marian Howell Cheyne, his daughter. Marian's son, Kenneth Cheyne, is a real estate developer who wanted to develop the property and principal of plaintiff. Plaintiff brought this quiet title action after Cheyne's negotiations with the city to develop the property broke down. On August 22, 2008, plaintiff filed its complaint that alleged in part:

5. On December 5, 1936, the said Charles Howell, by restricted quit claim deed granted park-only usage of the above-described real property to the CITY OF DETROIT. The CITY OF DETROIT had no rights under the restricted quit claim deed to use the property for any other purposes. The said grant was on the condition that the CITY OF DETROIT utilize the property solely for the purpose of maintaining and operating a public park, and the City's said right to possession of the property was to terminate and revert to Charles Howell or his heirs upon the discontinuance of the proper maintenance or the usage of the property as a public park. A copy of the said restricted Quit Claim Deed is attached as Exhibit B.

\* \* \*

8. The Defendant CITY OF DETROIT has discontinued operating the Eliza Howell Park as a properly maintained and functional public park; The property has been *de facto* abandoned as a public park by the CITY OF DETROIT.

9. The Defendant CITY OF DETROIT has also violated the conditions or restrictions in Exhibit B by using the land for purposes other than a park or recreation area.

\* \* \*

14. The right to possession of the above-described real property is therefore no longer vested in the Defendant CITY OF DETROIT and title is, therefore presently vested in fee simple in the name of HOWELL PARK PROPERTIES, LLC.

15. This Court should therefore enter its Order or Judgment quieting title to the property in fee simple absolute in the name of HOWELL PARK PROPERTIES, LLC.

Plaintiff filed its first motion for summary disposition pursuant to MCR 2.116(C)(10) on August 17, 2009. The city filed its own motion for summary disposition and a response to plaintiff's motion indicating that plaintiff had failed to show the park had been abandoned and

that at most the park had been misused, which would not warrant a forfeiture. On September 25, 2009, the trial court denied both motions without a statement of reasons.

After further discovery, on May 27, 2010, plaintiff refilled its motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff in its motion noted the deed “restrictions,” including that the property “be used . . . for park and recreational purposes only.” Plaintiff also alleged and presented evidence that the city was no longer maintaining the park and that the “essence of the matter” was that the city “has violated the deed restrictions and/or abandoned the property as a park, either intentionally or unintentionally.”

The city also filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Intervener filed a motion for summary disposition under both MCR 2.116(C)(8) and MCR 2.216(C)(10). The city presented evidence that the Eliza Howell Park consisted of 251 acres of which the Howell grant comprised 158 acres. The city identified the park in its master plan as one of five regional parks. The city asserted that due to budget constraints, maintenance for all city parks had been prioritized, and that although the grass at Eliza Howell Park was mowed less frequently than other city parks, it was still being maintained. Further, the city asserted that its residents continue to obtain permits to use Eliza Howell Park for activities, as did neighborhood residents. The city did not intend to abandon the park.

The trial court heard counsels’ arguments on the motions on October 21, 2010 and issued an opinion and order on October 26, 2010, granting defendant and intervening defendant’s motions for summary disposition and denying plaintiff’s motion for summary disposition. The trial court observed in its opinion that the burden of proving that the use of the property as a park had been abandoned is on the party asserting it, and even if the property is put to other uses, abandonment is not shown unless the dedicated use has wholly failed. The trial court then set forth its reasoning for ruling that plaintiff had not shown abandonment.

The trial court also ruled regarding plaintiff’s claim of waste that the evidence did not establish it and that “[n]owhere in the deed is there a condition that the property revert back [sic] to the grantor or grantor’s heirs if waste is committed or permitted to occur. Thus, Plaintiff has failed to establish waste which would harm the reversionary interest.” The trial court concluded:

Plaintiff has not shown that the City has abandoned the Howell Park property for use as a park and has failed to meet the burden of demonstrating that the “use for which the property is dedicated had wholly failed.” Plaintiff also has failed to demonstrate “waste” such that the reversionary interest has been injured. Conversely, Defendant and Intervening Defendant have shown that, while accepting all factual allegations as true, “no factual development could justify recovery.” MCR 2.116(C)(8). Accordingly, the Court will deny Plaintiff’s Motion for Summary Disposition and will grant Defendant’s and Intervening Defendant’s Motions for Summary Disposition. [Citations omitted.]

