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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

Case No. 2020-183155-CZ
Hon. Nanci Grant

HEARING DATE:
November 24, 2021

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

I. INTRODUCTION

This is an action against the City of Novi (the "City") challenging the reasonableness of the rates the city charges for "Water Service" and "Sewer Service" (collectively, the "Rates"). Michigan courts have long recognized that municipalities providing services to their citizens must not profit from those activities. *See, e.g., Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 220; 934 N.W.2d 713 (2019) (quoting *Mich. Ass'n of Home Builders v. City of Troy*, No. 331708, 2017 Mich. App. LEXIS 1521 (2017)) ("If the fees for a particular service consistently generate revenue exceeding the

costs for the service, the reasonableness of the fee for that service would be suspect."). The City has disregarded this fundamental principle for many years, to the detriment of its citizens and inhabitants, and Plaintiff brought this certified class action seeking redress for himself and everyone else who pays the Rates or who paid them since July 1, 2015 (the "Class Period").

The City's overcharges to its ratepayers (the "Rate Overcharges") during the Class Period exceed $13 million. Plaintiff advances the following legal arguments: (1) the Rate Overcharges are unlawful taxes in violation of the Prohibited Taxes by Cities and Villages Act, MCL 141.91; (2) the Rates are unreasonable under the common law because they generate revenue far in excess of the City's actual cost of providing water and sewer service; and (3) the Rates violate the City's Charter, § 13.3, because they are not "just and reasonable." *See* Complaint, ¶¶ 42-70.

In its motion, the City argues that Plaintiff's claims fail as a matter of law for five reasons, based solely on the pleadings under MCR 2.116(C)(8). A brief description of each argument and the reason why it fails is below.

1. **Plaintiff is constrained by the one-year statute of limitations applicable to Headlee Amendment claims, even though Plaintiff did not bring a Headlee Amendment claim.** This bizarre argument fails to recognize that Plaintiff is the master of his complaint and can choose not to bring a particular claim. It also relies on a recent Michigan Supreme Court opinion that does not have anywhere near the legal effect the City suggests.

2. **Plaintiff has failed to allege "malicious intent, capricious action, or corrupt conduct."** Those are not elements of any of Plaintiff's claims. The City also inexplicably fails to cite **recent, binding authority** from the Court of Appeals that **does** set forth the elements of Plaintiff's claims. The City essentially presents the Court with an incorrect legal standard, which the City knows (or should know) is incorrect. Moreover, even if Plaintiff must allege "capricious action," on the part of the City, Plaintiff **has** alleged that the City acted capriciously by setting Rates at a level sufficient to generate huge piles of cash from its water and sewer customers, including enough money to make below-market interest "loans" to other City funds, unrelated to the City's water and sewer function.

3. **Plaintiff's unjust enrichment claims fail because the City has complied with "lawful statutory, charter, and ordinance mandates."** No statute or other law requires or permits the City to overcharge for water and sewer service. In fact, the Revenue Bond Act (the "RBA") limits the City to Rates that are sufficient to pay the expenses of administration, operation, and maintenance of the water and sewer system, and the City's Charter both requires the Rates to be "just and reasonable."

4. **Plaintiff's claims fail because they sound in contract, and Plaintiff has no private right of action to enforce MCL 141.91 or the City's Charter.** Plaintiff's unjust enrichment claims are not quasi-contractual. Plaintiff seeks disgorgement of an unlawful exaction, not enforcement of an implied contract, and case law supports Plaintiff's claims. Plaintiff does not need MCL 141.91 or the Charter to provide an express private right of action because he is not seeking damages, but rather disgorgement of money the City wrongfully collected and retained, which the City never should have collected in the first instance.

5. **Assumpsit has been abolished as a private right of action.** Michigan's courts have held that assumpsit, or "money had and received," remains a proper **remedy** for recovering an unlawful exaction. MCL 141.91, the City's Charter, and the common law are the source of Plaintiff's substantive rights, and assumpsit provides one remedy (along with another remedy, unjust enrichment).

None of the City's arguments has merit, and the Court therefore should deny the City's motion for summary disposition.

II. BACKGROUND

These are the facts that the Court must accept as true for purposes of the City's Motion:[1]

Since at least 2015, the City has set its Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing water and sewage disposal services. Complaint, ¶ 3. The Rates during this period were established in contravention of established water and sewer rate-setting methodologies, and resulted in the accumulation of cash reserves far in excess of those necessary to support the City's water and sewer function. *Id.* Indeed, between June 30, 2015 and June 30, 2019, the City increased its cash and investments in the Water and Sewer Fund from an already excessive $56 million to over $69 million through its continuing imposition of the Rate

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1 A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, on the basis of the pleadings alone, to determine if the opposing party has stated a claim for which relief can be granted. *See* MCR 2.116(G)(5) ("Only the pleadings may be considered when the motion is based on subrule (C)(8) . . ."); *Corley v. Detroit Bd of Ed.*, 470 Mich. 274, 277; 681 N.W.2d 342 (2004). The Court must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party. *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) may be granted only if no factual development could possibly justify recovery. *Corley,* 470 Mich. at 277.

Overcharge. *Id.* A more detailed description of the Rate Overcharges appears in Plaintiff's Complaint, ¶¶ 16-34, and below.

These facts alone prove that the City's Water and Sewer Rates have been unreasonable because they were designed to generate, and actually did generate, revenues far in excess of those necessary to supply water and sewer services to the City's inhabitants. *Id.* As the Court of Appeals recently held, whether a municipality has been unjustly enriched by water and sewer charges "depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were excessive." *Youmans v. Bloomfield Township*, ___ Mich. App. ___; ___ N.W.2d ___ (2021) (Exhibit 1 hereto).

Again, for the purpose of this motion, the Court must accept as true Plaintiff's allegations that the City has imposed Rate Overcharges that have resulted in the accumulation of millions of dollars in its Water and Sewer Fund. The accumulated assets represent almost three times the City's annual water and sewer-related expenditures, and the accumulation of cash was not serendipitous but was undertaken pursuant to a plan to dramatically increase the cash in the Water and Sewer Fund through 2019 after paying all of the expenses of the Water and Sewer Fund, including capital improvements and debt service. Complaint, ¶¶ 16-17.

The Court must also accept as true Plaintiff's allegation that the City's Water and Sewer Fund accumulated so much excess and unnecessary cash that, in June 2017, the City authorized the Water and Sewer Fund to advance up to $17 million to other City funds to finance capital improvements unrelated to the City's water and sewer system. *Id.*, ¶ 4. In the fiscal year ending June 30, 2019, the Water and Sewer Fund advanced $3,000,000 of the authorized $17 million to the City's Capital Improvement Fund to finance capital improvements in the City.[2] *Id.* The City's Water and

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[2] In the fiscal year ending June 30, 2019, the Water and Sewer Fund advanced $3,000,000 of the authorized $17 million to the City's Capital Improvement Fund to finance capital improvements in the City.

Sewer Rates were thus designed to generate, and actually did generate, revenues far in excess of those necessary to supply water and sewer services to the City's inhabitants. *Id.*

The Court must also accept as true Plaintiff's allegation that in addition to the $3 million advance described above, the City also transferred $2.4 million to the Capital Improvement Fund to "finance construction of the Department of Public Works and Gun Range facilities" in the fiscal year ending June 30, 2019. *Id.*, ¶ 22.

The Court must also accept as true Plaintiff's allegation that at the time the City approved the $17 million in advances in June 2017, the Water and Sewer Fund had over $64 million in cash and investments. Complaint, ¶ 24. At that time, the City effectively acknowledged that its reserves were excessive by stating that its needed "long term capital reserves" were only approximately $20 million. *Id.* Therefore, as of June 2017, the City thus maintained cash and investments that were approximately $44 million more than the City itself determined were necessary to fund the future capital obligations of the Water and Sewer Fund. *Id.* As of June 2019, those excessive reserves had increased to approximately $49 million. *Id.*

The Court must also accept as true Plaintiff's allegation that unlike some older communities which have aging water and sewer systems in need of imminent replacement, the City's water and sewer system is still in its early phases and no major replacements are needed in the near future. *Id.*, ¶ 26. Consistent with these needs, the City's current capital improvement plan for its water and sewer assets for the fiscal year ending June 30, 2020 through the fiscal year ending June 30, 2025 calls for an average of only $3.5 million in expenditures per year over that period. *Id.*

Id. In the fiscal year ending June 30, 2020, the Water and Sewer Fund advanced another $7,710,000 to the City's Capital Improvement Fund. As of June 30, 2020, the entire $10,710,000 advanced remained outstanding, confirming that the Capital Improvement Fund had not at that point repaid any of the principal amounts advanced. The City has not yet released its 2021 financial report.

Finally, the Court must accept as true Plaintiff's allegation that not only are the City's future capital needs modest, but the City does not even plan to use its accumulated cash reserves to pay for those modest future capital improvements. *Id.*, ¶ 27. Instead, as reflected in its annual budgets, the City has traditionally planned to fund, and actually funded, its water and sewer capital improvements through a "pay as you go" approach – *i.e.*, including in its Rates on an annual basis the amount needed to fund current period capital improvements. *Id.* And the City's Water and Sewer Fund has very little debt, which confirms that the City has not traditionally financed water and sewer capital improvements by issuing bonds or other debt instruments. *Id.*

III. ARGUMENT

A. Plaintiff is the Master of His Complaint, and Is Not Bound by Limitations Periods that Apply to Claims he Did Not Assert

The City begins by arguing that Plaintiff should be bound by the one-year limitations period of a claim under the Headlee Amendment, **which Plaintiff did not assert**, and that by failing to assert a Headlee claim Plaintiff seeks to "dodge the bar" of Headlee's statute of limitations. Def. Br., pp. 6-8. The City forgets that "[i]n our system, the plaintiff gets to decide what facts to allege and what legal theories of recovery to assert." *Trowell v. Providence Hosp. & Med. Ctrs., Inc.*, 502 Mich. 509, 540; 918 N.W.2d 645 (2018); *see also The Fair v. Kohler Die & Specialty Co*, 228 U.S. 22, 25; 33 S. Ct. 410; 57 L. Ed. 716 ("Of course the party who brings a suit is master to decide what law he will rely upon . . ."). Plaintiff did not plead a Headlee Amendment claim; he pleaded only that the Rate Overcharges are unlawful taxes under the Prohibited Taxes by Cities and Villages Act, MCL 141.91, which states: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

The City relies on a recent opinion in *Gottesman v. City of Harper Woods*, ___ Mich. ___; 964 N.W.2d 365 (2021), wherein the Supreme Court considered an action in which the plaintiff **had**

brought claims under **both** the Headlee Amendment and MCL 141.91. The Court of Appeals had previously held that the plaintiff's claims for assumpsit and unjust enrichment arising from municipal utility overcharges were subject to a six-year statute of limitations, even though the plaintiff had brought alternative claims under the Headlee Amendment. *See Gottesman v. City of Harper Woods*, No. 344568, 2019 Mich. App. LEXIS 7657 *28-29 (Dec. 3, 2019). The Supreme Court **did not** hold that as a matter of law, the plaintiff was limited to a one-year limitations period. The court instead remanded the case to the Court of Appeals for **consideration** of that issue:

> In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" *Gottesman*, 2019 Mich. App. LEXIS 7657 at *29. As this Court has recognized, "statutes of limitations may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127; 537 N.W.2d 596 n 9 (1995) (TACT). Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), **does not necessarily mean** that the equitable claims may proceed.
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> In light of these errors, we REMAND to the Court of Appeals **to consider:** (1) whether the appellant's impermeable-acreage charges were "service charges" under 1970 CL 280.539, so that they were authorized prior to the ratification of the Headlee Amendment, *see* Const 1963, art 9, § 31, *see American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 357; 604 N.W.2d 330 (2000); and (2) if not, **whether plaintiff may seek equitable remedies for the alleged violation of MCL 141.91 beyond the one-year limitations period governing the Headlee Amendment claim . . .** [emphasis added]

The Supreme Court's opinion is thus twice removed from the standard the City asks this Court to apply. First, the plaintiff in *Gottesman* did in fact bring a Headlee Amendment claim, unlike Plaintiff in this action. Second, the Supreme Court merely noted that a claim under MCL 141.91 does not "necessarily" receive the benefit of a six-year statute of limitations when there is a Headlee claim in the case, and instructed the Court of Appeals to "consider" the question on remand. *Gottesman* is not the silver bullet the City would like it to be.

Michigan courts have applied the six-year statute to claims seeking refunds of unlawful

governmental exactions like the one at issue in this case, and have required full disgorgement of such exactions for the entire six-year period. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, No. 292569, 2010 Mich. App. LEXIS 2044 *12 (Oct. 21, 2010) (Exhibit 2 hereto); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for sales tax refund subject to six-year statute of limitations). As Justice Holmes held in *Fair*, *supra*, in 1913, a plaintiff may choose which claims to bring, and this Court must address those claims, not some other hypothetical claim.

B. Malicious Intent, Capricious Action, and Corrupt Conduct Are Not Elements of Any of Plaintiff's Claims

The City argues that under *City of N. Muskegon v. Bolema Const. Co.*, 335 Mich. 520, 526; 56 N.W.2d 371 (1953) and *Wolgamood v. Village of Constantine*, 302 Mich. 384, 395; 4 N.W.2d 697 (1942) a plaintiff must prove "malicious intent, capricious action, or corrupt conduct" in order to obtain any relief whatsoever against a municipality. *See* Def. Br., p. 9. Those opinions do not set forth the correct standard. The more recent opinion in *Youmans v. Bloomfield Township*, ___ Mich. App. ___; 961 N.W.2d 169 (2021) does: "Whether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on **whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,'** not on whether some aspect of the Township's ratemaking methodology was improper." [emphasis added]

In *Youmans*, the Court of Appeals considered claims which alleged, among other things, that Bloomfield Township's water and sewer rates were unreasonable because they included improper cost components. Although the court reversed the judgment in favor of Plaintiff, it did so in a way that confirms the validity of Plaintiff's claims here. The *Youmans* court accepted Bloomfield Township's argument that the use of an improper rate-making methodology was insufficient to demonstrate that the resulting rates were unreasonable, and that a plaintiff must show that the rates "viewed as a whole" generated revenues that were "excessive":

> . . . **the Township argues that, under *Trahey*, even if a specific expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a whole. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township**.
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> * * *
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> **Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper**. *See id.* at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position.") [*Youmans*, ____ Mich. App. at ____ (emphasis added).]

In other words, under *Youmans*, garbage in does not necessarily equal garbage out – and it is not necessary to prove that garbage went in (or that the City acted with malice or corrupt intent) to prove that the City's overall Rates are excessive.

Here, as *Youmans* requires, Plaintiff has alleged that the City's water and sewer rates, viewed as a whole, are "excessive" and thus unreasonable. The "reasonableness" of municipal utility charges is typically an issue of fact. *See Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015). In *Trahey*, the Court of Appeals affirmed the following principles:

1. Plaintiff meets his burden of proof by showing that "any given rate **or** ratemaking practice is unreasonable." *Id*; and
2. Plaintiff meets his burden of proof by providing "**clear evidence of illegal or improper expenses included in a municipal utility's rates**." *Id.* at p. 595.

Again, *Youmans* held that it is **not** sufficient to show that a rate contains improper components; a plaintiff must show that the overall rates are excessive. But *Youmans* did not disturb *Trahey*'s bedrock principle that once a plaintiff has met his or her burden, the defendant municipality must disgorge

the excessive rates. Further, although *Trahey* recognizes the presumption of reasonableness, that presumption of reasonableness may be overcome by a proper showing of evidence. *See Jackson Co v City of Jackson*, 302 Mich App 90, 109; 836 NW2d 903 (2013).

For the purpose of this motion, the Court must accept as true Plaintiff's factual allegation that the City's Rates are unreasonable. Under the standard the Court of Appeals set in *Youmans*, Plaintiff has stated a claim for disgorgement of excessive utility rates, and summary disposition is inappropriate. The City did not cite *Youmans* (2021) at all,[3] and cited *Trahey* (2015) only to support its arguments about the presumption of reasonableness. *See* Def. Br., p. 8. The City instead cited cases that have nothing to do with charges for water and sewer services. *Id.* (citing *City of North Muskegon* (1953), which dealt with sewer connection fees, and *Wolgamood* (1942), which dealt with electrical service charges). A review of the correct authority shows that Plaintiff has stated claims under all of its theories in this action.

Moreover, Plaintiff has alleged, and can easily prove, that the Rates are "arbitrary," "capricious" and/or "unreasonable." *See City of Plymouth v. City of Detroit*, 423 Mich. 106, 133, 377 N.W.2d 689 (1985) (recognizing that courts may invalidate municipal utility rates where the party challenging the rate demonstrates that the rate determination was "arbitrary, capricious or unreasonable").[4] The Complaint amply alleges facts that support a finding that "without

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[3] The City's decision to ignore *Youmans* is interesting, to say the least, because the City previously asked this Court to reconsider its decision on class certification based in part on the Court of Appeals' published opinion in *Youmans*. *See* Opinion and Order Denying Motion for Reconsideration, Exhibit E to Def. Br., p. 2. Perhaps the City has changed its mind about whether *Youmans*'s "profound" and "game-changing" impact (Def. Br. on Reconsideration, p. 4) helps its defense.

