STATE OF MICHIGAN
IN THE COURT OF APPEALS

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly-situated persons and entities,

Plaintiffs,

v.

CITY OF WESTLAND, a municipal corporation,

Defendant.

COA Case No. 339143

Wayne County Circuit Court
Case No. 2015-006473-CZ
Hon. Craig S. Strong

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiffs

Dean C. Robinette (P54197)
Foley & Robinette, P.C.
13349 Reeck Court
Southgate, MI 48195
(734) 283-4000
Co-counsel for Plaintiffs

James M. Pelland (P51237)
Melissa Anne Cox (P71972)
Fausone Bohn, LLP
41700 W. Six Mile Road, Suite 101
Northville, MI 48168
(248) 380-0000
Attorneys for Defendant

PLAINTIFFS/APPELLANTS BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE BASIS OF JURISDICTION OF THE COURT OF APPEALS

This Court has jurisdiction over this appeal pursuant to MCR 7.203(A)(1) because the order appealed from constitutes a final order.

This appeal is from an Opinion (Exhibit A hereto) and a separate Order (Exhibit B hereto), both dated June 28, 2017, denying Plaintiffs' motion for summary disposition, granting Defendant's motion for summary disposition, and dismissing all of Plaintiff's claims with prejudice.

Plaintiffs filed a timely Claim of Appeal on July 10, 2017, within 21 days of the entry of the June 28, 2017 Opinion and the June 28, 2017 Order, in accordance with MCR 7.204(A)(1)(b).

STATEMENT OF QUESTIONS PRESENTED

1. When deciding a summary disposition motion under MCR 2.116(C)(10), the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Moreover, a "**trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)**." *Id.* (emphasis added) (citing *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994)). In each fiscal year from 2010 to 2016, the City transferred at least $2.8 million from the W&S Fund to the General Fund and the transfers were funded by charges imposed upon the City's water and sewer customers (the "General Fund Support Charge"). The Circuit Court held that "water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large." Opinion at p. 14-15. This finding of fact was based solely upon its consideration of Defendant's "evidence" and by wholly disregarding the substantial evidence, including expert opinions, submitted by Plaintiffs. Did the Circuit Court err by making this finding of fact in the context of a (C)(10) motion?

Plaintiff states: Yes

Defendant/Appellee states: No

The Circuit Court stated: No

This Court should state: Yes

2. Assuming the City included charges in the Water and Sewer Rates that were intended to generate revenues that it would transfer to the General Fund to support governmental activities unrelated to water and sewer services did those charges constitute unlawful "taxes" under the Headlee Amendment and MCL 141.91?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court did not address this issue

This Court should state: Yes

3. Assuming the City included charges in the Water and Sewer Rates that were intended to generate revenues that it would transfer to the General Fund to support governmental activities unrelated to water and sewer services did those charges render the Rates arbitrary, capricious and/or unreasonable under common law rate-making principles?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court did not address this issue

This Court should state: Yes

4. Assuming the City included charges in the Water Rates that were intended to generate revenues that it would transfer to the General Fund to support governmental activities unrelated to water and sewer services did the Rates exceed the City's cost of providing water service in violation of MCL 123.141?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court did not address this issue

This Court should state: Yes

5. Assuming the City included charges in the Sewer Rates that were intended to generate revenues that it would transfer to the General Fund to support governmental activities unrelated to water and

sewer services did those charges violate Section 17.3 of the City's Charter, which requires that the City establish "just and reasonable rates"?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court did not address this issue

This Court should state: Yes

6. In each year since 2011, the City has included $500,000 in the Rates that the City has used to create a fund to finance future improvements to the City's water and sewer system. In addition to imposing Rates which cover the current costs of operating, repairing, maintaining and replacing the City's water and sanitary sewer system, the City has required its **current** water and sewer customers to pay millions of dollars to create a significant "reserve" fund that might be used at some undefined time **in the future** to pay for still-unplanned improvements to the City's water and sewer system. Did those charges constitute unlawful "taxes" under the Headlee Amendment and MCL 141.91?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

7. In each year since 2011, the City has included $500,000 in the Water and Sewer Rates that the City has used to create a fund to finance future improvements to the City's water and sewer system. Did those charges render the City's Water and Sewer Rates arbitrary, capricious and/or unreasonable under common law rate-making principles?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