Plaintiff’s motion for reconsideration was denied and it now appeals by right.

## II. STANDARDS OF REVIEW

MCR 2.116(C)(8) permits a trial court to grant summary disposition when an opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim, *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 8; 807 NW2d 343 (2011), and may not be supported or opposed with affidavits, admissions, or other documentary evidence. MCR 2.116(G)(2); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Rather, the motion must be decided based on the pleadings alone. MCR 2.116(G)(5); *Patterson*, 447 Mich at 432. The trial court reviewing the motion must accept as true all factual allegations supporting the claim and any reasonable inferences or conclusions that might be drawn from those facts. *Detroit Int’l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). A motion pursuant to MCR 2.116(C)(8) may be granted only when a claim is so plainly unenforceable as a matter of law that no factual development could possibly justify recovery. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). Conclusory statements that are unsupported by factual allegations are insufficient to state a cause of action. *Ypsilanti Fire Marshall v Kircher (On Reconsideration)*, 273 Mich App 496, 544; 730 NW2d 481 (2007). But when the grounds for granting summary disposition are MCR 2.116(C)(8), (9), or (10), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” MCR 2.116(I)(5). Under this rule, the trial court should freely permit the amendment of a complaint unless doing so would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

MCR 2.116(C)(10) permits a trial court to grant summary disposition on all or part of a party’s claim or defense when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” Thus, this subrule “tests the factual support of a plaintiff’s claim.” *Huntington Woods v Detroit*, 279 Mich App 603, 614, 761 NW2d 127 (2008). The trial court must consider the pleadings, affidavits, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Id.*; MCR 2.116(G)(5). “The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial.” *Patterson*, 447 Mich at 432; MCR 2.116(G)(4). The trial court may properly grant summary disposition only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Huntington Woods*, 279 Mich App at 614.

### III. ANALYSIS

We conclude that the trial court erred by granting defendants’ motion for summary disposition under MCR 2.116(C)(8) because on its face, plaintiff’s complaint stated a claim on which factual development could justify granting relief. In granting defendants’ motion for summary disposition, the trial court never addressed plaintiff’s claim that the city of Detroit violated the Howell deed’s condition subsequent requiring that the property be used “for park and recreational purposes only” by using the property for other than park and recreational purposes, thus triggering the deed’s reverter clause. To the extent the complaint was deficient in its factual allegations, the trial court abused its discretion by not affording plaintiff the opportunity to amend its complaint. MCR 2.116(I)(5); MCR 2.118; *Ormsby*, 471 Mich at 52-53. But we also conclude that the trial court properly granted defendants’ motion for partial

summary disposition regarding plaintiff's claims of abandonment and waste, even if it did so under the wrong court rule. Accordingly, and for the reasons discussed below, we reverse in part, affirm in part, and remand for further proceedings.

A deed must be construed to enforce the parties' intent as expressed by the deed's language read as a whole. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc.*, 472 Mich 359, 370; 699 NW2d 272 (2005) ("our objective in interpreting a deed is to give effect to the parties' intent as manifested in the language of the instrument"); *Huntington Woods*, 279 Mich App at 620-621. Thus, the clear and unambiguous terms of a deed must be enforced as written. *Moore v Kimball*, 291 Mich 455, 460-461; 289 NW 213 (1939); *Minerva Partners, LTD v First Passage, LLC*, 274 Mich App 207, 216; 731 NW2d 472 (2007).

The deed in this case clearly conveyed a fee interest subject to termination on the occurrence or nonoccurrence of a future event and provided that if such event were to occur or not occur, the property would revert to the grantor or his heirs.<sup>1</sup> As a fee subject to divestment, the deed conveyed either a fee simple determinable or a fee simple subject to a condition subsequent. 1 Cameron, Michigan Real Property Law (3d ed), § 7.9, p 266. A fee simple determinable is a future interest known as a "right of reversion," or the "possibility of reverter." *Ditmore v Michalik*, 244 Mich App 569, 580; 625 NW2d 462 (2001); *Ludington & N R v Epworth Assembly*, 188 Mich App 25, 35-36; 468 NW2d 884 (1991). With a fee simple subject to a condition subsequent, a "right of entry" is retained in the grantor or his heirs or assigns that may be exercised on the occurrence or nonoccurrence of the future event. *Ditmore*, 244 Mich App at 580; *Ludington & N R*, 188 Mich App at 36. The distinction between a fee simple determinable and a fee simple subject to a condition subsequent is that "in the former the estate reverts at once on the occurrence of the event by which it is limited, while in the latter the estate in fee does not terminate until entry by the person having the right." *Ludington & N R*, 188 Mich App at 36; see also *Huntington Woods*, 279 Mich App at 621, quoting 28 Am Jur 2d, Estates, § 164, p 191. The Legislature has time-limited, MCL 554.61 *et seq.*, and labeled such estates a "terminable interest."<sup>2</sup>