[4] The Michigan Supreme Court has stated that "arbitrary" and "capricious" have generally accepted meanings and wrote that "arbitrary" is: "[W]ithout adequate determining principle . . . [f]ixed or arrived at through an exercise of will or by caprice, **without consideration or adjustment with reference to principles**, circumstances, or significance, . . . decisive but unreasoned. Capricious is: [A]pt to change suddenly; freakish; whimsical; humorsome. *Goolsby v City of Detroit*, 419 Mich 651, 678; 358 NW2d 856, 870 (1984) (citing *United States v Carmack*, 329 US 230, 246 n 14; 67 S Ct 252, 260; 91 L Ed 209 (1946)) (emphasis added). Additionally, Black's Law Dictionary defines arbitrary as "[d]epending on individual discretion; of,

consideration or adjustment with reference to principles," and in contravention of "fixed rules" of municipal ratemaking, the City arbitrarily and capriciously decided to impose Rates that not only allowed a massive accumulation of cash, but that also financed below-market rate of interest "loans" to other sections of the City's government. Arbitrarily making water and sewer customers overpay for water and sewer services so that a municipality can, among other things, make below-market loans to other City funds is the very definition of "arbitrary" and/or "capricious."

C. No Statute or Common Law Principle Requires or Allows the City to Grossly Overcharge Plaintiff and the Class

The City argues that Plaintiff has failed to state a claim for unjust enrichment because the RBA and the City's charter and ordinances supposedly give the City "no choice but to charge the Utility Fees at issue in this case . . ." Def. Br., p. 10. This is incorrect because no law requires the City to grossly overcharge its citizens for water and sewer service.

First, the Court of Appeals has specifically held that municipal utility Rates must still be reasonable even where they are required to conform to the Revenue Bond Act. In *Mapleview Estates v. City of Brown*, 258 Mich. App. 412 (2003), the Court held:

> As defendant obligingly points out, **even if the tap-in fees are not a tax, they must still be reasonable**. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich. App. 14, 24; 575 N.W.2d 56 (1997) [emphasis added]. The Revenue Bond Act (RBA), MCL 141.101 *et seq.*, authorizes municipalities to "purchase, acquire, construct, improve, enlarge, extend or repair" public improvements such as water and sewer systems, and to "own, operate and maintain" them. MCL 141.104, 141.103(a) and (b). The act also authorizes cities to fix the rate for these services, which includes "the charges, fees, rentals, and rates that may be . . . imposed for the services." MCL 141.103(e), 141.121. "**A connection charge clearly falls within the ambit of a [municipality's] authority to fix the rate for service" under the RBA, and must simply be "reasonable."** *Atlas Valley*, *supra* at 21. [*Mapleview Estates*, 258 Mich. App. at 417 (emphasis added)].

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relating to, or involving a determination made without consideration of or regard for facts, circumstances, **fixed rules**, or procedure" and "capricious" as "contrary to the evidence or established rules of law." ARBITRARY, Black's Law Dictionary (10th ed. 2014); CAPRICIOUS, Black's Law Dictionary (10th ed. 2014).

See also Seltzer v. Sterling Twp., 371 Mich. 214, 222; 123 N.W.2d 722 (1963) (charges authorized under the RBA must still be reasonable). In short, the RBA, consistent with common law principles, requires that the City's Rates be reasonable. Therefore, the RBA does not assist the City here.

Second, *Bolt* specifically rejected the argument that the RBA "trumps" the limitations on municipal taxing authority. The dissenting Justices in *Bolt* argued that the stormwater charges did not violate Headlee because the Revenue Bond Act (which was first enacted in 1933) empowered the City of Lansing to construct and operate a sewer system. The *Bolt* majority rejected this argument and held that, even though the **power** to **build** the system predated Headlee, the City was not allowed to **finance** its sewer system through unlawful taxes:

> In response to this conclusion, the dissent notes that the Revenue Bond Act permits the City to implement a sewer system. However, whether the City was authorized to implement a sewer system is not at issue in the present case. What is at issue is how that system is to be funded. **It stands to reason that even though the City may be authorized to implement the system, its method of funding the system may not violate the Headlee Amendment**. [459 Mich. at 169 (emphasis added)].

Third, the evidence suggests that the City's Rates have generated far more revenues than the City requires to meet any obligation under the RBA. The City cites no case holding that the RBA removes any limitations on a municipality's Rates. The RBA, at most, requires the City to establish rates to "cover all costs of administering, operating and maintaining its water and sewer systems necessary to preserve the systems in good repair and working order, as well as all other costs for those systems required by the City's ordinances." It assuredly does not authorize the City to establish Rates generating revenues far in excess of the reasonable costs of operating, maintaining and improving the City's water and sewer system. Accepting the City's RBA argument swallows whole the *Bolt* and reasonableness limitations on municipalities, which no authority permits or supports. In fact, the Revenue Bond Act ("RBA"), MCL 141.121, **prohibits** a municipality from generating a profit from utility charges, either in the form of a cash hoard or excess money to loan to other divisions of government:

(1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be **sufficient** to provide for all the following:

(a) The **payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement** as may be necessary to preserve the public improvement in good repair and working order.

(b) The payment of the **interest on and the principal of bonds** payable from the public improvements when the bonds become due and payable.

(c) The creation of any **reserve for the bonds** as required in the ordinance.

(d) Other expenditures and funds for the public improvement as the ordinance may require. [MCL 141.121(1) (emphasis added).]

Most importantly, the RBA expressly provides that "[t]he rates shall be fixed and revised by the governing body of the borrower **so as to produce the amount described in subsection (1)**." MCL 141.121(2) (emphasis added). This provision clearly evinces an intent on the part of the legislature to prevent municipalities from generating profits from their charges. Notably, there is no provision in "subsection (1)" which allows a municipality to stock-pile tens of millions of dollars of unnecessary cash, including millions of dollars intended to be "loaned" to other City funds.[5]

Thus, not only does the law not permit the City to overcharge, it forbids the City from overcharging. Indeed, the central issue in this case is whether the City's Rates are "just and reasonable" as the Charter requires or, on the other hand, have generated more revenue than is necessary for the "payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement" under the Revenue Bond Act.

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5 Similarly, the City's Charter, § 13.3, provides: "The Council shall have the power to fix from time to time such **just and reasonable rates** as may be deemed advisable for supplying inhabitants of the City and others with such public-utility services as the City may provide." Far from authorizing the Rate Overcharges, the Charter prohibits the overcharges because they are not "just and reasonable." *See also* City Ord. 34-145 ("The amount of the rates and charges shall be **sufficient** to provide for debt service and for the expenses of operation, maintenance, and replacement of the system as necessary to preserve the same in good repair and working order."). Even if the City's ordinances authorized Rates "sufficient" to build a reserve to pay for the replacement of 100% of the City's infrastructure all at once, such Rates would not be "just and reasonable" to the payors as required under the Charter.

D. None of Plaintiff's Claims Sound in Contract, and Plaintiff Does Not Need a Private Right of Action to Enforce MCL 141.91 or the City Charter Because He Is Not Seeking Damages, But the Disgorgement of an Unlawful Exaction

The City argues that each of Plaintiff's claims sounds in contract and is therefore prohibited as a matter of law. *See* Def. Br., p. 12. Although it is true that Plaintiff pleaded claims for unjust enrichment, and that such claims can be quasi-contractual in other contexts, that body of law does not apply to actions seeking the return of illegally-collected funds to a municipality. In *Wright v. Genesee Cty.*, 504 Mich. 410, 422; 934 N.W.2d 805 (2019), the court observed the following about the doctrine of unjust enrichment:

> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. Restatement Restitution, 1st, Sec. 1, comment a, p 12. It is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at another's expense." *McCreary v. Shields*, 333 Mich. 290, 294, 52 N.W.2d 853 (1952) (quotation marks and citation omitted). A claim of unjust enrichment can arise when a party "has and retains money or benefits which in justice and equity belong to another." *Id.* (quotation marks and citation omitted).
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> The remedy for unjust enrichment is restitution. *See, e.g., Kammer Asphalt Paving Co., Inc. v. East China Twp. Sch.,* 443 Mich. 176, 185, 504 N.W.2d 635 (1993) ("[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'"), quoting Restatement Restitution, 1st, Sec. 1, p 12 (second alteration in original); *City Nat'l Bank of Detroit v. Westland Towers Apartments*, 413 Mich. 938, 938, 320 N.W.2d 881 (1982) (discussing "equitable recovery on the claim of unjust enrichment"); 2 Restatement Restitution & Unjust Enrichment, 3d, § 49, p 176 ("A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment."). [504 Mich. at 417-418]

The Court of Appeals has applied these well-established principles to require a municipality that illegally collected funds to return those funds to the person or entity who paid the funds. In *Mercy Services*, 2010 Mich. App. LEXIS 2044 *12 (Exhibit 2 hereto), the plaintiff, a tax-exempt entity, challenged an annual service charge imposed by a city on the grounds that it violated a state statute prohibiting the imposition of taxes on tax-exempt entities. After finding that the charge was

unlawful, the court held that the plaintiff could recover the charges paid because the city would be unjustly enriched if it were not required to return the funds to the plaintiff:

> Plaintiff paid defendant approximately $1,293,327.59 in annual service charges from 2002 through 2007. Defendant had no legal right to impose an annual service charge. Plaintiff was unaware of the impropriety of the charges, and therefore, simply paid what defendant asked. Defendant does not contest that this money constituted a benefit to it bestowed by plaintiff. **But an inequity plainly resulted to plaintiff when defendant retained improperly imposed annual services charges.**
>
> * * *
>
> **Although it is true that it would be burdensome for defendant to have to return to plaintiff six years worth of annual service charges on which defendant has relied, this does not render a refund inequitable. Defendant was never entitled to the annual services charges in the first place. In essentially all cases where a party has been unjustly enriched, it would be burdensome to the enriched party to require it to return the benefit; this alone is insufficient to defeat an unjust enrichment claim**. [*Id.* at *8-11 (emphasis added).]

The *Mercy Services* court ultimately concluded that "[w]here funds are unlawfully collected by a governmental entity, the circuit court is empowered to order a refund." *Id.* (citing *Romulus City Treasurer v. Wayne County Drain Com'r*, 413 Mich. 728, 746-47; 322 N.W.2d 152 (1982)). Here, the City has been unjustly enriched by its collection and retention of the unlawful Rate Overcharges. Plaintiff and the class may recover on the substantive claims stated in the Complaint.

Similarly, in *Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020) (Exhibit 3 hereto), the court held that where a statute does not provide a private right of action for its violation, the court retains the equitable power to require refunds of monies collected in violation of the statute under principles of unjust enrichment. In *Logan*, the plaintiff challenged certain fees imposed by a municipality's building division that allegedly were excessive and imposed in violation of the state construction code act ("CCA"), MCL 125.1501 *et seq.* The plaintiff brought claims for (1) statutory violation of the CCA, (2) violation of the Headlee Amendment and (3) unjust enrichment premised on the municipality's violation of the CCA. In an earlier opinion dated January 11, 2018 (Exhibit 4), the Court of Appeals held that, even though the plaintiff there did not

have a private right of action under the CCA, he still could seek a refund of the excessive fees under the equitable doctrine of unjust enrichment:

> In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count. [2018 Mich. App. LEXIS 89, *7-8.]

The court of appeals vacated the circuit court order partially granting summary disposition in the township's favor. *Id.* The township applied for leave to appeal to the Supreme Court, which ultimately vacated the Court of Appeals January 11, 2018 Opinion and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich. 204; 934 NW2d 713 (2019) (MAHB), and *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). *Logan v West Bloomfield Charter Twp*, 505 Mich. 863; 935 NW2d 42 (2019). On remand, the *Logan* Court affirmed its prior ruling, holding that "*MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order." Exhibit 3, p. 1. The Court characterized the plaintiff's equitable claims as follows:

> As noted, in the current case, plaintiffs are individuals who seek the return of excessive fees assessed in violation of the CCA. But **plaintiffs have not sought redress directly under the statute; rather, plaintiffs claimed that the township was unjustly enriched by the funds collected in violation of the statute**.

Similarly, Plaintiff has not "sought redress directly under" MCL 141.91 and the City's Charter. Instead, Plaintiff claims the City was "unjustly enriched by the funds collected in violation" of these statutes. The *Logan* Court went on to find that, even though he had no private cause of action under the CCA, the *Logan* plaintiff nonetheless had properly sought return of the excessive fees by invoking the equitable doctrine of unjust enrichment:

> The current matter is similar to Genesee Co in that while the plaintiffs in both actions do seek money from the defendants, **the money is not meant as**

> **compensation. Rather, plaintiffs in this action, like the plaintiff in Genesee Co, seek the return of monies paid over to defendant that should not have been charged in the first instance** and therefore was unjustly held by defendant. **Requesting the return of the funds was not a tort or contract action, but an action to divest the township of benefits unjustly retained. As the relief sought is equitable in nature, the claim is not barred by MAHB**. Accordingly, we again conclude that the circuit court improperly dismissed plaintiffs' unjust enrichment claim. [Emphasis added].[6]

Here, the money sought is not "meant as compensation." Rather, Plaintiff seeks "the return of monies paid over to defendant that should not have been charged in the first instance . . ." No express private right of action under a statute or the City's Charter is needed.

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[6] Even more recently, in *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948 (Exhibit 6 hereto), the plaintiff challenged the City of Flint's water and sewer charges on various grounds, including that certain rate increases violated the city's own ordinances. This Court held that **even where a private right of action does not exist under a city ordinance,** if a municipality has obtained money through an unlawful exaction in violation of the ordinance, the plaintiff has a common law equitable claim for a refund. The Court expressly recognized the distinction that Plaintiff asserts here – **namely, that there is a difference between a private cause of action for money damages (which is not at issue here) and an equitable claim to compel a refund of money obtained in violation of the law (which is at issue here)**:

> **Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute**." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895**). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions**. *See id. Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."). Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's mere violation of a City Ordinance, *Lash*, 479 Mich at 194, **but it is equally clear that plaintiffs may maintain a cause of action for a refund of an unlawful exaction**. [Exhibit 6 at p. 8 (emphasis added) (footnote omitted)].

The court went on to find that the Circuit Court erred in dismissing the plaintiff's unjust enrichment claims because they were "premised on an unlawful exaction:"

> In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*, Count IV properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. Moreover, as our Supreme Court made clear in *Wright*, a claim for unjust enrichment is not barred by the GTLA. *Wright*, 504 Mich at 422, summary disposition of Count III was not appropriate under MCR 2.116(C)(7). [*Id.* at pp. 8-9]

E. Assumpsit Remains a Proper Remedy for an Unlawful Governmental Exaction

The City claims that assumpsit "has been abolished in Michigan as a cause of action." Def. Br., p. 20. However, it is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

The City's motion misconstrues the prevailing law. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich. 543, 564, 837 N.W.2d 244 (2013), the Court observed that "[w]ith the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. **But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved**[.]" *Id.* (emphasis added). Thus, as long as a plaintiff can demonstrate that money was obtained by a defendant in violation of the law, that plaintiff properly invokes the equitable doctrine of assumpsit to obtain a remedy. That is why the Michigan appellate courts have repeatedly recognized long after the adoption of the General Court Rules in 1963 that a plaintiff who can establish that the government collected monies in violation of the law can properly invoke the remedy of assumpsit. Here, Plaintiff's causes of action are based upon the City's violation of statutory and Charter provisions—MCL 141.91 and the Charter § 13.3—which bind the City and require the City to comply with their edicts. Assumpsit merely provides the **substantive remedy** for the City's violation of the common law, Michigan statute, and its own Charter. **Assumpsit is not the source of Plaintiff's substantive rights**.

In *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 696-97; 178 N.W.2d 484 (1970), the plaintiffs sued the Ann Arbor public school district alleging that the district's fees for books and supplies violated a provision of the Michigan Constitution that required "a system of free public elementary and secondary schools". The plaintiffs claimed "that large amounts were illegally collected by defendant from its pupils as general fees, so-called, determined pursuant to a schedule adopted by the board of education of defendant." *Id.* at 697. The plaintiffs thus sought a "judgment for the full amount of the general fees collected." *Id.* at 698. The Michigan Supreme Court ruled in their favor: "We remand this cause to the circuit court for the entry of a judgment against defendant for the amount of the general fees collected by it in the sum of $140,862, plus interest from date of collection of same . . ." *Id.* at 705. In *Bond,* as here, the plaintiffs sued because the defendant had imposed unlawful charges. The *Bond* court ordered the defendant to repay the amounts it had unlawfully collected, and the Court here should do likewise.