Reading the deed as a whole, including its paragraph containing the conditions of the grant, *Carmody-Lahti Real Estate*, 472 Mich at 370, compels the conclusion that the deed created a fee simple subject to a condition subsequent. The deed unambiguously attaches

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<sup>1</sup> At common law a right of reversion was enforceable only by the grantor or his heirs; an assignment of such a future contingent interest would result in its destruction. See *Schoolcraft Community Sch Dist v Burson*, 357 Mich 682, 687-688; 99 NW2d 353 (1959). The Legislature has altered this common-law rule. "The reversionary interest in lands conveyed on a condition subsequent may be granted, conveyed, transferred or devised by the owner of such interest, and by the subsequent grantees or devisees thereof, either before or after the right of re-entry becomes effective: Provided, That this act shall not affect any such interest created before it takes effect." MCL 554.111, added by 1931 PA 219, effective September 18, 1931.

<sup>2</sup> The legislative time limits do not apply in this case because the deed at issue conveyed the property for "public, educational, religious or charitable purposes." MCL 554.64(c).

conditions to the conveyance, which include “that in the event of a breach of any of the . . . conditions . . . then the property herein conveyed is to revert to the within named grantor and his heirs.” See *Huntington Woods*, 279 Mich App at 622. While a breach of a condition in a fee simple determinable “triggers an automatic reversion to the grantor or its successors and assigns,” *Ditmore*, 244 Mich App at 580, a fee simple subject to a condition subsequent creates a “right of reverter” that requires that the party holding such right take enforcement action on a breach of a condition. *Ludington & N R*, 188 Mich App at 36; 13 Michigan Law & Practice 2d, Deeds § 176. At common law, the action would be that of ejectment. *Chippewa Lumber Co v Tremper*, 75 Mich 36, 38; 42 NW2d 532 (1889). The holder of the right of action on the breach of a condition subsequent could also waive it. *Id.* at 38, 40; see also *Schoolcraft Community Sch Dist v Burson*, 357 Mich 682, 687; 99 NW2d 353 (1959), and 13 Michigan Law & Practice 2d, Deeds § 177. The deed in this case specifically recognizes that its conditions could be waived, which means a breach of a condition of the deed would not operate to automatically trigger a “reversion to the grantor or its successors and assigns.” It could, however, render ripe an action on the “right of entry” by the grantor or his heirs or assigns. *Ditmore*, 244 Mich App at 580; *Ludington & N R*, 188 Mich App at 35-36. A condition subsequent is now enforced by an action to quiet title. MCL 600.2932; MCR 3.411; 13 Michigan Law & Practice 2d, Deeds § 178.

MCL 600.2932(1) permits any person “who claims any right in, title to, equitable title to, interest in, or right to possession of land” to “bring an action in the circuit court[] against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.” An action to quiet title is an equitable action. MCL 600.2932(5); *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). “The complaint must describe the land in question with reasonable certainty,” MCR 3.411(B)(1), and “must allege (a) the interest the plaintiff claims in the premises; (b) the interest the defendant claims in the premises; and (c) the facts establishing the superiority of the plaintiff’s claim.” MCR 3.411(B)(2). In an action to quiet title, the plaintiff has the burden of establishing a prima facie case of title, and if plaintiff does so, defendant then has the burden of proving superior title. *Stinebaugh v Bristol*, 132 Mich App 311, 316; 347 NW2d 219 (1984).