In *Woodland Condos Homeowners Ass'n v. Fannie Mae*, 2019 Mich. App. LEXIS 384 (2019) (Exhibit 5 hereto), the Court of Appeals rejected the City's argument:

> Defendants argue that they were entitled to summary disposition of plaintiff's claim for assumpsit because assumpsit has been abolished as a form of action. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich 543, 564, 837 N.W.2d 244 (2013), our Supreme Court recognized that "assumpsit as a form of action was abolished" with the adoption of the General Court Rules in 1963. The Court further stated, however, that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* **Consequently, plaintiff's use of the term "assumpsit" in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded a valid claim**. [emphasis added].[7]

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[7] Finally, in *Huron Valley Outfitters v. Lyon Township,* Oakland Co. Circuit Case No. 20-179677-CK Judge Leo Bowman, also relying on *Fisher Sand*, *supra*, expressly found that the remedies available under a claim for assumpsit were preserved:

> Accepting plaintiff's well-pleaded allegations as true and construing them in the light most favorable to the non-moving party, this Court does not find that plaintiff's claims [are] so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. The parties acknowledge that the *Fisher Sand* Court recognized that "assumpsit as a

Again, Plaintiff's allegations in his Complaint must be taken as true. Because the Complaint alleges that the City imposed water and sewer charges in violation of the common law, statute, and Charter, Plaintiff has properly asserted assumpsit claims in order to provide a substantive remedy for the City's improper collection of the water and sewer charges.

IV. CONCLUSION

None of the City's various grounds for dismissing Plaintiffs' complaint has merit. The Court should deny the City's motion for summary disposition under MCR 2.116(C)(8).

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*

Dated: November 17, 2021

Gregory D. Hanley (P51204)
Attorneys for Plaintiff and the Class

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form of action was abolished" with the adoption of the General Court Rules in 1963 but it preserved "the substantive remedies traditionally available under assumpsit." *Fisher Sand, supra,* at 564. Having reviewed the complaint, this Court finds that plaintiff used the term "assumpsit" in labeling its claim but that does not automatically warrant dismissal. *Adams, supra* at 710-711. **Plaintiff's allegations clearly seek the substantive remedy traditionally available under assumpsit pursuant to its claim that defendant violated common laws when it charged the sewage rates**. Summary disposition pursuant to MCR 2.116(8) is, therefore, inappropriate. [Exhibit 7 at pp. 13-14 (emphasis added).]

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2021, I served the foregoing pleadings on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

4857-7799-7828 v.1

EXHIBIT - 1

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

JAMILA YOUMANS, and all others similarly situated, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED January 7, 2021 APPROVED FOR PUBLICATION March 2, 2021 9:00 a.m.
v	No. 348614 Oakland Circuit Court LC No. 2016-152613-CZ
CHARTER TOWNSHIP OF BLOOMFIELD, Defendant-Appellant/Cross-Appellee.	

Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based upon a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31, reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The

Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In

addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper

method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water

Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

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[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of

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[4] Heid indicated that the $35,000 estimate was facially reasonable.

"general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of the services that it had previously received from the Township at no charge.

D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using

"notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were

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[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

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[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually

occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively

on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally,

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to

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[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable,"

and “most widespread method” is to per-form “a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service.” The second is an antiquated method that was developed in Maine in 1961 (the “Maine Curve method”). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an “average peak” factor of 2½, thereby estimating the “peak day” (or “peak hour demand”) on the system’s water usage. Subsequently, the utility’s *overall* “peak day requirements” are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of “the Maine Curve” to determine what percentage of the water utility’s gross revenue should be recovered by PFP charges assessed to the given municipality’s general fund.

Heid did not attempt to analyze the Township’s PFP expenses under the preferable ‘fully allocated cost of service study” method because he had inadequate information, and it is “virtually impossible” to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility’s staff members. Rather, for each year at issue in this case, Heid calculated the Township’s public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township’s overall “peak day requirements” using the “average peak” factor of 2½, and he admitted that, if the Township’s actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township’s water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township’s general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility’s gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility’s “end use customers” to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid’s experience, used “from time to time under certain circumstances,” although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan’s auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, “most” water distribution systems in Michigan don’t

even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 *et seq*., which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7

million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to

view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

> blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately \$2.935 million with regard to the "non-rate revenue" claim and about \$2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in

plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'."

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

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[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Hence, an "assumpsit" claim is modernly treated as a claim arising under "quasi-contractual" principles, which represent "a subset of the law of unjust enrichment." *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
>
> * * *
>
> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
>
> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court

in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:

> We held in [*Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 62 S Ct 736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.

* * *

> For these reasons, we hold that 1981 PA 89 [i.e., the public act that last amended MCL 123.141,] did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2)[.] [*Novi*, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id*. at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id*. "Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Shaw v Dearborn*, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[12] See *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent clear evidence of *illegal or improper expenses* included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable") (emphasis added),

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against Rain Tax v City of Detroit*, ___ Mich ___; 937 NW2d 120 (2020). *Shaw v Dearborn*, ___ Mich ___; 944 NW2d 720 (2020).

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. See *id.* at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

Plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be

ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let

alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine Co*, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's

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[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject plaintiff's instant claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on

state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained that

> "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id*. at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id*. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, 329 Mich App 650-652, 664-669, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Shaw*, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
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> * * *
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> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.* [*Shaw*, 329 Mich App at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is

> in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage

> may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up).
>
> * * *
>
> Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a

variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id*. at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id*. at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." See *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

EXHIBIT - 2

Neutral
As of: March 6, 2018 4:51 PM Z

Mercy Servs. v. City of Rochester Hills

Court of Appeals of Michigan

October 21, 2010, Decided

No. 292569

Reporter

2010 Mich. App. LEXIS 2044 *; 2010 WL 4137465

MERCY SERVICES FOR THE AGING, Plaintiff-Appellee/Cross-Appellant, v. CITY OF ROCHESTER HILLS, Defendant-Appellant/Cross-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal dismissed by Mercy Servs. v. City of Rochester Hills, 2011 Mich. LEXIS 1005 (Mich., June 24, 2011)

Prior History: **[*1]** Oakland Circuit Court. LC No. 2008-089295-CK.

Core Terms

annual, service charge, trial court, refund, unjust enrichment, tribunal, taxes, charges, exempt, laches, property tax law, tax exemption, nonprofit, services, unlawfully

Judges: Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right from the trial court's order enjoining it from charging or collecting from plaintiff an annual service charge and denying plaintiff's unjust enrichment claim. On cross-appeal, plaintiff appeals as of right from the same order. Because the trial court had subject matter jurisdiction over this case, and did not err in finding that the property was tax exempt under several independent provisions of the General Property Tax Act (GPTA), MCL 211.1 et seq., we affirm in part. Because the trial court erred in concluding that plaintiff was not entitled to a refund of the annual service charges it has paid from 2002 through 2007, we reverse in part, and remand.

This dispute arises from plaintiff's payment of an annual service charge to defendant in lieu of ad valorem property taxes. Plaintiff is a Michigan nonprofit corporation which owns and operates the Mercy Bellbrook Retirement Community in Rochester Hills, a housing and medical care facility for low and middle income elderly persons. Pursuant to the Michigan State Housing Development Authority Act (MSHDAA), **[*2]** MCL 125.1415a(1), the property, because it is owned by a nonprofit housing corporation, is exempt from all ad valorem property taxes. Further pursuant to that statute, plaintiff "shall pay to the municipality in which the project is located an annual service charge for public services in lieu of all taxes" and the annual service charge "shall not exceed the taxes that would be paid but for this act." MCL 125.1415a(2). Plaintiff has been paying defendant annual service charges since the late 1980s. In February 2008, plaintiff filed suit in the Oakland Circuit Court seeking a declaratory judgment that defendant's annual services charges were illegal, and pursuing a refund of the unlawfully imposed charges it had paid from 2002 through 2007 (approximately $ 1,293,228), under a theory of restitution/unjust enrichment. The trial court determined that the annual service charges were unlawful, but found that laches barred plaintiff's claim for a refund.

On appeal, defendant first contends that the trial court erred in determining that it had subject matter jurisdiction over this case. Whether a trial court had subject matter jurisdiction over a claim presents a question of law that is reviewed **[*3]** de novo. Ryan v Ryan, 260 Mich App 315, 331; 677 NW2d 899 (2004).

According to defendant, the essence of this case concerns whether the subject property is tax exempt under the GPTA and therefore, the case falls squarely

within the tax tribunal's exclusive jurisdiction. The tax tribunal's jurisdiction statute, MCL 205.731, provides, in relevant part:

The tribunal has exclusive and original jurisdiction over all of the following:

> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.

This proceeding is one where plaintiff sought a declaratory judgment that defendant had no right to impose an annual service charge and also pursued a refund of the allegedly unlawful annual service charges imposed in the six years prior to plaintiff filing suit. Annual service charges are not taxes; they are imposed in lieu of taxes. Defendant imposed the charges pursuant to the MSHDAA, which is not a property tax **[*4]** law. MCL 125.1401 states that the purpose of the MSHDAA is to address "a seriously inadequate supply of, and a pressing need for, safe and sanitary dwelling accommodations within the financial means of low income or moderate income families or persons." Accordingly, this is not a proceeding for review of a decision "relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state," within the meaning of MCL 205.731(a). We found no authority to support defendant's argument that, because the annual service charge issue required a preliminary finding of whether the property was tax exempt under the GPTA, this necessarily compels a finding that this case falls within the tax tribunal's exclusive jurisdiction. Neither does this case fall within the ambit of MCL 205.731(b), which pertains to cases for a refund or redetermination "of a tax levied under the property tax laws." There was no tax levied in this case, only an annual service charge in lieu of a tax. And again, defendant levied the annual service charge under the MSHDAA, which is not a property tax law.

The parties both discuss this Court's recently released case **[*5]** of *Kasberg v Ypsilanti Twp*, __ Mich App __; __ NW2d __ (2010). The plaintiffs in *Kasberg* filed suit in the tax tribunal challenging the defendant's tax assessment of the plaintiffs' real property. The plaintiffs alleged that the defendant wrongfully denied them a property tax exemption for nonprofit charitable corporations pursuant to the MSHDAA. The tax tribunal dismissed the case, finding that it lacked jurisdiction because the claimed exemption was a creature of the state's police power under the MSHDAA, not of the GPTA. This Court reversed, finding that the tax tribunal did have jurisdiction over the case because the plaintiffs were challenging an assessment, and that assessment was imposed "under the property tax laws," i.e., the GPTA. *Kasberg* is distinguishable from the instant case. In *Kasberg*, a tax was assessed, and the plaintiffs sought to challenge it seeking a property tax exemption. Here, there was no tax assessed. Despite the fact that *Kasberg*, too, involved an MSHDAA exemption issue, this Court found jurisdiction in Kasberg based on the fact that a tax was assessed on the plaintiff's property, and the plaintiffs challenged that assessment. That scenario is not present **[*6]** here. As such, *Kasberg* does not compel a finding that the tax tribunal has jurisdiction in this case.

Also, there is no merit to defendant's argument that plaintiff was required to comply with MCL 205.735a(3) of the Tax Tribunal Act, which provides:

> Except as otherwise provided in this section or by law, for an assessment dispute as to the valuation or exemption of property, the assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute under subsection (6).

For the reasons discussed above, this is not an assessment dispute. It is a dispute centered on the annual service charge in lieu of a tax. Therefore, plaintiff's failure to bring its claim to the board of review prior to filing suit does not invalidate its claim.

Next, defendant argues on appeal that the trial court erred in finding that the subject property is tax exempt under the GPTA. This Court reviews de novo issues of statutory interpretation. *Universal Underwriters Ins Group v Auto Club Ins Assoc, 256 Mich App 541, 544; 666 NW2d 294 (2003)*.

The trial court held that the subject property was exempt from all taxes pursuant to three independent provisions in the GPTA: MCL 211.7o(7), **[*7]** MCL 211.7o(8), and MCL 211.7r. Plaintiff had also argued that the property was exempt pursuant to MCL 211.7o(1), but the trial court did not address that provision. MCL 211.7o(7) provides:

> A charitable home of a fraternal or secret society, or a nonprofit corporation whose stock is wholly owned by a religious or fraternal society that owns and operates facilities for the aged and chronically

ill and in which the net income from the operation of the corporation does not inure to the benefit of any person other than the residents, is exempt from the collection of taxes under this act.

Plaintiff is a nonprofit corporation that is wholly owned by an order of the Roman Catholic Church. Plaintiff owns and operates the subject property, which is a housing and medical care facility for low and middle income elderly persons. Many of the residents of the property suffer from serious medical illnesses and the facility provides 24/7 medical care by physicians, nurses, and other health care professionals. Plaintiff does not pay any shareholder dividends, and any net income derived from the property is applied to pay for the cost of the property's operation. Therefore, plaintiff meets the criteria **[*8]** and defendant does not dispute the establishment of the criteria for tax exemption under MCL 211.7o(1). In light of this conclusion, we need not address the alternate GPTA provisions under which plaintiff claims exemption.

Finally, on cross-appeal, plaintiff argues that the trial court erred in dismissing its unjust enrichment claim. Whether a claim for unjust enrichment can be maintained is a question of law, which this Court reviews de novo. Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 193; 729 NW2d 898 (2006). Also reviewed de novo is a trial court's dispositional ruling on an equitable matter. *Id*.

Plaintiff has been paying defendant annual service charges since the 1980s. The trial court held, and we agree, that defendant unlawfully imposed these charges. Plaintiff paid defendant approximately $ 1,293,327.59 in annual service charges from 2002 through 2007 alone. Because the statute of limitations for unjust enrichment claims is six years, plaintiff brings an unjust enrichment claim seeking restitution in the form of a refund of annual service charges for the six-year period that preceded the filing of the complaint. See MCL 600.5813 (stating that "[a]ll other personal **[*9]** actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.") and MCL 600.5815 (stating that "[t]he prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought."). Although defendant questions whether the statute of limitations is actually six years, it presents no authority to suggest an alternate time period.

In order to sustain a claim of unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. Morris Pumps, 273 Mich App at 195. Plaintiff paid defendant approximately $ 1,293,327.59 in annual service charges from 2002 through 2007. Defendant had no legal right to impose an annual service charge. Plaintiff was unaware of the impropriety of the charges, and therefore, simply paid what defendant asked. Defendant does not contest that this money constituted a benefit to it bestowed by plaintiff. But an inequity plainly resulted to plaintiff when defendant retained improperly imposed annual **[*10]** services charges.

We are not persuaded by the trial court's reasoning supporting its denial of plaintiff's unjust enrichment claim. The trial court found that it would be inequitable to compel defendant to return the money "when plaintiff actually received and knew it was receiving benefits for fees paid for [public] services including police and fire protection." The fact that plaintiff's property is exempt from taxes and annual service charges by mandate of statute manifests the Legislature's intent that a nonprofit corporation like plaintiff, so long as it meets certain requirements, is not obligated to pay taxes or annual service charges despite the fact that it may receive benefits from the city in the form of public services. Although it is true that it would be burdensome for defendant to have to return to plaintiff six years worth of annual service charges on which defendant has relied, this does not render a refund inequitable. Defendant was never entitled to the annual services charges in the first place. In essentially all cases where a party has been unjustly enriched, it would be burdensome to the enriched party to require it to return the benefit; this alone is insufficient **[*11]** to defeat an unjust enrichment claim.

Furthermore, the trial court's finding that laches applied to bar plaintiff's claim is unpersuasive. The doctrine of laches reflects the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust. Lothian v Detroit, 414 Mich 160, 168; 324 NW2d 9 (1982). To properly invoke the doctrine of laches, the defendant must show (1) a passage of time, (2) prejudice to the defendant, and (3) lack of diligence on the part of the plaintiff. Eberhard v Harper-Grace Hospitals, 179 Mich App 24, 38; 445 NW2d 469 (1989). The doctrine of laches may be applied if "compelling equities" or "exceptional circumstances" exist. Id. at 37. A lack of diligence on the

part of a plaintiff may provide the "compelling equities" necessary to invoke the doctrine of laches. Id. at 39. Furthermore, in cases displaying "compelling equities," laches may be invoked without reference to any statute of limitations period and, therefore, a claim may be held to be barred by laches early in a lawsuit before the applicable statute of limitations period has expired. Lothian, 414 Mich at 170.

Defendant **[*12]** has not shown that it has been prejudiced, nor that plaintiff acted with a lack of diligence. Prior to its hiring an expert in 2006 to investigate the propriety of the annual service charges, plaintiff reasonably assumed that the charges, particularly as they were assessed by a governmental agency, were due and owing. Once plaintiff determined that the annual service charges were being unlawfully imposed, it conveyed this to defendant and requested that defendant cease billing it and refund past collections. Defendant refused. Plaintiff then brought suit in February 2008. On these facts, defendant cannot demonstrate a lack of diligence on plaintiff's part which has prejudiced defendant. Accordingly, the trial court erred in denying plaintiff's restitution claim. There is no adequate remedy at law for plaintiff because the MSHDAA contains no mechanism by which a property owner may be refunded an unlawfully imposed annual service charge. Plaintiff is therefore entitled to the equitable remedy of a refund of the annual service charges it paid from 2002 through 2007. See Romulus City Treasurer v Wayne County Drain Com'r, 413 Mich 728, 746-747; 322 NW2d 152 (1982) (finding that where funds **[*13]** are unlawfully collected by a governmental entity, the circuit court is empowered to order a refund).

Affirmed in part, reversed in part, and remanded. We reverse the portion of the order appealed denying plaintiff's unjust enrichment claim, and affirm the remaining portions of the order. We remand to the trial court with a directive that it order defendant to refund to plaintiff the annual service charges paid to it by plaintiff from 2002 through 2007. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio

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EXHIBIT - 3

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

KEVIN LOGAN, Individually and on Behalf of All others Similarly Situated,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF WEST BLOOMFIELD,

Defendant-Appellee.

UNPUBLISHED
February 18, 2020

No. 333452
Oakland Circuit Court
LC No. 2015-149134-CZ

ON REMAND

Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

As noted in our prior opinion, "[p]laintiffs brought a self-styled class-action suit against West Bloomfield Charter Township, challenging fees levied by the township's building division" and raising both equitable and legal claims. *Logan v West Bloomfield Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued January 11, 2018 (Docket No. 333452) (*Logan I*), slip op at 1. We vacated the circuit court order partially granting summary disposition in the township's favor. *Id*. The township applied for leave to appeal to the Supreme Court, which ultimately vacated our judgment and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204; 934 NW2d 713 (2019) (*MAHB*), and *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). *Logan v West Bloomfield Charter Twp*, ___ Mich ___; 935 NW2d 42 (2019). *MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order.

I. BACKGROUND

We succinctly outlined the relevant background of this case in *Logan I*, slip op at 1-2, as follows:

> Plaintiffs' putative class action complaint against West Bloomfield Charter Township alleges that the township's building division charged excessive fees, generated a profit, and deposited the extra money in the township general fund "to finance other operations." The class representative[1] asserted that he and others were forced to pay into this illegal municipal enterprise when applying for building permits. Through this system, plaintiffs alleged, the township violated the Stille-DeRossett-Hale single state construction code act (CCA), MCL 125.1501 *et seq.* Plaintiffs alleged that the township also violated the Headlee Amendment, Const 1963, Art 9, § 31,[2] by charging fees that exceeded the reasonable cost of its building division services as the fees had "the effect of a tax increase that was not authorized by a majority of the electorate . . . ." Plaintiffs ultimately raised four counts in their complaint: (1) statutory violation of the CCA, (2) violation of the Headlee Amendment, (3) unjust enrichment premised on the township's violation of the CCA, and (4) a request for permanent injunctive relief against imposition of the challenged fees.
>
> The circuit court summarily dismissed plaintiffs' complaint in part upon the township's motion. The court dismissed the class plaintiffs' and Logan's individual Headlee Amendment claims arising before September 16, 2014, on statute of limitations grounds pursuant to MCR 2.116(C)(7). Plaintiffs do not challenge this ruling.
>
> The township contended that plaintiffs' claims for unjust enrichment and for violation of the CCA were "derived from the Headlee Amendment Claim" and therefore were also time barred. Plaintiffs retorted that the claims were "distinct causes of action requiring different proofs." The circuit court avoided deciding this issue, ruling instead that "there is no private cause of action for a refund or damages under the CCA" according to the plain language of the act and that "there is no cause of action for unjust enrichment arising out of the Headlee Amendment

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[1] Kevin Logan raised individual claims as well.

[2] The Headlee Amendment provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .

violation."[3] In relation to the latter, the court ruled that equitable relief was precluded in plaintiffs' Headlee Amendment claim because "there is already a fully [sic], complete, and adequate legal remedy." Accordingly, the court dismissed the CCA and unjust enrichment claims under MCR 2.116(C)(8). Only plaintiffs' request for injunctive relief to prevent future excessive fees remained.

> We granted leave to appeal limited to the issue of whether the circuit court erred when it dismissed plaintiffs' unjust enrichment claim premised on the township's alleged violation of the CCA (not the Headlee Amendment as incorrectly posited in the circuit court's opinion) pursuant to MCR 2.116(C)(8). *Logan v Charter Twp of West Bloomfield*, unpublished order of the Court of Appeals, entered November 30, 2016 (Docket No. 333452). Plaintiffs contend that the circuit court erred because: (1) they were permitted to plead alternative and inconsistent causes of action, and (2) the circuit court incorrectly ruled that plaintiffs were precluded from raising a claim of unjust enrichment premised on MCL 125.1522(1) where that statute did not expressly provide a legal remedy for violations of its provisions.

We ultimately concluded in *Logan I*, slip op at 4, that MCL 125.1522(1) of the CCA did not preclude a plaintiff from raising an unjust enrichment claim relating to a violation of the statute. We further held that under the court rules, plaintiffs could raise inconsistent claims in their complaint—one for unjust enrichment in relation to a violation of the CCA and one for a legal remedy in relation to a violation of the Headlee Amendment. *Id.*

II. ANALYSIS

Genesee Co and *MAHB* further support that the circuit court improperly summarily dismissed plaintiffs' unjust enrichment claim stemming from the township's violation of the CCA.

Relevant to the current matter, in *MAHB*, 504 Mich at 207, the Supreme Court held that the city of Troy violated MCL 125.1522(1) of the CCA by charging excessive fees for the city's Building Inspection Department's public services in order to generate a revenue to pay off the department's existing deficit. Just as we found in *Logan I*, the Supreme Court determined in *MAHB* that MCL 125.1522(1) does not include an "express or implied monetary remedy" for its violation. *MAHB*, 504 Mich at 208. But, the Court concluded, the trade associations who filed suit against the city could "seek declaratory and injunctive relief to redress present and future violations." *Id.*

The background of *MAHB* is different in one important aspect from the current case. In *MAHB*, the plaintiffs filed suit against the city alleging CCA and Headlee Amendment violations, just as here. However, the plaintiffs did not seek relief in the form of unjust enrichment. Instead, they sought injunctive and declaratory relief to end the building department's illegal practices. *Id.* at 209. The Court held that MCL 125.1522(1) "does not explicitly provide for a private cause of

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[3] Plaintiffs had not sought equitable relief in connection with its Headlee Amendment claim, however, only in relation to their challenge under the CCA.

action" and that there was "no indication that the Legislature intended a monetary remedy for a violation" of the statute. *MAHB*, 504 Mich at 223, 225. The Court further noted that a private cause of action would be precluded by the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. *MAHB*, 504 Mich at 224. However, the Court continued, a private cause of action for monetary damages was not "the only mechanism" for enforcing the statute. *Id*. at 225. The plaintiffs could enforce the statute through a preliminary injunction preventing the further collection of excessive fees until the debate was settled in court. *Id*. The plaintiffs could assert an "actual controversy" as they claimed their "economic interests" were affected by the fees and therefore could seek a declaratory judgment that the fees were illegal and could not be assessed in the future. *Id*. at 225-226.

As noted, in the current case, plaintiffs are individuals who seek the return of excessive fees assessed in violation of the CCA. But plaintiffs have not sought redress directly under the statute; rather, plaintiffs claimed that the township was unjustly enriched by the funds collected in violation of the statute. *MAHB* does not address whether such an unjust enrichment claim would be permitted in response to a violation of the CCA.

In *Genesee Co*, the Supreme Court considered the nature of an unjust enrichment claim. In that case, the defendant county served as the administrator for its employees' Blue Cross healthcare plan. Blue Cross conducted a multiyear audit and discovered that the county had collected "millions of dollars" more insurance premiums from its employees than it should have charged. The plaintiff, the county's drain commissioner, filed suit seeking his pro rata refund of the premium overpayment, raising claims in contract and tort (conversion and fraud). *Genesee Co*, 504 Mich 414-415. In an amended complaint, the plaintiff added an unjust enrichment count based on the county's wrongful retention of the overpayed insurance premiums. *Id*. at 416. The trial court dismissed the plaintiff's tort claims as barred by the GTLA, and this Court affirmed that ruling. This Court and the Supreme Court agreed with the trial court, too, that the unjust enrichment claim was not barred by governmental immunity. *Id*.

The Court described unjust enrichment as follows:

> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. It is grounded in the idea that a party shall not be allowed to profit or enrich himself inequitably at another's expense. A claim of unjust enrichment can arise when a party has and retains money or benefits which in justice and equity belong to another. [*Id*. at 417-418 (cleaned up).[4]]

The remedy for a tort and sometimes a contractual breach, the Court held, is compensatory damages. *Id*. at 419. But, "[t]he remedy for unjust enrichment is restitution." *Id*. at 418.

[4] This opinion uses the parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

> Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position. [*Id*. at 419 (cleaned up).]

The Court alternatively explained, "[U]njust enrichment claims based in equity [historically] involved remedies other than money judgments, including the establishment of constructive trusts, equitable liens, subrogation, and accounting." *Id*. at 421. Ultimately, the Court asserted:

> Unjust enrichment has evolved from a category of restitutionary claims with components in law and equity into a unified independent doctrine that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's wrongful behavior. Both the nature of an unjust-enrichment action and its remedy—whether restitution at law or in equity—separate it from tort and contract. [*Id*. at 422.]

The current matter is similar to *Genesee Co* in that while the plaintiffs in both actions do seek money from the defendants, the money is not meant as compensation. Rather, plaintiffs in this action, like the plaintiff in *Genesee Co*, seek the return of monies paid over to defendant that should not have been charged in the first instance and therefore was unjustly held by defendant. Requesting the return of the funds was not a tort or contract action, but an action to divest the township of benefits unjustly retained. As the relief sought is equitable in nature, the claim is not barred by *MAHB*. Accordingly, we again conclude that the circuit court improperly dismissed plaintiffs' unjust enrichment claim.

We vacate the summary disposition judgment in relation to plaintiffs' unjust enrichment claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

EXHIBIT - 4

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As of: February 8, 2018 7:25 PM Z

Logan v. Charter W. Bloomfield

Court of Appeals of Michigan

January 11, 2018, Decided

No. 333452

Reporter
2018 Mich. App. LEXIS 89 *; 2018 WL 383751

KEVIN LOGAN, Individually and on Behalf of All others Similarly Situated, Plaintiffs-Appellants, v CHARTER TOWNSHIP OF WEST BLOOMFIELD, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Oakland Circuit Court. LC No. 2015-149134-CZ.

Core Terms

township, unjust enrichment, plaintiffs', legal remedy, circuit court, equitable relief, cause of action, equitable, Charter, appeals

Judges: Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

Opinion

PER CURIAM.

Plaintiffs brought a self-styled class-action suit against West Bloomfield Charter Township, challenging fees levied by the township's building division. Their complaint asserted equitable and legal claims. The circuit court granted partial summary disposition to the township, ruling that plaintiffs could not seek equitable damages when they had an adequate remedy at law, and that a statute underlying one of plaintiffs' legal claims did not authorize an independent cause of action. We granted plaintiffs' application for leave to appeal, and now vacate the circuit court's order.

I. BACKGROUND

Plaintiffs' putative class action complaint against West Bloomfield Charter Township alleges that the township's building division charged excessive fees, generated a profit, and deposited the extra money in the township general fund "to finance other operations." The class representative[1] asserted that he and others were forced to pay into this illegal municipal enterprise when applying for building permits. Through this system, plaintiffs alleged, the township violated the Stille-DeRossett-Hale **[*2]** single state construction code act (CCA), *MCL 125.1501 et seq.* Plaintiffs alleged that the township also violated the Headlee Amendment, *Const 1963, Art 9, § 31*,[2] by charging fees that exceeded the reasonable cost of its building division services as the fees had "the effect of a tax increase that was not authorized by a majority of the electorate . . . ." Plaintiffs ultimately raised four counts in their complaint: (1) statutory violation of the CCA, (2) violation of the Headlee Amendment, (3) unjust enrichment premised on the township's violation of the CCA, and (4) a request for permanent injunctive relief against imposition of the challenged fees.

The circuit court summarily dismissed plaintiffs' complaint in part upon the township's motion. The court dismissed the class plaintiffs' and Logan's individual Headlee Amendment claims arising before September 16, 2014, on statute of limitations grounds pursuant to **[*3]** *MCR 2.116(C)(7)*. Plaintiffs do not challenge this ruling.

The township contended that plaintiffs' claims for unjust enrichment and for violation of the CCA were "derived from

[1] Kevin Logan raised individual claims as well.

[2] The Headlee Amendment provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .

the Headlee Amendment Claim" and therefore were also time barred. Plaintiffs retorted that the claims were "distinct causes of action requiring different proofs." The circuit court avoided deciding this issue, ruling instead that "there is no private cause of action for a refund or damages under the CCA" according to the plain language of the act and that "there is no cause of action for unjust enrichment arising out of the Headlee Amendment violation."[3] In relation to the latter, the court ruled that equitable relief was precluded in plaintiffs' Headlee Amendment claim because "there is already a fully [sic], complete, and adequate legal remedy." Accordingly, the court dismissed the CCA and unjust enrichment claims under MCR 2.116(C)(8). Only plaintiffs' request for injunctive relief to prevent future excessive fees remained.

We granted leave to appeal limited to the issue of whether the circuit court erred when it dismissed plaintiffs' unjust enrichment claim premised on the township's alleged violation of the CCA (not the Headlee Amendment as incorrectly posited in the circuit court's opinion) pursuant to MCR 2.116(C)(8). *Logan* ***[*4]*** *v Charter Twp of West Bloomfield*, unpublished order of the Court of Appeals, entered November 30, 2016 (Docket No. 333452). Plaintiffs contend that the circuit court erred because: (1) they were permitted to plead alternative and inconsistent causes of action, and (2) the circuit court incorrectly ruled that plaintiffs were precluded from raising a claim of unjust enrichment premised on MCL 125.1522(1) where that statute did not expressly provide a legal remedy for violations of its provisions.

II. ANALYSIS

> We review a trial court's decision on a motion for summary disposition de novo. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. We must accept all wellpleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery. [*Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

The Michigan Supreme Court has explained that a court

> may grant equitable relief "[w]here a legal remedy is not available[.]" "A remedy at law, in order to preclude a suit in equity, must **[*5]** be complete and ample, and not doubtful and uncertain . . . ." Furthermore, to preclude a suit in equity, a remedy at law, "both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . ." While legislative action that provides an adequate remedy by statute precludes equitable relief, the absence of such action does not. This is so because "[e]very equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." [*Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010) (citations omitted).]

Accordingly, the Legislature may preclude equitable relief by specifically including a legal remedy in a statute or act. Where the Legislature neither includes nor expressly excludes a legal remedy, equitable relief might remain available.

This Court outlined the remedy of unjust enrichment in *AFT Mich v Michigan*, 303 Mich App 651, 677; 846 NW2d 583 (2014), aff'd sub nom *AFT Mich v State of Michigan*, 497 Mich 197 (2015), as follows:

> Unjust enrichment is an equitable doctrine. It is the equitable counterpart of a legal claim for breach of contract. Unjust enrichment of a person occurs when he has and retains money **[*6]** or benefits which in justice and equity belong to another. [I]n order to sustain a claim of . . . unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. [Quotation marks and citations omitted, alterations in original.]

The statute at issue in this case—MCL 125.1522(1)—neither provides a legal remedy nor expressly excludes a plaintiff from seeking recourse:

> The legislative body of a governmental subdivision shall establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of **[*7]** appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative

[3] Plaintiffs had not sought equitable relief in connection with its Headlee Amendment claim, however, only in relation to their challenge under the CCA.

> body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose.

Although the circuit court correctly recognized that the statute did "not expressly allow a private cause of action for recovery of fees collected in violation of its provisions," it failed to take the next, necessary step; the court did not ask whether *any* remedy was available to plaintiffs with regard to their claim that the township had violated MCL 125.1522(1). And plaintiffs did properly state an unjust enrichment claim.

In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint **[*8]** in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count.

However, the township alternatively contends that plaintiffs' CCA challenge is duplicative of their Headlee Amendment challenge and that plaintiffs have an adequate legal remedy for that violation. Accordingly, the township asserts, dismissal of plaintiffs' claim for unjust enrichment under the CCA would still be appropriate as time-barred. But the township disregards MCR 2.111(A)(2)(b). The court rule provides, "Inconsistent claims or defenses are not objectionable. A party may . . . state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or on both." MCR 2.116(C)(8) is not a proper vehicle to dismiss properly raised, although inconsistent, alternative grounds for relief. MCR 2.116(C)(8) only concerns the legal sufficiency of a claim and whether a party has stated a claim on which relief could be granted. *Zaher, 300 Mich App at 139*. The summary disposition rule does not preclude plaintiffs from investigating the factual support for alternative claims in discovery. And the unjust enrichment claim based on the **[*9]** CCA is not fettered by the same short limitations period.

In their CCA claim, plaintiffs assert that the township's building division fees were unreasonable and misappropriated for non-building division purposes in violation of MCL 125.1522(1). In the Headlee Amendment claim, plaintiffs contended that the township's fees were actually an illegal tax. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Jackson Co v City of Jackson, 302 Mich App 90, 99; 836 NW2d 903 (2013)* (quotation marks and citation omitted). "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax,' on the other hand, is designed to raise revenue." *Bolt v Lansing, 459 Mich 152, 161; 587 NW2d 264 (1998)* (citations omitted). "[T]hree primary criteria" guide a court's determination: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) a fee is voluntary. *Id. at 161-162*. While the factual considerations are similar and interrelated, plaintiffs were not required to exclusively allege one claim over the other. Moreover, given that there is no "bright-line test" for a Headlee Amendment claim, it is entirely **[*10]** possible that plaintiffs' Headlee Amendment claim might fail, leaving them without an adequate legal remedy absent their unjust enrichment claim. Therefore, it was appropriate for plaintiffs to raise both claims in their complaint.