Here, plaintiff’s complaint described the property at issue with certainty and sets forth defendant’s interest as the grantee of Charles Howell under a 1936 deed that contained a condition providing that the property be used “for park and recreation purposes only.” The complaint also alleged that in the event of a breach of any of the deed’s conditions, the property conveyed “is to revert to the within named grantor and his heirs.” The complaint further set forth plaintiff’s interest as the grantee of the heir of Charles Howell to enforce the “right of entry,” MCL 554.61, or the “power in the grantor to terminate the estate on the happening of a specified event, such as a breach of a condition.” *Huntington Woods*, 279 Mich App at 621, quoting 28 Am Jur 2d, Estates, § 164, p 191. Paragraph 9 of plaintiff’s complaint alleges that defendant “has also violated the conditions or restrictions in [the deed] by using the land for purposes other than a park or recreation area.” We find that the complaint alleges a factual basis for plaintiff’s claim to title that is superior to defendant’s. MCR 3.411(B)(2). Accepting as true all factual allegations supporting plaintiff’s claim, including reasonable inferences, the complaint is not so plainly unenforceable as a matter of law that no factual development could possibly justify granting relief. *Johnson*, 491 Mich at 435. The complaint states a claim on which relief can be granted: a party holding a right of entry asserting a violation of a condition subsequent that has

triggered that right. 13 Michigan Law & Practice 2d, Deeds § 178; *Quinn v Pere Marquette R Co*, 256 Mich 143, 152; 239 NW 376 (1931); MCL 554.111.

Defendant and intervener acknowledge that plaintiff's complaint states a claim to superior title on the grounds that defendant used the property for purposes other than for park or recreation purposes but contends that ¶ 9, which states that claim, is deficient because it is a conclusory statement, citing *Kircher*, 273 Mich App at 544 (mere conclusory statements that are unsupported by factual allegations are insufficient to state a cause of action). See also *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). There are problems with this argument. First, the trial court did not grant defendants summary disposition under MCR 2.116(C)(8) on the basis that plaintiff's complaint contained conclusory statements. In fact, the trial court never discussed plaintiff's claim that defendant had violated the deed's condition subsequent that required the property be used "for park and recreation purposes only." While the trial court addressed plaintiff's claims of abandonment and waste, it did not address whether a violation of a condition subsequent had occurred. Second, if the trial court had found that the complaint was deficient in its factual allegations, from which a violation of the condition subsequent could be found, the court should have so ruled and afforded plaintiff the opportunity to amend its complaint. MCR 2.116(I)(5); *Ormsby*, 471 Mich at 52-53. It is proper for the trial court to preclude plaintiff from amending its complaint when considering granting a motion for summary disposition only if an amendment would be futile. *Id.* The record indicates that questions of fact may exist regarding whether the use of the property for farming, cell tower deployment, and public works use beyond a mere innocuous subsurface sewer or water line, violated the condition subsequent. Thus, the evidence before the court did not show that allowing plaintiff to amend its complaint would be futile. MCR 2.116(I)(5).

Defendant and intervener also argue that plaintiff waived its right to amend its complaint by only arguing below in its motion for summary disposition that the city had abandoned using the property as a park and by not moving to amend its complaint. Waiver is the intentional relinquishment or abandonment of a known right. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) ("a waiver is a voluntary and intentional abandonment of a known right"). Nowhere in the record does plaintiff intentionally relinquish or abandon its claim that defendant violated the deed's condition subsequent that the property be used "for park and recreation purposes only." In fact, plaintiff has consistently asserted this claim. While it is true that plaintiff also asserted claims of abandonment and waste and stressed the former claim in its motion for summary disposition, it is not accurate to say that this was plaintiff's only argument. Plaintiff included in its original motion for summary disposition that defendant had violated a condition subsequent by using the property for purposes other than for park or recreational purposes, referring to ¶ 9 of its complaint where this allegation is made. Plaintiff's renewed motion for summary disposition also alleged that defendant "has violated the deed restrictions and/or abandoned the property as a park." Plaintiff's brief in support of its motion asserted that the property was "no longer being used 'for park and recreational purposes only.'" Thus, plaintiff did not waive its claim that defendant violated the condition subsequent that the property be used "for park and recreation purposes only," and that such violation gave plaintiff the right of entry to forfeit the estate granted in the 1936 quitclaim deed.

Defendant and intervener further argue that plaintiff waived its right to amend its complaint by not moving the trial court to permit it to do so. MCR 2.116(I)(5); MCR 2.118(A)(2) (“Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.”) Again, we find this argument misplaced and conclude there was no waiver. While plaintiff failed to move the trial court to amend its complaint, the most that can be said of that failure is that plaintiff may have forfeited a right by failing to act. “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Carines*, 460 Mich at 762 n 7 (citation omitted). Generally, mere silence or the failure to act will not be construed as a waiver. *Id.*; see also *Quality Products & Concepts*, 469 Mich at 377. With respect to forfeiture, this Court may recognize plain errors or defects that affect substantial rights even when not brought to the attention of the lower court. *Carines*, 460 Mich at 763. In this case, plain error occurred because the trial court failed to recognize plaintiff’s claim of a breach of a condition subsequent, and if the pleadings were deficient regarding the factual underpinnings of plaintiff’s claim, it erred by not allowing plaintiff an opportunity to amend its complaint. MCR 2.116(I)(5); *Ormsby*, 471 Mich at 52-53. The plainly erroneous dismissal of plaintiff’s complaint under MCR 2.116(C)(8) affected plaintiff’s substantial rights because such a dismissal is with prejudice. *ABB Paint Finishing v Nat’l Union Fire Ins*, 223 Mich App 559, 563; 567 NW2d 456 (1997). Consequently, assuming that plaintiff forfeited its right to amend its complaint, plaintiff has satisfied the requirements for relief under the plain error rule: “1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Carines*, 460 Mich at 763. Moreover, because the trial court never addressed plaintiff’s claim before dismissing it on the basis of the pleadings alone, the plain error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

Although the trial court did not address plaintiff’s claim regarding the condition subsequent, it clearly granted defendants’ motion for summary disposition under MCR 2.116(C)(8) regarding plaintiff’s claims under theories of abandonment and waste. In doing so, however, the trial court reviewed and relied on the evidence the parties had gathered during discovery. When a party moves for summary disposition on multiple grounds and the trial court rules on the motion by considering material outside the pleadings, this Court will review the trial court’s decision under MCR 2.116(C)(10). See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). Also, when the trial court grants summary disposition under the wrong court rule, this Court may review the decision under the correct rule. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000). Further, we will generally affirm a trial court when it reaches the correct result even if it does so for an incorrect reason. *Id.* at 150.

To prove abandonment of a dedicated public use of property, the party asserting such a claim must show “both an intent to relinquish the property and external acts putting that intention into effect[.]” *Amb’s v Kalamazoo Co Rd Comm*, 255 Mich App 637, 642; 622 NW2d 424 (2003). Abandonment of the public use “occurs only when the use for which the property is dedicated wholly fails.” *Kirchen v Remenga*, 291 Mich 94, 113; 288 NW 344 (1939). Moreover, with respect to plaintiff’s claim of abandonment, the rule stated in *Ford v Detroit*, 273 Mich 449, 452; 263 NW2d 425 (1935) applies: “Misuse or nonuse does not as a rule work a forfeiture. Neither misuse nor nonuse alone will be sufficient to constitute an abandonment of

land dedicated to a public use so as to work as a reverter to the dedicators.” See also *Clark v Grand Rapids*, 334 Mich 646, 656; 55 NW2d 137 (1952).<sup>3</sup>

The trial court correctly applied the above-stated principles to the evidence before it by concluding that plaintiff had not shown abandonment. On the basis of the evidence before it, the trial court correctly ruled that plaintiff had not shown “both an intent to relinquish the property [from use as a park and recreational area] and external acts putting that intention into effect[.]” *Ambis*, 255 Mich App at 642. At best, the evidence presented would support a finding that the city had engaged in misuse or nonuse of the property which were insufficient to establish abandonment of the dedicated use for park and recreational purposes. *Clark*, 334 Mich at 656. More precisely, because the trial court relied on evidence outside the pleadings, the court’s implied ruling was that plaintiff had failed to produce sufficient evidence to raise a material question of fact and defendants were entitled to judgment as a matter of law on plaintiff’s claim of abandonment. *Silberstein*, 278 Mich App at 457; *Huntington Woods*, 279 Mich App at 614. We will affirm the trial court when it reaches the correct result albeit under the wrong rule. *Wickings*, 244 Mich App at 147, 150.