We vacate the summary disposition judgment in relation to plaintiffs' unjust enrichment claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher

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EXHIBIT - 5

Cited
As of: November 16, 2021 8:36 PM Z

Woodland Condos. Homeowners Ass'n v. Fannie Mae

Court of Appeals of Michigan

February 28, 2019, Decided

No. 339850

Reporter

2019 Mich. App. LEXIS 384 *; 2019 WL 982924

WOODLAND CONDOMINIUMS HOMEOWNERS ASSOCIATION, INC, Plaintiff/Counterdefendant-Appellee, FEDERAL NATIONAL MORTGAGE ASSOCIATION, also known as FANNIE MAE, Defendant-Appellant, and DITECH FINANCIAL, LLC, Defendant/Counterplaintiff/Cross-Plaintiff-Appellant, and FUTURE HOLDINGS, LLC, Defendant/Cross-Defendant, and MARY ANN WUJCIAK, Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Genesee Circuit Court. LC No. 16-107570-CH.

Core Terms

summary disposition, restoration, repair, insurance proceeds, feasible, defendants', plaintiff's claim, trial court, reconstruction, mortgage contract, quotation, mortgage, marks, genuine issue of material fact, conversion, assumpsit, funds, matter of law, proceeds, parties, condominium unit, pleadings, costs, opposing party, own motion, motions

Judges: Before: TUKEL, P.J., and SHAPIRO and GADOLA, JJ.

Opinion

PER CURIAM.

Defendants Federal National Mortgage Association ("Fannie Mae") and Ditech Financial, LLC ("Ditech"), formerly known as Green Tree Servicing, LLC, appeal by leave granted the trial court's order denying their motion for summary disposition pursuant to *MCR 2.116(C)(10)* (no genuine issue of material fact). We reverse and remand for entry of summary disposition in favor of defendants.

I. FACTS AND PROCEEDINGS

Plaintiff is the homeowners association for the Woodland condominium development. Mary Ann Wujciak owned a condominium unit in the development. At all times relevant to these proceedings, Ditech was the servicer of a mortgage owned by Fannie Mae that secured a purchase money loan for the unit. The development was insured by a master policy issued by Farm Bureau General Insurance Company to plaintiff covering the standard condominium unit for fire and other damage. The Farm Bureau master policy identified plaintiff and Ditech as parties with an insurable interest in Wujciak's unit.

The mortgage contract between Ditech and Wujciak contained the following provision addressing insurance proceeds:

> In the **[*2]** event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. *Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened*. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and **[*3]** shall be the sole obligation of Borrower. *If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower*. Such insurance proceeds shall be applied in the order provided for in Section 2. [Emphasis added.]

Plaintiff's bylaws, Article V, Sections 4, 5, and 8, state:

> Section 4. ASSOCIATION RESPONSIBILITY FOR REPAIR. Except as otherwise provided in the Master Deed and in Section 3 hereof, the Association shall be responsible for the reconstruction, repair and maintenance of the Common Elements. Immediately after a casualty causing damage to property for which the Association has the responsibility of maintenance, repair and reconstruction, the Association shall obtain reliable and detailed estimates of the cost to replace the damaged property in a condition as good as that existing before the damage. *If the proceeds of insurance are not sufficient to defray the estimated costs of reconstruction or repair required to be performed by the Association*, or if at any time during such reconstruction or repair, or upon completion of such reconstruction **[*4]** or repair, *the funds for the payment of the costs thereof are insufficient, assessment shall be made against all Co-owners for the cost of reconstruction or repair of the damaged property in sufficient amounts to provide funds to pay the estimated or actual cost of repair*. [Emphasis added.]
>
> Section 5. TIMELY RECONSTRUCTION AND REPAIR. If damage to Common Elements or a Unit adversely affects the appearance of the Project, the Association or Co-owner responsible for the reconstruction, repair and maintenance thereof shall proceed with replacement of the damaged property without delay, and shall complete such replacement within 6 months after the date of occurrence which caused damage to the property.
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> * * *
>
> Section 8. PRIORITY OF MORTGAGEE INTERESTS. Nothing contained in the Condominium Documents shall be construed to give a Condominium Unit Owner, or any other party, *priority over any rights of first mortgagees of Condominium Units pursuant to their mortgages in*

> *the case of a distribution to Condominium Unit Owners of insurance proceeds* or condemnation awards for losses to or a taking of Condominium Units . . . . [Emphasis added.]

On December 7, 2014, the subject unit was destroyed by a fire. Plaintiff obtained **[*5]** from J.C. Chappell Construction ("Chappell") a quote of $141,000 for the cost of restoring the property. Plaintiff submitted to Farm Bureau a proof of claim. Plaintiff entered into a restoration agreement with Chappell. On April 14, 2015, Farm Bureau issued a check for $87,900, jointly payable to Ditech and plaintiff. Plaintiff's agent, Anna Bincsik-Hawker, endorsed the check on plaintiff's behalf without restriction and delivered the check to Ditech. Ditech deposited the funds into an escrow account pending receipt of further information regarding plaintiff's claim. On July 27, 2015, Ditech issued a check in the amount of $43,950, payable to Wujciak, Chappell, and plaintiff, but the check was returned as undeliverable because Wujciak's address was unknown.

In the meantime, Wujciak failed to make timely payments under her mortgage. A balance of $106,469.91 remained due on Wujciak's mortgage debt. Without informing plaintiff, Ditech decided that restoration of the unit was not feasible because the insurance proceeds were insufficient. Ditech initiated foreclosure by sheriff's sale in December 2016. The proceeds from the sheriff's sale and the insurance payment satisfied Wujciak's mortgage **[*6]** debt in full.

Plaintiff thereafter brought this action against defendants for statutory and common-law conversion, breach of contract, and assumpsit. These claims were based on plaintiff's theory that Ditech's original plan to apply the insurance proceeds to restoration precluded Ditech from subsequently abandoning that plan on the ground that restoration was not feasible. Ditech brought a countercomplaint for a declaratory judgment. Plaintiff moved for summary disposition of Ditech's counterclaim. Defendants also moved for summary disposition pursuant to *MCR 2.116(C)(10)*, arguing that there was no genuine issue of material fact that restoration was not feasible because the insurance proceeds were insufficient to cover the restoration costs. The trial court jointly heard both motions and thereafter issued an opinion and order denying both motions on the basis that there were questions of fact precluding summary disposition in favor of either party. However, the court did not identify the question or questions that it found to be in dispute.

II. SUMMARY DISPOSITION ANALYSIS

A. PROCEDURAL GROUND

Preliminarily, we reject defendants' unpreserved argument that procedural deficiencies in plaintiff's response **[*7]** to defendants' summary disposition motion entitled defendants to summary disposition as a matter of law.

Defendants filed their motion for summary disposition shortly after plaintiff filed its own motion for summary disposition under *MCR 2.116(C)(10)*. Plaintiff's brief in response to defendants' motion simply referenced plaintiff's own motion and supporting brief, and the exhibits submitted with plaintiff's motion, to oppose defendants' motion for summary disposition. Defendants argue that plaintiff's response to their motion was procedurally deficient, entitling them to summary disposition as a matter of law. We disagree. We review de novo issues involving the interpretation and application of court rules. *Lech v Huntmore Estates Condo Ass'n, 315 Mich App 288, 290; 890 NW2d 378 (2016)*.

When a party files a motion for summary disposition under *MCR 2.116(C)(10)*, "[t]he moving party has the initial burden to support its claim for summary

disposition by affidavits, depositions, admissions, or other documentary evidence." *Lockwood v Ellington Twp, 323 Mich App 392, 401; 917 NW2d 413 (2018)* (quotation marks and citation omitted). Once that burden is satisfied, "the party opposing summary disposition under *MCR 2.116(C)(10)* may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material **[*8]** fact exists." *Id.* (quotation marks and citation omitted). Defendants argue that the trial court should have granted their motion for summary disposition because plaintiff failed to submit a properly supported response. Defendants rely on *MCR 2.116(G)*, which provides, in pertinent part:

> (3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required
> (a) when the grounds asserted do not appear on the face of the pleadings, or
>
> (b) when judgment is sought based on *subrule (C)(10)*.
>
> (4) A motion under *subrule (C)(10)* must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under *subrule (C)(10)* is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Defendants argue that plaintiff failed to satisfy the requirements of *subparagraph (G)(4)* **[*9]** by filing a response that merely referenced plaintiff's own motion for summary disposition. Defendants also argue that plaintiff failed to satisfy *MCR 2.119(A)(2)*, which provides that "[a] motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based." Defendants further argue that plaintiff's attempt to incorporate by reference its brief in support of its own motion for summary disposition was ineffective pursuant to *MCR 2.113(G)*, which provides that "[s]tatements in a pleading may be adopted by reference only in another part of the same pleading."

A motion for summary disposition brought under *MCR 2.116(C)(10)* "tests the factual sufficiency of the complaint," and "should be granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Lockwood, 323 Mich App at 400* (quotation marks and citation omitted). Even accepting that plaintiff's response to defendants' motion could be considered procedurally deficient because, standing alone, it did not properly set forth the factual support for plaintiff's opposition to defendant's motion, we are not persuaded that this deficiency entitled defendants to summary disposition **[*10]** as a matter of law under the circumstances of this case.

Defendants and plaintiff had filed competing motions for summary disposition. The motions involved the same legal and factual issues. The trial court had discretion to hear and decide the motions at the same time, cf. *Zaremba Equip, Inc v Harco Nat'l Ins Co, 302 Mich App 7, 21; 837 NW2d 686 (2013)*, which it did. Moreover, a court hearing a summary disposition motion may sua sponte render judgment in favor of the opposing party if it determines that the opposing party is entitled to judgment. *MCR 2.116(I)(2)*. Thus, regardless of whether plaintiff failed to adhere to the formalities for responding to a motion by failing to file an entirely separate brief in response to defendants' motion, the trial court was still permitted to consider plaintiff's cross-motion for

summary disposition, as well as that motion's supporting brief and exhibits, in determining whether plaintiff or defendants were entitled to judgment as a matter of law.

Defendants' reliance on *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc, 285 Mich App 362; 775 NW2d 618 (2009)*, is misplaced. In that case, this Court recognized that a trial court does not have a duty "to *independently* consider *all* the evidence contained in the court record" before granting a motion for summary disposition. *Id. at 375-376*. In this case, plaintiff did not invite the trial court **[*11]** to conduct its own review of the record to determine if the evidence supported finding that there was a genuine issue of material fact that precluded judgment for defendants. Rather, plaintiff referenced the supportive evidence it submitted in support of its own motion for summary disposition, which was properly before the court at the time it considered and decided defendants' cross-motion for summary disposition. Accordingly, defendants are not entitled to relief on this basis. See *id. at 377* ("[I]f a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is 'then filed in the action or submitted by the parties,' the trial court must consider it.").

B. SUBSTANTIVE MERITS OF PLAINTIFF'S CLAIMS

Defendants argue that the trial court erred by finding that genuine issues of material fact precluded summary disposition in their favor with respect to each of plaintiff's claims. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Lockwood, 323 Mich App at 400*. When reviewing a motion under *MCR 2.116(C)(10)*, the court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc, 284 Mich App 25, 29; 772 NW2d 801 (2009)*. "However, the party **[*12]** opposing summary disposition under *MCR 2.116(C)(10)* may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lockwood, 323 Mich App at 401* (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* (quotation marks and citation omitted). A motion brought under *MCR 2.116(C)(10)* is properly "granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id. at 400* (quotation marks and citation omitted).

Additionally, questions concerning the proper interpretation of a contract are questions of law that we review de novo. *McDonald v Farm Bureau Ins Co, 480 Mich 191, 197; 747 NW2d 811 (2008)*.

1. CONVERSION

The civil tort of conversion is defined as "any distinct act of domain wrongfully exerted over another's property in denial of or inconsistent with the rights therein." *Lawsuit Fin, LLC v Curry, 261 Mich App 579, 591; 683 NW2d 233 (2004)* (citation omitted). Statutory conversion requires an additional showing that the defendant "employed the converted property for some purpose personal to the defendant's interests." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc, 497 Mich 337, 358-359; 871 NW2d 136 (2015)*; see also *MCL 600.2919a*.

"To support an **[*13]** action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care." *Lawsuit Fin,*

261 Mich App at 591 (quotation marks and citation omitted). Defendants argue that they cannot be liable for conversion because Ditech was entitled to retain the insurance proceeds pursuant to the mortgage contract and plaintiff's bylaws. "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust, 480 Mich 19, 24; 745 NW2d 754 (2008)*. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *Id.*

The plain language of the mortgage contract unambiguously imposes on Ditech the requirement to apply the proceeds of the property insurance to restoration or repair of the subject unit, (1) *if* the restoration or repair is economically feasible, and (2) *if* Ditech's security is not lessened. The plain language of plaintiff's bylaws provides that the bylaws cannot take **[*14]** priority over the rights of Ditech, as first mortgagee, pursuant to the mortgage contract. It is not disputed that the cost of restoration of the subject unit was $141,000, or that Farm Bureau's insurance payout was $87,900. That left $53,100 unpaid on the restoration contract. Together with the $12,000 paid for demolition, that left a net unpaid balance of $41,100 unpaid. These figures support Ditech's determination that restoration was not feasible because Ditech would be required to pay approximately one-third of the cost of restoration merely to return the subject unit to its status quo ante as security for the loan. Thus, Ditech's security interest would be lessened.

Plaintiff argues that Ditech originally pursued a plan of restoration but abandoned that course without informing plaintiff of its changed decision, and that this conduct should preclude Ditech from contending that restoration was not feasible. Even if plaintiff's frustration with the events is understandable, the circumstances here do not provide a legal basis for concluding that Ditech had no right to apply the insurance proceeds to Wujciak's unpaid loan balance. The mortgage contract did not require Ditech to give **[*15]** plaintiff notice or to consult with plaintiff before applying the proceeds to Wujciak's debt. The mortgage contract did not prohibit Ditech from effectively rescinding the $43,950 check after it failed in its efforts to deliver the check to Wujciak for her endorsement.

Plaintiff also asserts that there is a question of fact regarding the feasibility of restoration because the $87,900 payment would be supplemented by the insurance payments for debris removal and depreciation, and by plaintiff's $30,000 contribution. Plaintiff asserts that the $144,000 sum of the $87,900 payment, its own $30,000 expenditure, the $12,000 insurance payment for demolition and debris removal, and the depreciation check for $14,100, was sufficient to pay Chappell's $141,000 total cost. However, the notation in Farm Bureau's record that plaintiff "had to use" $30,000 from its own savings account because Ditech "has not released any funds" indicates that plaintiff was not contributing part of the cost to supplement the insurance deficiency, but instead acting on the expectation that it would eventually receive payment from Ditech. There is no evidence that plaintiff attempted to negotiate a shared cost arrangement **[*16]** with Ditech. Under these circumstances, plaintiff cannot establish a question of fact whether Ditech should have known that restoration was feasible despite the substantial difference between the insurance proceeds and restoration costs.

Plaintiff also argues that defendants are estopped from claiming that reconstruction was not feasible because defendants originally agreed to reconstruction by issuing the check for $43,950 payable to Chappell, Wujciak, and plaintiff. "Estoppel arises where a party, by

representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." Wigfall v Detroit, 322 Mich App 36, 43; 910 NW2d 730 (2017). Defendants did not misrepresent facts related to the feasibility of reconstruction. Plaintiff and defendants had access to the same facts concerning Chappell's estimate and Farm Bureau's resolution of the claim. The response to an e-mail in August 2016, from Farm Bureau's claims specialist, Thomas Nault, to plaintiff's board member, Jacqueline Gutierrez, showed that plaintiff expected payment in addition to the $87,900 and **[*17]** smaller payments already received, contrary to the adjuster's report issued on July 6, 2015. Defendant, however, was not responsible for plaintiff's misunderstanding.

Accordingly, the trial court erred by denying defendants' motion for summary disposition with respect to plaintiff's claims for conversion.

2. BREACH OF CONTRACT

To prevail on a claim for breach of contract, a plaintiff must prove the following elements: "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." Bank of America, NA v First American Title Ins Co, 499 Mich 74, 100; 878 NW2d 816 (2016). "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." Id. at 101 (quotation marks and citation omitted).

Defendants assert that they were entitled to summary disposition on plaintiff's claim for breach of contract because there was no evidence of a contract between plaintiff and defendants. We agree.

Plaintiff addresses this argument indirectly, by stating that Ditech "breached the contract implied by the mortgage by applying the proceeds of Woodland's insurance to Wujciak's loan." Plaintiff does not identify **[*18]** any transaction, document, or communication in which plaintiff and Ditech entered into a contract. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." Mudge v Macomb Co, 458 Mich 87, 105; 580 NW2d 845, 854 (1998) (quotation marks and citation omitted).

Here, plaintiff was not a party to the mortgage contract between defendants and Wujciak. Plaintiff claims that the mortgage contract language did not give Ditech discretion on whether to apply the insurance proceeds, but plaintiff does not claim status as a third-party beneficiary to the contract. Plaintiff and Ditech were parties to the insurance policy as insureds, but the policy does not govern application of proceeds toward repair cost and debt satisfaction.