With respect to the trial court’s ruling regarding waste, the parties and intervener do not even address whether property that is subject to a possibility of a reverter under a deed with a condition subsequent may be the subject of an action for waste. The trial court ruled that a holder of a reversionary interest in land may recover damages for waste of the land under MCL 600.2919. The statute provides in part that “[a]ny guardian, tenant in dower, life tenant, or tenant for years who commits or suffers any waste . . . is liable for double the amount of actual damages.” MCL 600.2919(2)(a). But the city held a fee subject to forfeiture only on the occurrence of a condition subsequent; the city was not a “guardian, tenant in dower, life tenant, or tenant for years.” The statute provides in part that “[a] claim under this provision may be brought by the person having the next immediate estate, in fee, for life, or for years or by *any person* who has the *remainder or reversion* in fee or for life *after an intervening estate for life or*

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<sup>3</sup> We agree with plaintiff that both *Ford* and *Clark* are factually distinguished, and, therefore, not pertinent to plaintiff’s claim that defendant violated the condition subsequent in this case. In *Ford*, a clause in the deed provided that the property would revert to the grantor or heirs whenever the property’s public use as a park “shall be legally discontinued.” *Ford*, 273 Mich at 454. The Court held that the city misused the “park” property but did not abandon it; nor was there a “legal discontinuance.” *Id.* at 452-453. In *Clark*, the Court found the one condition subsequent in the deed with a reverter clause had been satisfied, and then the Court addressed “whether or not the other covenants in the deed have been carried out.” *Clark*, 334 Mich at 655. A breach of a restrictive covenant does not result in a forfeiture of the estate to the grantor or his heirs but may be enforced by a court in equity. 1 Cameron, Michigan Real Property Law (3d ed), § 7.9, p 267; 13 Michigan Law & Practice 2d, Deeds § 171. Further, restrictive covenants may be “construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction[.]” *Huntington Woods*, 279 Mich App at 628-629, quoting *Webb v Smith (After Remand)*, 204 Mich App 564, 570; 516 NW2d 124 (1994).

*for years.*” MCL 600.2919(2)(b) (emphasis added). Again, the city is the holder of the fee, subject to a condition subsequent, not “an intervening estate for life or for years.”

Legal treatises indicate that the holder of only a possibility of reverter because of its contingent nature may not bring an action for waste. “One entitled to a contingent remainder may not maintain an action at law against the tenant in possession to recover damages for waste, because it cannot be known in advance whether the contingent remainderman would suffer damage or loss by the waste as the estate may never become vested.” 78 Am Jur 2d, Waste, § 13, pp 315-316. Similarly, Michigan texts state that “the right of action for waste is in the person seized of the estate in reversion.” 16 Michigan Law & Property 2d, Estates, Waste, § 72. “Seized” refers to “seizen” or “seisin” defined as “[p]ossession of a freehold estate in land; ownership.” Black’s Law Dictionary, (7th ed). In sum, these authorities suggest that the holder of only a possibility of reverter may not bring an action of waste against the holder of the fee in possession. At best, an action for injunctive relief might be maintained. MCL 600.2919(3); 78 Am Jur 2d, Waste, § 13, p 316. In this case, however, plaintiff did not seek injunctive relief.

The trial court ruled that plaintiff had failed to establish waste which would harm the reversionary interest because the property still functioned as a park for public enjoyment. The trial court erred by granting summary disposition to defendants under MCR 2.116(C)(8) because the court considered matters beyond the pleadings. MCR 2.116(G)(5). Nevertheless, based on legal treatises, it appears that the trial court reached the correct result regarding plaintiff’s claim of waste. This Court will affirm the trial court’s ruling when it reaches the correct result even if for the wrong reason. *Wickings*, 244 Mich App at 150.

In addition to the foregoing reasons, we also affirm the trial court’s rulings granting defendants summary disposition as to plaintiff’s claims of abandonment and waste because plaintiff has essentially abandoned these claims on appeal by presenting no effective argument that the trial court erred. In its brief on appeal, plaintiff argues that it presented claims and evidence of abandonment and waste only to show that the city had violated the condition subsequent in the deed, thus triggering its reverter clause. An appellant’s failure to properly brief the merits of an alleged error constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). “It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). For this additional reason, we affirm the trial court’s granting of partial summary disposition on plaintiff’s claims of abandonment and waste.

In summary, we reverse the trial court’s grant of summary disposition under MCR 2.116(C)(8) of plaintiff’s claim that defendants violated the deed’s condition subsequent requiring that the property be used “for park and recreational purposes only” and that such violation resulted in the fee’s reverting to the grantor’s heirs or successors (plaintiff). To the extent that plaintiff’s complaint is deficient in its allegation of the factual underpinnings of this claim, the trial court on remand should afford plaintiff the opportunity to amend its complaint. We also affirm the trial court’s grant of partial summary disposition to defendant of plaintiff’s claims of abandonment and waste. We remand for proceedings consistent with the Court’s opinion.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Jane E. Markey  
/s/ Donald S. Owens