For these reasons, the trial court erred by denying defendants' motion for summary disposition with respect to plaintiff's claim for breach of contract.[1]

3. ASSUMPSIT

Defendants argue that they were entitled to summary disposition of plaintiff's claim for assumpsit because assumpsit has been **[*19]** abolished as a form of action. In Fisher Sand & Gravel Co v Neal A Sweebe, Inc, 494

[1] In light of our decision on this issue, it is unnecessary to address defendants' additional argument that any oral contract would have been unenforceable under the statute of frauds, MCL 566.132.

Mich 543, 564; 837 N W2d 244 (2013), our Supreme Court recognized that "assumpsit as a form of action was abolished" with the adoption of the General Court Rules in 1963. The Court further stated, however, that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* Consequently, plaintiff's use of the term "assumpsit" in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded a valid claim. See also *Adams v Adams (On Reconsideration), 276 Mich App 704, 710-711; 742 NW2d 399 (2007)* ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

Plaintiff alleged in Count III that (1) it was the owner of the insurance proceeds with the right to immediate possession of the funds for restoration costs; (2) defendants were holding the funds; and (3) defendants were unjustly enriched by exercising dominion over the funds. In substance, this claim was a reiteration of plaintiff's conversion claim. This is a valid theory of relief, but as already addressed, there is no evidentiary support for plaintiff's claim that defendants were not **[*20]** entitled to apply the funds to satisfy the mortgage debt. Accordingly, the trial court should have granted defendants' motion for summary disposition with respect to this claim.

III. CONCLUSION

All of plaintiff's claims against defendants lacked evidentiary support because the mortgage contract authorized defendants to apply the insurance proceeds toward satisfaction of Wujciak's mortgage debt if restoration and repair of the property was not feasible. There was no genuine issue of material fact that restoration was not feasible because the insurance proceeds were insufficient to pay the restoration cost of $141,000. The trial court therefore erred by denying defendants' motion for summary disposition on plaintiff's claims. This matter is remanded for entry of an order granting defendants' motion for summary disposition.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants, as to plaintiff's claims. We do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs pursuant to *MCR 7.219*.

/s/ Jonathan Tukel

/s/ Douglas B. Shapiro

/s/ Michael F. Gadola

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EXHIBIT - 6

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM SCOTT KINCAID, ERAINA POOLE, GEORGE POOLE, and MARY B. BELL,

Plaintiffs-Appellees,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
April 16, 2020

Nos. 337972; 337976
Genesee Circuit Court
LC No. 12-098490-CZ

ON REMAND

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

This case, which involves a dispute over utility pricing in the City of Flint, returns to this Court on remand from the Supreme Court. *Kincaid v City of Flint*, 505 Mich 882 (2019) (*Kincaid V*). The Supreme Court has directed this Court to reconsider plaintiffs' unjust enrichment claim in light of *Wright v Genesee Co Bd of Comm'rs*, 504 Mich 410; 934 NW2d 805 (2019), and, "if necessary," to consider "the issues raised by the defendant" that this Court did not address in its initial review. In accordance with our Supreme Court's directive, we now consider defendant, the City of Flint's, argument that the trial court erred by denying summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

The underlying factual dispute was set forth by this Court in *Kincaid v City of Flint*, 311 Mich App 76, 77-80; 874 NW2d 193 (2015) (*Kincaid II*):

> On August 15, 2011, defendant's finance director, Michael Townsend, sent to the city council and mayor a notice of a proposed 35% water and sewer rate increase to be effective September 6, 2011. The increase was proposed to meet a projected fiscal year deficit in the sewer fund of $14,789,666 as well as a water fund deficit of $8,078,917. The city council adopted the proposal and the mayor signed it.

Shortly thereafter, defendant was declared to be in a state of financial emergency. On November 28, 2011, Governor Rick Snyder appointed Michael Brown as defendant's Emergency Manager (EM). On May 30, 2012, after he was informed by newly appointed finance director, Gerald Ambrose, of the financial disarray of defendant's water and sewer funds, EM Brown created Emergency Order No. 31. Order No. 31 ratified and confirmed the water and sewer rates implemented under former finance director Townsend on September 16, 2011, and additionally raised water and sewer rates, 12.5% and 45%, respectively, effective July 1, 2012.

After the emergency order by EM Brown, plaintiffs in this suit filed a complaint seeking this Court's original jurisdiction pursuant to Const. 1963, art. 9, §§ 31 and 32. The claim of error was that defendant violated the Headlee Amendment. This Court dismissed plaintiffs' claims without a hearing, finding that the rate increases from September 2011 and those set to take place in July 2012 were "revisions of existing user fees that do not implicate the Headlee Amendment." *Kincaid v Flint*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 310221) [(*Kincaid I*)]. Plaintiffs' claims not relating to the Headlee Amendment were dismissed for lack of original jurisdiction. *Id.*

After the case before this Court was dismissed, plaintiff filed the instant action. The essence of this case is a claim that the rate increases in September 2011 were made contrary to defendant's Ordinances § 46–52.1 and § 46–57.1, and a claim that defendant had illegally pooled the [money] collected for the water and sewer funds and used [it] to pay general obligations not related to sewer or water expenses. Plaintiffs requested that the trial court certify a class action suit against defendant by all sewer and water customers of defendant, declare that the rate increases were an illegal tax under the Headlee Amendment, and order the commingling of funds to cease. Additionally, plaintiffs asked for monetary relief in the form of a refund of the illegally collected rates and for damages caused to defendant's residents who were left without water and sewer service.

In lieu of filing an answer, defendant moved the trial court to grant it summary disposition pursuant to MCR 2.116(C)(6), (7), and (8). However, before defendant's motion for summary disposition was heard, plaintiffs moved the trial court for leave to amend their complaint to allege a violation of MCL 123.141(2) and (3).

Defendant responded to plaintiffs' motion to amend their complaint by arguing that it should be denied as futile. On February 15, 2013, the trial court heard the two outstanding motions. On June 21, 2013, the trial court entered an opinion and order granting summary disposition in favor of defendant. [Footnotes omitted.]

Thereafter, plaintiffs filed an appeal in this Court, arguing that

> (1) water and sewer rate increases that occurred under former finance director Townsend in September 2011 were not authorized by defendant's ordinances, (2) EM Brown did not have the authority to ratify Townsend's unauthorized increases and then further increase water and sewer rates in violation of the same ordinances, and (3) defendant wrongly deposited funds from water and sewer revenue into a single pooled cash account. [*Id*. at 82-83.]

With regard to the first of those claims of error, the *Kincaid II* Court agreed with plaintiffs "in part," holding that some of the September 2011 rate increases violated the applicable ordinances. *Id*. at 84. With regard to the second claim of error, this Court agreed with plaintiffs that EM Brown lacked "the authority to ratify a previously unauthorized rate increase[.]" *Id*. at 91. Contrastingly, with regard to the third claim of error, this Court held that the trial court had properly granted summary disposition under MCR 2.116(C)(10), concluding that "plaintiffs provided no evidence that [Flint]'s accounting system was illegal." *Id*. at 93. Finally, this Court held that it was unable to "discern on what basis the trial court denied plaintiffs' motion to amend their complaint;" therefore, this Court remanded that issue with instructions for the trial court "to consider the additional claims in plaintiffs' proposed amended complaint and articulate its reasons for granting or denying the motion." *Id*. at 95.

On remand, the trial court granted plaintiffs leave to file their first amended complaint. In their amended complaint plaintiffs continue to allege that the water and sewer rate increases between January 15, 2011 and September 15, 2011 were contrary to the Flint City Ordinances and that the money collected was illegally pooled with the general fund and was used to pay general obligations unrelated to the sewer or water expenses. In addition, plaintiffs alleged, somewhat confusingly, that defendant violated Ordinance 46-52 when it charged and collected water and sewer rates between July 3, 2006 and June 30, 2012 (or September 15, 2011).[1] Plaintiffs stated legal theories were for breach of contract, or, in the alternative, for unjust enrichment, and throughout the complaint, plaintiffs alleged that defendant's actions were "Ultra Vires." Plaintiffs sought the equitable remedy of "recoupment," but also sought that the "excessive, illegal, and ultra vires" rate increases be refunded to plaintiffs. Plaintiffs also requested declaratory relief in the form of an injunction.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(8). In support, it argued that summary disposition was appropriate under MCR 2.116(C)(7) on dual grounds: (1) because Flint was entitled to immunity under the governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., and (2) because plaintiffs' claims were barred by the three-year period of limitation set forth by MCL 600.5805(10). Regarding MCR 2.116(C)(8), Flint contended that summary disposition of all plaintiffs' claims was appropriate (1) because plaintiffs' "egregiously belated claims" were barred by the equitable

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[1] Without consistency or explanation, the first amended complaint sets forth the time range for the claim starting in 2006 as being "between July 3, 2006 and September 15, 2011" in one part; between "July 3, 2006 and June 30, 2012" in other parts; and as "between June 30, 2012 and July 3, 2006" for other parts.

doctrine of laches, (2) because plaintiffs had failed to plead the claims in their first amended complaint in avoidance of governmental immunity, alleging "ultra vires" acts where none existed, and (3) because the claims were precluded by the res judicata effect of a ruling in related litigation (specifically, the order appealed and decided in *Shears v Bingaman*, unpublished per curiam opinion of the Court of Appeals, issued August 24, 2017 (Docket No. 329776)). Additionally, Flint contended that, in light of this Court's decision in *Kincaid I*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 310221), collateral estoppel precluded plaintiffs from relitigating the issue whether the rate increases at issue were merely "revisions of existing user fees[.]" Defendant further argued that Count V of plaintiffs' first amended complaint (alleging that Flint had improperly commingled funds) was barred by the law of the case doctrine. In particular, Flint noted that in *Kincaid II*, this Court had ruled that plaintiffs failed to present any evidence that the commingling of such funds was unlawful. See *Kincaid II*, 311 Mich App at 93.

The trial court dispensed with oral argument[2] and denied Flint's motion for summary disposition in a written opinion and order. Concerning the preclusive effect of *Shears*, the trial court indicated that it was then unable to decide that issue, noting that it was "not conversant with all of the specifics of the *Shears* litigation" and that the lower court file in *Shears* was unavailable because it had been conveyed to this Court for the then-pending appeal in *Shears*. Nor did the trial court's opinion squarely address Flint's other arguments in favor of summary disposition. Rather, the trial court glossed over those arguments, reasoning as follows:

> Defendant [Flint] has filed a motion to dismiss plaintiffs' first amended complaint on the grounds that the complaint raises issues not contemplated or contained within the original complaint filed by the plaintiffs. If that were not the case, there would be no reason to amend the Complaint. This Court has reviewed the briefs submitted with respect to this motion and the Court finds the plaintiffs' response to be correct. This Court did not rule that an amended complaint could never be filed. The denial was without prejudice. However, to the extent that the amended complaint raises issues that were addressed by [the circuit court] or by the Court of Appeals in the *Shears* case, the Court reserves the right to revisit the question upon the return of the *Shears* file to Genesee County.

Defendant appealed in this Court, alleging that the trial court erred by failing to grant it summary disposition (1) based on governmental immunity under the GTLA, (2) because the local ordinances at issue in this matter do not afford plaintiffs any private cause of action against defendant, (3) for plaintiffs' failure to rebut the strong presumption that those ordinances were not intended to create vested contractual rights, (4) in light of the applicable period of limitations, (5) under the equitable doctrine of laches, (6) under the law of the case doctrine, (7) because collateral estoppel precludes relitigation of previously decided issues, and (8) because res judicata bars all of plaintiffs' claims in this action. In an unpublished per curiam opinion,

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[2] Under MCR 2.119(E)(3), "[a] court may, in its discretion, dispense with or limit oral arguments on motions."

this Court concluded that plaintiffs' claims were barred by res judicata; therefore, we reversed the trial court's order denying summary disposition and remanded for entry of an order granting defendant summary disposition under MCR 2.116(C)(7). *Kincaid v City of Flint*, unpublished order of the Court of Appeals, entered June 26, 2018 (Docket Nos. 337972 and 337976) (*Kincaid III*).[3]

Plaintiffs applied for leave in our Supreme Court, which, as indicated *supra*, vacated our opinion and remanded to this Court to reconsider plaintiffs' unjust enrichment claims and, as necessary, the issues raised by defendant that we declined to address in *Kincaid III*. We do so now.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Per the *Kincaid V* Court's directive, we now consider whether the trial court erred by denying defendant's motion for summary disposition. Our review of a trial court's decision regarding a motion for summary disposition is de novo *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). Likewise, we review de novo whether governmental immunity applies under the GTLA, *Ray v Swager*, 501 Mich 52, 61; 903 NW2d 366 (2017), and whether the applicable statute of limitations bars a claim, *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright*, 504 Mich at 417.

B. ANALYSIS

1. BREACH OF CONTRACT

We first consider whether the trial court erred by denying defendant's motion for summary disposition of Counts I and III of plaintiffs' first amended complaint. Defendant argues that these claims should have been dismissed under MCR 2.116(C)(8). We agree.[4]

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[3] The prior action identified by this Court in *Kincaid III* was *Shears v Bingaman*, unpublished per curiam opinion of the Court of Appeals, issued August 24, 2017 (Docket No. 329776) (*Shears I*). *Shears I*, however, has been vacated in part and remanded to the trial court for further proceedings. *Shears v Bingaman*, 505 Mich 882 (2019) (*Shears II*). Accordingly, because the *Shears* case is again pending in the trial court without any final judgment, and additional appeals may ensue, the decision in *Shears I* cannot be considered a "final" decision for purposes of res judicata. See *In re Bibi Guardianship*, 315 Mich App 323, 333; 890 NW2d 387 (2016). Additionally, we note that on remand the *Shears* case has been stayed pending resolution of the appeal in this case. See register of actions Docket No. 14-103476-CZ available at http://www.co.genesee.mi.us/roaccsinq/default.aspx, last accessed April 8, 2020.

[4] Defendant also asserts that this claim should have been dismissed under MCR 2.116(C)(7). However, because we agree that the court erred by not granting summary disposition under MCR

Summary disposition under MCR 2.116(C)(8) is appropriate if the plaintiff has "failed to state a claim on which relief can be granted." As explained by our Supreme Court in *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

In their first amended complaint, plaintiffs allege that a contract for the provision of water services was created by the Flint City Ordinances. Plaintiffs contend that under the ordinance-created contract defendant is a vendor of water services and plaintiffs, the purchasers of the "water commodity," are defendant's customers. Specifically, in Counts I and III, plaintiffs allege that by violating Ordinances 46-52.1 and 46-57.1, defendant breached its contract with plaintiffs by forcing them to overpay for water and sewer services. In response, defendant argues that no contract was created by the Flint City Ordinances.

"[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance[.]" *Bonner v City of Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). Although the

> venerable principle that a legislative body may not bind its successors can be limited in some circumstances because of its tension with the constitutional prohibitions against the impairment of contracts, . . . such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments. A necessary corollary of these limitations . . . is the strong presumption that statutes do not create contractual rights. [*Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660-661; 698 NW2d 350 (2005) (citations omitted).]

"This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Id*. at 661 (quotation marks and citation omitted). "Thus, the party asserting the creation of a contract must overcome this well-founded presumption, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id*. at 662 (quotation marks and citation omitted). "The first step in this cautious procession is to examine the statutory language itself. In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other

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2.116(C)(8), we decline to consider whether summary disposition was also warranted under (C)(7).

reasonable construction than that the Legislature intended to be bound to a contract." *Id.* (quotation marks and citations omitted). Moreover, "as a general rule, a statute will not be held to have created contractual rights if the Legislature did not covenant not to amend the legislation." *Id.* at 663 (quotation marks and citations omitted).

Flint Ordinance, § 46-52.1 provides:

> CALCULATION OF RATES.
>
> (a) Every year the Director of Finance shall calculate and transmit on or before April 15 to the Mayor and City Council the new water rate schedules with a complete itemization of water system costs for all classes of customers as given in § 46-52, for the purpose of calculating all bills for the forthcoming 12 months beginning July 1 of that year. The new water rate schedules shall be published at least 30 days prior to the date of implementation.
>
> (b) Water rates shall be reviewed annually and the water rate percentage index (WRI) as applied to the water rate schedules shall be limited to an adjustment of 8% in any year unless:
>
> (1) The adjustment is necessary to provide for all costs of operation, maintenance, replacement and debt service of the water supply system; or
>
> (2) The adjustment is necessary to comply with applicable provisions of the City's water supply revenue bond resolutions or ordinances.

Flint Ordinance, § 46-57.1 provides:

> CALCULATION OF RATES.
>
> Every year the Director of Finance shall calculate and transmit, on or before April 15, to the Mayor and City Council the new sewage rate schedules with a complete itemization of sewage system costs for all classes of customers as given in § 46-57, for the purpose of calculating all bills for the forthcoming 12 months beginning July 1 of that year. The new sewage rate schedules shall be published at least 30 days prior to the date of implementation.

Based on the plain language of the ordinances, it is clear that neither Ordinance 46-52.1 nor Ordinance 46-57.1 expressly state any intent to bind defendant contractually with regard to pricing structures. Indeed, in their brief on appeal, plaintiffs admit "that there was no express contract[.]"

Furthermore, assuming arguendo that one could reasonably infer an intent to contract on behalf of Flint based on ordinances 46-52.1 and 46-57.1, such an inference is insufficient. On their face, the ordinances are equally susceptible—if not more so—to a reasonable interpretation that they were merely intended to state Flint's policy with regard to rate calculation. Also fatal to plaintiffs breach of contract claims is that the ordinances did not state (or imply in any way), that Flint would be unable to subsequently amend them. Accordingly, plaintiffs have failed to

rebut the strong presumption that Flint Ordinances, §§ 46-52.1 and 46-57.1, were not intended to bind Flint contractually to any particular pricing schedule. Therefore, the trial court erred by failing to grant Flint summary disposition of plaintiffs' breach of contract claims (Counts I and III) under MCR 2.116(C)(8). We reverse the court's order denying summary disposition with respect to Counts I and III, and remand for entry of an order granting defendant summary disposition on both claims under MCR 2.116(C)(8).

2. UNJUST ENRICHMENT

Defendant next argues that the trial court erred by not summarily dismissing plaintiffs' unjust enrichment claims set forth in Counts II and IV. "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "If this is established, the law will imply a contract in order to prevent unjust enrichment." *Id.* "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id.*

We first consider defendant's argument that the Flint Ordinances at issue here, Flint Ordinances, §§ 46-52.1 and 46-57.1, did not afford plaintiffs a private cause of action. We agree only in part.

"[N]o cause of action can be inferred against a governmental defendant." *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014). Absent "*express* legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity[.]" *Lash*, 479 Mich at 194 (quotation marks and citations omitted; emphasis added). Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions. See *id.* *Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction.").[5] Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's mere violation of a City Ordinance, *Lash*, 479 Mich at 194, but it is equally clear that plaintiffs may maintain a cause of action for a refund of an unlawful exaction.

In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*, Count IV

[5] Modernly, "assumpsit" is often described as an action for an implied contract. *Garcia v McCord Gasket Corp*, 201 Mich App 697, 714; 506 NW2d 912 (1993).

properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. Moreover, as our Supreme Court made clear in *Wright*, a claim for unjust enrichment is not barred by the GTLA. *Wright*, 504 Mich at 422, summary disposition of Count III was not appropriate under MCR 2.116(C)(7).[6]

Turning to Count II (unjust enrichment), plaintiffs argue that defendant "charged and collected an illegal water readiness to serve charge . . . between January 15, 2011 and September 15, 2011" and that defendant "charged and collected an illegal water readiness to service charge . . . between June 30, 2012 and July 3, 2006 [sic]." Although plaintiffs allege that by receiving the "unauthorized/illegal water service charge payments" defendant "unjustly received" a benefit from plaintiffs in breach of an implied contract for the above timeframes, nothing in Count II specifically identifies *why* the water service charge was illegal or unauthorized. Turning to other sections of the first amended complaint, plaintiffs allege that defendant violated Flint City Ordinance, § 46-52(b)(1), which provides that "[w]here the customer has a remote water meter and the bills are for residential, small commercial and industrial accounts, a readiness-to-serve charge shall apply. The charges shall be established from time to time by resolution of the City Council, kept on file by the City Clerk, and contained in Appendix A of the City Code." Plaintiffs alleged that the resolution required by Ordinance 46-52(b)(1) was not kept on file or contained in Appendix A of the City Code at the times relevant to this lawsuit. Accordingly, based on consideration of the entire first amended complaint, it appears that the unjust enrichment claim stated in Count II is premised on defendant's alleged violation of Ordinance, § 46-52(b)(1). Yet, even assuming that such a violation exists, it does not automatically mean that all payments for the water services resulted in an inequity. Nothing in the complaint indicates that plaintiffs did not receive the benefit of the water services that they paid for

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[6] Defendant, in a supplemental brief, contends that *Wright* should not apply in this case because there is no contract between it and plaintiffs in this case. That distinction, however, is not dispositive. In *Wright*, the plaintiff brought an unjust-enrichment claim against his employer after it overcharged him for health-insurance premiums, thereby enriching itself at his expense. *Wright*, 504 Mich at 414-415. The *Wright* Court explained that unjust enrichment seeks "to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position." *Id.* at 419 (citing Restatement (Third) of Restitution & Unjust Enrichment § 1 (2011)). Here, plaintiffs are seeking a refund of money overpaid for water and sewer services. Thus, as explained in *Wright*, the GTLA does not bar the claim. That is not to say that a plaintiff will automatically be able to avoid governmental immunity by labeling a tort claim as a claim for unjust enrichment. When evaluating summary disposition motions, we examine the nature of the claim, not the label that the parties attach to the claim. See *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998) (stating that courts are not bound by the labels that parties attach to their claims); see also *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

between July 3, 2006 and June 30, 2012. Furthermore, there is nothing in the complaint indicating that the amount charged was illegal. Instead, Count II alleges a mere violation of the statute, for which there is no private cause of action for money damages available. See *Lash*, 479 Mich at 194. Accordingly, the trial court erred by denying defendant summary disposition on Count II of the complaint.

3. COUNT V

Next, we also examine Count V, which is labeled "equitable remedy—recoupment by refunds of the 22% water and sewer rates of January 15, 2011 and the water service charges from July 3, 2006—September 15, 2011." It provides:

> 54. FLINT's excessive/illegal/Ultra Vires water and sewer rates, and water service charges, charged and collected between January 15, 2011 and September 15, 2011 were illegal charges that were collected for an improper purpose in violation of law, including but not limited to using restricted water and sewer revenues to fund the general fund or other funds or general operations of FLINT.
>
> 55. FLINT's excessive/illegal/Ultra Vires water service charges, charged and collected between July 3, 2006 and September 15, 2011 were illegal charges that were collected for an improper purpose in violation of law, including but not limited to using restricted water service charge revenues to fund the general fund or other funds, or general operations of FLINT.
>
> 56. FLINT'S actions alleged herein, through the Ultra Vires actions and misconduct of various former city officials constitute illegal charges and collections from plaintiffs that proximately caused Plaintiffs to make overpayments to FLINT which should be ordered refunded by FLINT to Plaintiffs.

Defendant contends that Count V, which alleges that Flint unlawfully used its water and sewer revenues to "fund the general fund," is barred by the law-of-the-case doctrine. We agree.

"Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Admin v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). Here, as defendant correctly notes, *Kincaid II*, 311 Mich App at 92, explicitly ruled on the merits of this issue, as follows: "Plaintiffs argue that defendant illegally commingled funds. We find no merit to this claim." Under the law of the case doctrine, *Kincaid II*'s judgment in that regard is binding on the trial court, which was not entitled to "take action on remand . . . inconsistent with the judgment" of this Court. See *Grievance Admin*, 462 Mich at 260. Consequently, to the extent that the claims in plaintiffs' first amended complaint alleged that Flint's commingling of funds was unlawful, summary disposition of those claims was appropriate under MCR 2.116(C)(8). No possible factual development could justify granting plaintiffs relief regarding such claims. The trial court erred by denying summary disposition on this basis.

4. DECLARATORY RELIEF

Count VI of plaintiffs' amended complaint seeks declaratory relief in the form of an injunction. Defendant contends that this claim is barred by the GTLA. However, in *In re Bradley Estate*, 494 Mich 367, 389 n 54; 835 NW2d 545 (2013), our Supreme Court explained that the GTLA does not afford governmental immunity against claims seeking declaratory relief. Accordingly, the trial court did not err by declining to grant summary disposition of this claim.

III. CONCLUSION

Based on our de novo review, we conclude that the trial court erred by not summarily dismissing Counts I and III (breach of contract) under MCR 2.116(C)(8). Additionally, we conclude that summary disposition under MCR 2.116(C)(8) was warranted for Count II (unjust enrichment) and the parts of Count V that sought recovery for the imposition of a water readiness charge in violation of Ordinance, § 46-52(b)(1), between July 3, 2006 and September 15, 2011. The court also erred by not dismissing Count V under the law-of-the-case doctrine. However, the trial court did not err by denying summary disposition of Count IV and Count VI. Accordingly, we affirm the court's denial of summary disposition as to Count IV and Count VI, but we reverse the remainder of the order and remand for the court to enter an order granting defendant summary disposition of Counts I, II, III, and V.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No taxable costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

EXHIBIT - 7

FILED Received for Filing Oakland County Clerk 6/3/2020 3:58 PM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

HURON VALLEY OUTFITTERS, LLC,
A Michigan limited liability company,
Plaintiff,

Case No: 20-179677-CK
Hon. Leo Bowman

v.

CHARTER TOWNSHIP OF LYON,
A Municipal corporation,
Defendant.
_________________________________/

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Proof of Service

The undersigned certifies that a copy of the within instrument was served upon the attorneys of record or the parties not represented by counsel in the above case at their respective addresses disclosed on the pleadings on the 3 day of June 2020, by:

- ☐ US Mail
- ☐ Hand Delivered
- x Electronic Filing System

/s/ V. King
V King

OPINION AND ORDER

At a session of said Court held in the Courthouse in Pontiac, Oakland County, Michigan on 6/3/2020

PRESENT: LEO BOWMAN, Circuit Judge

I. Introduction

This matter is before the Court on defendant's motion for partial summary disposition as to

Counts II and III filed on April 14, 2020.[1] Plaintiff alleges that it entered into an agreement with defendant to purchase property identified as sidwell number 21-03-352-006 located in Lyon Township and consisting of 17,988 acres (Property). Plaintiff further alleges that it conveyed an easement over the Property to defendant so that it could construct "Ring Road" designed to connect Grand River Avenue with Milford Road. Plaintiff also alleges that defendant advised it that it no longer intended to construct Ring Road. Plaintiff additionally alleges that defendant breached the parties' agreement and overcharged the capital charges and sewage disposal rates based on its residential equivalency units (REUs) so it filed this lawsuit seeking money damages. Defendant brings its motion for partial summary disposition as to Counts II and Count III pursuant to MCR 2.116(C)(8) and (C)(10). For the reasons stated more fully below, defendant's motion for partial summary disposition as to Counts II and III is DENIED.

II. Background

Defendant acknowledges that it provides sewage disposal and treatment services to its residential and commercial property owners pursuant to its ordinance. (Defendant's ***Exhibits 1*** - Lyon Ordinance 46-286 and ***2*** – Lyon Ordinance 46-338).[2] Defendant alleges that its REU (residential equivalency units) charges are based in significant part on its sewage disposal and treatment facility agreement (Facility Agreement) with Lyon Wastewater (Wastewater). (Defendant's ***Exhibit 3*** – Second Amended Sewage Disposal Facility Agreement). Defendant further alleges that the its agreement with Wastewater goes back to 1997 when it contracted with Wastewater to construct a sanitary sewer treatment facility at Wastewater's cost on land owned by

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[1] This Court acknowledges that plaintiff's motion for partial summary disposition as to Count I filed on April 14, 2020, which will be addressed in a separate opinion and order.

[2] Lyon Ordinance 46-286 statutes that users pay "[c]apital charges for connection to the township's sewer" and that these charges "shall be based on user connection unites as identified in section 46-338. . ." and Lyon Ordinance 46-338 provides for the number of "[u]sers connection units, also referred to in this chapter as residential equivalency units

Wastewater to service defendant's residents and businesses. Defendant also alleges that Wastewater owned the Treatment Facility and the land and it paid Wastewater fees for the Treatment Facility's use. Defendant next alleges the parties entered into the Facility Agreement in 2006, which transferred the Treatment Facility from Wastewater and the land to defendant and allowed Wastewater retained ownership of the Treatment Facility's sewage treatment capacity. (*Id.* at ¶¶ 3 and 4). Defendant additionally alleges that the Facility Agreement (1) provides that Wastewater sells sewage treatment capacity to defendant in exchange for compensation; (2) measures sewage capacity by REUs; (3) requires defendant to pay a base rate to Wastewater per REU (as REUs are acquired by third parties for connection); and (4) adjusts REU base rate annually in accordance with indexes agreed to by the parties (Eleven Bond Index for many years changed to a Consumer Price Index). (*Id.* at ¶¶ 5 and 6 and Defendant's ***Exhibit 4*** – Third Amendment to Second Amended Sewage Disposal Facility Agreement at ¶ 4). Further, defendant alleges that a majority of its REU charges to its users is a pass-through of its primary costs to provide the REUs to each user (e.g., the amounts owed to Wastewater) pursuant to the Facility Agreement.

Plaintiff acknowledges that defendant has a sewer system that provides sewage disposal services to its inhabitants. Plaintiff further acknowledges that defendant imposes a Capital Charge pursuant to Ordinance 46-286 (intended to reimburse defendant for its share of the capital costs associated with the Sewer System) and that the charge is based in part on the number of REUs assigned by defendant to plaintiff. Plaintiff further acknowledges that defendant separately charges plaintiff for the costs allegedly associated with the disposal and treatment of sewage generated by plaintiff pursuant to Ordinance 46-287. Plaintiff alleges that defendant overcharged it for sewer-related expenses as follows: (1) defendant allocated an excessive number of REUs to plaintiff based

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(REUs)" per user based on a chart setting forth various property "usages" and "unit Factors" that relate to the sewer

on a nonsensical methodology; (2) defendant's capital charge per REU is grossly excessive and wholly disproportionate to the actual costs defendant intends to recoup through the charge; and (3) defendant's sewer rates have been excessive and unreasonable.

Defendant acknowledges that plaintiff purchased the Property (a vacant parcel) from defendant legally described in the Purchase Agreement. (Defendant's ***Exhibit 7*** – Purchase Agreement). Defendant alleges that plaintiff constructed improvements at the Property including a multi-unit, commercial building that houses an indoor shooting range. Defendant also alleges that plaintiff later added a full restaurant and a barber shop. Defendant next alleges that plaintiff increased its necessary capacity and added connections to defendant's sewage disposal and treatment system such that it incurred "capital charges" for additional REUs under Lyon Ordinances. Defendant asserts that the REU Application Forms accurately reflect the number of REUs that plaintiff was required to pay under the Lyon Ordinances and the Facility Agreement and the amount payable to Wastewater pursuant to the Facility Agreement. (Defendant's ***Exhibits 8*** – Request to Connect to Sanitary Sewer Systems dated 9/29/2016 (reflecting 4 total REUs)***, 9*** – Request to Connect to Sanitary Sewer Systems undated (probably 7/17/2017 (reflecting 1.8 total REUs)***, 10*** – Request to Connect to Sanitary Sewer Systems dated 7/16/2019 (reflecting 4.9 total REUs), and ***11*** – Leslie Zawada's affidavit (averring that she reviewed the requests and verified their accuracy and estimated charges)). Defendant alleges that plaintiff was required to pay $89,277.08 of the total $127,972.82 in REU charges based on 10.7 REUs paid by it to Wastewater as a pass-through under the Facility Agreement. (Defendant's ***Exhs. 8, 9***, and ***10***).

Plaintiff acknowledges that it owns the Property and that it receives sewage disposal services from defendant through its sewer facilities. Plaintiff notes that Counts II and III of its complaint

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treatment capacity. (Defendant's ***Exhibits*** 1 - Lyon Ordinance 46-286 and 46-338).

challenges the reasonableness of the "capital charges" and the sewage disposal rates imposed by defendant.

On February 14, 2020, plaintiff filed a complaint against defendant alleging (1) breach of contract (Count I); (2) unjust enrichment – unreasonable water and sewer rates (Count II); and (3) assumpsit – money had and received unreasonable water and sewer rates (Count III). On April 13, 2020, defendant filed an answer, which denies the allegations of liability as untrue and states affirmative defenses. On April 14, 2020, defendant's motion for partial summary disposition as to Counts II and III pursuant to MCR 2.116(C)(8) and (C)(10). On April 16, 2020, this Court entered a Brief Scheduling Order pursuant to MCR 2.116(G),[3] which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **May 20, 2020** by 4:30 p.m." Plaintiff filed a timely response. The Brief Scheduling Order also provided that the moving party *may* file a reply brief pursuant to MCR 2.116(G)(1)(a)(iii) and it must be filed on or before **May 27, 2020** by 4:30 p.m. Defendant elected to file a reply brief.

III. Standard of Review

MCR 2.116(C)(8) states that the court will grant summary disposition when the opposing party has failed to state a claim upon which relief could be granted. MCR 2.116(C)(8). Under MCR 2.116(C)(8), the court accepts all well-pleaded allegations as true and construes them in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Unless a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the court should deny the motion. *Adell v Sommers, Schwartz, Silver, and Schwartz, PC*,

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[3] A trial court may order the parties to meet scheduling deadlines when the court "concludes that such an order would facilitate the progress of the case[.]" MCR 2.401(B)(2)(a). Also, MCR 2.401(B)(2) provides trial courts with the discretion to decline to consider motions a party files after the ordered deadline. *Velez v Tuma*, 283 Mich App 396, 409 (2009), *rev'd in part* on other grounds 492 Mich 1 (2012). This court rule "promotes the efficient management of the trial court's docket[.]" *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350 (2005).

170 Mich App 196, 203 (1988).

Under MCR 2.116(C)(10), the court will grant a motion for summary disposition if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). The courts generally recognize that summary disposition is premature under MCR 2.116(C)(10) if discovery is not complete "***unless*** there is ***no fair likelihood that further discovery*** will ***yield support*** for the nonmoving party's position." *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140 (2002) (emphasis added). In determining a motion for summary disposition under MCR 2.116(C)(10), the court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Richie-Gamester v City of Berkley*, 461 Mich 73, 76 (1999). Additionally, a party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) has the burden of showing that a genuine issue of disputed fact exists. The party opposing such a motion must produce documentary evidence to set forth specific facts demonstrating that there is a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432 (1994).

IV. Analysis

Plaintiff filed a complaint against defendant alleging (1) breach of contract (Count I); (2) unjust enrichment – unreasonable water and sewer rates (Count II); and (3) assumpsit – money had and received unreasonable water and sewer rates (Count III). Defendant argues that it is entitled to summary disposition on plaintiff's assumpsit claim because it was abolished under Michigan law pursuant to *Fisher Sand & Gravel Co v Neal A Sweebe,* Inc, 494 Mich 543, 564 (2013) and it is entitled to summary disposition on the unjust enrichment claim because (1) the "capital charges" were a pass-through of direct cost such that it was not benefited and (2) there is an express contract between the parties that covers the charges at issue. In response, plaintiff disagrees. Defendant

elected to file a reply brief.

As a preliminary matter, plaintiff argues that defendant's motion pursuant to MCR 2.116(C)(10) is premature because the parties have not engaged in the discovery. Plaintiff addressed this argument as it relates to whether the parties entered into an express contract with respect to the REDUs. To support its argument, plaintiff directs this Court's attention to *CMI Int'l v Intermet Int'l Corp*, 251 Mich App 125, 134-35 (2002). Then, plaintiff argues that it is entitled to take discovery and that it anticipates that it will demonstrate that the parties did not intend to form a contract based on the Request to Connect and that it did not voluntarily assent to any contract when it paid defendant for the REUs. Having considered the documentary evidence attached as well as the parties' argument, this Court does not find that it is premature for this Court to decide defendant's motion for partial summary disposition pursuant to MCR 2.116(C)(8) or (C)(10).

In *Fisher Sand, supra* at 564, Michigan Supreme Court recognized that "assumpsit as a form of action was abolished" with the adoption of the General Court Rules in 1963. The *Fisher* Court further stated that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* As such, a plaintiff's use of the term "assumpsit" in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded a valid claim. See also *Adams v Adam* (On Reconsideration), 276 Mich App 704, 710-711 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

The equitable theory of unjust enrichment (also known as quantum meruit)[4] is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party.

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4 *See Spartan Distributions v Golf Coast International,* unpublished per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 295408) (stating that "the elements of unjust enrichment or quantum meruit are: '(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of

Belle Isle Grill Corp v Detroit, 256 Mich App 463, 478 (2003). As the Court of Appeals observed in *Belle Isle Grill Corp, supra* at 478, a claim for unjust enrichment requires that the plaintiff establish:

(1) The receipt of a benefit by defendant from plaintiff and

(2) An inequity resulting to plaintiff because of the retention of the benefit by defendant.

However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* When there is an express contract covering the same subject matter, summary disposition of the unjust enrichment claim is properly granted. *Id.* at 479. *Belle Isle Grill Corp v Detroit*, 256 Mih App 463, 478 (2003).

Defendant argues that it is entitled to summary disposition on plaintiff's assumpsit claim because it was abolished under Michigan law pursuant to *Fisher Sand & Gravel Co v Neal A Sweebe,* Inc, 494 Mich 543, 564 (2013). To support its argument, defendant recognizes that plaintiff claims the "Township's Rates" are unreasonable so it is entitled to relief under an assumpsit cause of action for money had and received. Then, defendant directs this Court's attention to *Fisher Sand, supra* at 564 as well as cases from the Eastern District of Michigan that recognized the abolishment of assumpsit as a cause of action. Next, defendant acknowledges that plaintiff claims to be entitled to bring an equitable action of assumpsit to recover "the amount of the legal exaction" pursuant to *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704 (1970). Then, defendant challenges that this claim would be sufficient to revive plaintiff's cause of action because "[a] remedy . . . is not a cause of action." *See Friess v City of Detroit,* unpublished per curiam opinion of the United States District Court for the Eastern District of Michigan, issued March 27, 2019, at *9 (Docket. No. 17-14139) (finding that the plaintiffs failed to statute a viable cause of action). Defendant further argues that this claim relies on an assertion that the REU charges were unreasonable. Defendant challenges

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the benefit by defendant'" *quoting Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478 (2003)).

this assertion when it argues for summary disposition as to the unjust enrichment claim. Therefore, defendant concludes that this Court should dismiss plaintiff's claim for assumpsit.

In response, plaintiff disagrees. Plaintiff acknowledges that *Fisher Sand, supra* abolished assumpsit as a form of action; however, it argues that it bases its cause of action on defendant's violation of common law principles, which requires the municipal utility rates to be "reasonable" and that assumpsit merely provides the substantive remedy for defendant's violation of common law not the source of plaintiff's substantive rights. To support its argument, plaintiff directs this Court's attention to case[5] law recognizing that there are common law limitations on a municipality's water and sewer rates and charges and defining reasonable fees. Then, plaintiff acknowledges the four principals (municipal utility rates are presumptively reasonable; presumption of reasonableness may be overcome by showing proper evidence; plaintiff has the burden to show any given rate or ratemaking practice is unreasonable; and must provide clear evidence of illegal or improper expenses included in the municipal utility's rate) and concludes that reasonableness is typically a question of a fact. Next, plaintiff notes that the case is in its infancy so that it has not yet obtained discovery of the actual methodology for determining REU Charges and Sewer Charges. Then, plaintiff asserts that a cursory review of defendant's financial statement confirms that the Charges consistently generate revenue that exceeds the cost of service and concludes that the overcharges left defendant flush with cash where the Sewage Fund had over $8 million. (Plaintiff's ***Exhibit D*** – Fiscal Year ending 2018 (noting defendant's cash revenues exceeded its cash expenses by over $1.7 million)). Next, plaintiff argues that assumpsit is a proper remedy for governmental overcharges and directs this Court's

[5] *Wogamood v Village of Constantine*, 302 Mich 384, 404-405 (1942); *City of Plymouth v City of Detroit*, 423 Mich 106, 133 (1985); *Trahey v City of Inkster*, 311 Mich App 582, 595 (2015); *Kircher v Ypsilanti*, 269 Mich App 224, 231-232 (2005); and *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 220 (2019) (citation omitted).

attention to case[6] law (generally laying the foundation for the cause of action) and *Fisher Sand, surpa* (recognizing that General Court Rules in 1963 abolished assumpsit as a cause action but preserving its substantive remedies). Plaintiff argues that assumpsit provides its substantive remedy for defendant's violation of the common law principals that require municipalities to have reasonable municipal utility rates. To support its argument, plaintiff directs this Court's attention to *Woodland Condos Homeowners Ass'n v Fannie Mae*, unpublished per curiam opinion of the Court of Appelas, issued February 28, 2019 (Docket No 339850) (recognizing that the use of the term assumpsit does not warrant dismissal). As such, plaintiff requests that this Court allow it to proceed on its claim that defendant imposed unreasonable sewer rates and charges in violation of the common law so that it can seek a substantive remedy as set forth in assumpsit for defendant's improper acts.

Defendant argues that it is entitled to summary disposition on plaintiff's unjust enrichment claim. To support its argument, defendant directs this Court's attention to *Morris Pumps v Centerline Piping, Inc,* 273 Mich App 187, 195 (2006)(citations omitted), which sets forth the elements for an unjust enrichment claim. Specifically, defendant states the following arguments to support its request for summary disposition:

- **Defendant's REU charges were reasonable because they were based on its contractual costs to provide REUs to plaintiff; therefore, plaintiff's unjust enrichment claim fails**. To support its argument, defendant directs this Court's attention to *Trahey v City of Inkster*, 311 Mich App 582, 594 (2015) and its findings that (1) municipal utility rates are presumptively reasonable; (2) plaintiff has the burden to show that a given rate or ratemaking practice is unreasonable; (3) a court has no authority to disregard the presumption absent clear evidence of illegal or improper expenses included in the municipal utility rate; and (4) mathematic precision is not required to calculate the municipal utility rate. Then, defendant concludes that *Trahey, supra* establishes that its municipal utility rate is presumed

[6] *Moore v Mandlebaum*, 8 Mich 433, 448 (1860); *De Croupet v Frank*, 212 Mich 465, 467 (1920); *Bond, supra*; *Service Coal C v Unemployment Compensation Comm*, 333 Mich 526, 530-531 (1952); and *Yellow Freight Sys Inc v Michigan*, 231 Mich App 194, 203 (1998) *rev'd on other grounds* 464 Mich 21 (2001), *rev'd* 537 US 36, 123 S Ct 371, 154 L Ed 2d 377 (2002).

reasonable when based on direct costs of providing the service if it does not include any illegal or improper expenses. Next, defendant notes that it incurs a contractual cost for sewage disposal and treatment capacity that it owes to Wastewater per REU sold to its users. As such, defendant concludes that there is no genuine issue of material fact that the contractually Wastewater REU payments were defendant's actual, direct costs of providing sewage disposal and treatment services to plaintiff. Then, defendant requests that this Court dismiss plaintiff's unjust enrichment claim for that reason alone. Next, defendant requests that this Court dismiss the unjust enrichment claim because it was not benefited by plaintiff since the payments are reviewed and approved by Wastewater and defendant remits the payment to Wastewater as a "pass through" payment within 30 days pursuant to the Facility Agreement. Defendant concludes that it would also be entitled to summary disposition because there is no genuine issue of material fact that it did not benefit from the payment because remitted it as a pass-through payment to Wastewater within 30 days.

- **Defendant collected the subject charges by lawful ordinance not by unjust or inequitable means, which bars plaintiff's unjust enrichment claim**. To support its argument, defendant directs this Court's attention to *Kochis v City of Westland*, 409 F Supp 39 598, 611 (ED Mich 2019), which granted summary disposition of an unjust enrichment claim as to fees collected pursuant to ordinance that – on their face – were not unlawful. Then, defendant notes that it charged the fees in question pursuant to its lawful ordinance and requests dismissal of the unjust enrichment claim.

- **An express contract between plaintiff and defendant exists that covers the same subject matter that bars plaintiff's unjust enrichment claim**. To support its argument, defendant directs this Court's attention to *Morris Pumps, supra* at 194 (citation omitted), which recognized that a contract will only be implied when there is no express contract covering the same subject. Then, defendant directs this Court's attention to case[7] law discussing the formation of an express contract. Then, defendant directs this Court's attention to the first written REU Application Form submitted by plaintiff on September 29, 2016 (one week after the sale of the Property). (Defendant's ***Exh. 8***). Defendant alleges that it notified plaintiff of the number of the REUs and the amount it would be charged for the REUs based on plaintiff's then disclosed intended usage of the Property and number of employees. (Defendants' ***Exhs. 8*** and ***11***). Defendant asserts that its response constituted an offer that also included a note directing plaintiff's attention to the certain language in Lyon Ordinance 46-96. Defendant alleges that plaintiff paid the required REU charges on October 5, 2016 and purchased the Property the next day such that it concludes that plaintiff agreed to and accepted the terms

[7] *Bodnar v St John Providence, Inc*, 327 Mich App 203, 213 (2019), *app denied* __ Mich __ (2019) and *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 247 (2020).

of the offer pursuant to the terms contained in the application. (Defendant's ***Exhs. 8*** and ***15***). Defendant next notes that plaintiff altered the use of the Property on two subsequent occasions and it submitted additional REU Application Forms that authorized defendant to increase or decrease the number of REUs assigned to the Property based on actual usage. Defendant concludes that the parties had a meeting of the minds when plaintiff remitted payment. To support its argument, defendant directs this Court's attention to *Autumn Acres Senior Vill, Inc v Vill of Mayville*, unpublished opinion of the Court of Appeals, issued November 19, 2019 (Docket No. 343485)(affirming that the court will not imply a contract between parties in equity when one already exists on the same subject matter).

For each of the above reasons, defendant requests that this Court grant it summary disposition on plaintiff's unjust enrichment – unreasonable water and sewer rates (Count II) claim.

In response, plaintiff disagrees. Specifically, plaintiff argues that defendant's attack as to the unjust enrichment claims ignores and distorts plaintiff's allegations. To support its argument, plaintiff directs this Court's attention to *Morris Pumps, supra* and *Wright v Genesee County*, 504 Mich 410 (2019) and concludes that the Court of Appeals applied well-established principles to require a municipality that illegally collected funds to return those funds to the person or entity that paid those funds. Then, plaintiff directs this Court's attention to *Mercy Services for the Aging v City of Rochester Hills,* unpublished per curiam opinion of the Court of Appeals, issued October 21, 2010 (Docket No. 292569) (holding that the plaintiff could recover annual service charges paid that violated a state statute). Next, plaintiff addresses defendant's arguments as follows:

- **Defendant retained the benefit of capital charges and sewer charges that plaintiff paid**. Plaintiff further argues that defendant's own bills for Capital Charges (Defendant's ***Exhs. 8*** to ***10***) combined with Zawada's Affidavit (Defendant's ***Exh. 11***) confirm the amount plaintiff paid, the amount defendant received, and the amount not remitted to Wastewater that defendant retained. Plaintiff additional argues that defendant focuses only on the REU Overcharge and not the Sewer Rate Overcharge.

- **The fact that the charges are authorized by an ordinance does not preclude a finding that the charges are unreasonable such that defendant was unjustly enriched**. Plaintiff acknowledges defendant's

argument that it could not have been unjustly enriched because it imposed the charges pursuant to a "lawful" ordinance. Then, plaintiff directs this Court's attention to *Oshtemo Charter Twp v Kalamazoo County Rd Comn'n*, 302 Mich App 574, 576-577 (2013) to support that the charges must be reasonable and the ordinance cannot conflict with state law. As such, plaintiff concludes that municipal utility rate-setting must be reasonable and cannot be cured with the enactment of an ordinance.

- **The existence of an express contract does not preclude the unjust enrich claim**. First, plaintiff argues that even if an express contract existed, it only applies to REU overcharges and not to sewer rate overcharges. Next, plaintiff acknowledges that defendant's argument turns on the "request to connect" forms and plaintiff's payment to defendant. Then, plaintiff directs this Court's attention to the fact that it never signed the 2019 Request to Connect and that it submitted its payment for 2018 with the notation "REU FEES PAID UNDER PROTEST." (Defendant's ***Exhibits 10*** and ***11***). Then, plaintiff directs this Court's attention to *Blackburne & Brown Mortg Co v Ziomek*, 264 Mich App 615, 627 (2004) to support its contention that a payment under protest cannot be recognized as an unequivocal intent to be bound. As such, plaintiff concludes that its third and final payment could not be recognized as forming an express contract. Next, plaintiff argues that its payment of legally required fee cannot be consideration. To support its argument, plaintiff directs its attention to *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 20-22 (1989) (holding that the payment of a fee required by law cannot be consideration for a contract between a party and the government. Then, plaintiff concludes that it had no choice but to pay the REUs so that it could develop the Property such that the payment cannot be consideration. Finally, plaintiff argues that issues of fact exist as to whether the parties entered into an express contract with respect to the REUs based on (1) mutuality of agreement; (2) mutuality of obligation; (3) mutuality of acceptance; (4) contained essential terms (e.g., time for performance); and (5) illusory because it did not bind defendant to charge a particular price.

For each of the above reasons, plaintiff requests that this Court deny defendant's request for summary disposition on the unjust enrichment claim.

Defendant elected to file a reply brief that reiterates its argument that the independent claim of assumpsit and the claim for unjust enrichment should be dismissed.

Accepting plaintiff's well-pleaded allegations as true and construing them in the light most favorable to the non-moving party, this Court does not find that plaintiff's claims is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. The

parties acknowledge that the *Fisher Sand* Court recognized that “assumpsit as a form of action was abolished” with the adoption of the General Court Rules in 1963 but it preserved “the substantive remedies traditionally available under assumpsit.” *Fisher Sands, supra.* at 564. Having reviewed the complaint, this Court finds that plaintiff used the term “assumpsit” in labeling its claim but that does not automatically warrant dismissal. *Adams, supra* at 710-711. Plaintiff's allegations clearly seek the substantive remedy traditionally available under assumpsit pursuant to its claim that defendant violated common laws when it charged the sewage rates. Summary disposition pursuant to MCR 2.116(C)(8) is, therefore, inappropriate.

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is a genuine issue of material fact. Having reviewed the documentary evidence, this Court finds that disputed material facts exist as to (1) whether the charges (sewage rates and capital) are reasonable; (2) whether defendant benefited from the payment; and (3) whether the parties formed an express contract as to the charges. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, inappropriate.

V. Conclusion

Accordingly, defendant's motion for partial summary disposition as to Counts II and III is DENIED. *This Order is not a final Order so it does not resolve the last pending claim and does not close the case.*

IT IS SO ORDERED.

/s/ Leo Bowman
Hon. Leo Bowman
6/3/2020
Date