8. In each year since 2011, the City has included $500,000 in the Water and Sewer Rates that the City has used to create a fund to finance future improvements to the City's water and sewer system. Did those charges violate Section 17.3 of the City's Charter, which requires that the City establish "just and reasonable rates"?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

9. Did the Circuit Court err in concluding that Plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations applicable to such claims?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

10. Did the Circuit Court err in holding that Plaintiffs' equitable claims for assumpsit were subject to the same one-year statute of limitations applicable to Plaintiffs' Headlee Amendment claim and therefore those claims also were time-barred?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

11. Did the Circuit Court err in considering the opinion testimony of Mark Beauchamp and Debra Peck offered by the City where (1) their opinions were not disclosed until after the close of discovery and months after the parties filed dispositive motions and the court-ordered deadline for disclosure of those opinions had passed, (2) the methods employed by Mr. Beauchamp were not "reliable" and in fact were precluded by Michigan law, and (3) the purported "facts" and data which supported the opinions was not in evidence but, in fact, had been hidden from Plaintiffs and the Court?

Plaintiffs/Appellants state: Yes

Defendant/Appellee states: No

The Circuit Court held: No

This Court should state: Yes

STATEMENT OF FACTS

I. THE NATURE OF THE CASE

A. The City's Imposition Of A "General Fund Support Charge" On Its Water and Sewer Customers.

This certified class action challenges the City of Westland's egregious looting of its Water and Sewer Fund (the "W&S Fund") to support governmental activities wholly unrelated to providing water and sewer service to the City's inhabitants. Remarkably, the City's representatives have confirmed the looting in sworn deposition testimony, yet it continues unabated in the face of a City Charter provision that mandates that revenues derived from the City's sewer charges "**shall be exclusively used for the purpose of the sewage disposal.**" *See* City Charter Sec. 16.10 (emphasis added).

In each fiscal year from 2010 to 2016, the City transferred at least $2.8 million from the W&S Fund to the General Fund and the transfers were funded by charges imposed upon the City's water and sewer customers (the "General Fund Support Charge"). The City incorporated the General Fund Support Charge into the Rates and therefore each member of the certified Class paid the General Fund Support Charge when they paid their water and sewer bill. The City utilized the General Fund Support Charge to pay for, among other things, health care insurance for retired General Fund employees, property tax refunds and other General Fund expenses unrelated to providing water and sewer services.[1]

The City attempts to justify the General Fund Support Charge and the associated transfers as payments for "contracted services" provided to the W&S Fund by the City's General Fund Departments. But this justification is unavailing because the value of any such services is far less than the amounts transferred. In fact, the General Fund Support Charge is particularly pernicious because the City has

[1] The General Fund Support Charge was also imposed to cover the clean-up costs and litigation expenses the City incurred in connection with two significant rain events, which occurred in 2010 and 2011 and which caused flooding which impacted approximately 800 dwellings in the City. The City paid approximately $2 million to an outside contractor to remediate flood damage to the affected properties. Even though the clean-up costs benefitted only approximately 800 of the City's residents, the City reimbursed itself for those payments by incorporating the costs into the Rates it charged to its 26,000 water and sewer customers.

taken an otherwise appropriate cost allocation methodology and secretly added millions of dollars of phantom expenses in order to surreptitiously transfer millions of dollars to the General Fund. While certain General Fund departments, such as the Finance Department, supply goods, services and/or facilities to the W&S Fund, the City has grossly inflated the costs of those goods, services and/or facilities in order to allocate a disproportionate amount of the costs to the W&S Fund.

There is no reasonable dispute that the General Fund Support Charge far exceeded the actual value of services the General Fund provided. All amounts in excess of the actual value of services were available and actually used to pay for the general expenses of the City unrelated to providing water or sanitary sewer services. These transfers were vital to allow the City to meet its general municipal obligations. Unfortunately for the City, however, this creative method of municipal finance is unlawful.

In Count I of Plaintiffs' First Amended Complaint ("FAC"), Plaintiffs allege that by including the General Fund Support Charge in the City's Water Rates, the City has violated MCL 123.141, which prohibits the City from selling water to its citizens at a rate which exceeds the City's actual cost of providing water service. Counts II and IV of the FAC allege that the General Fund Support Charge is an unlawful tax imposed by the City in violation of the Headlee Amendment and MCL 141.91. Count III of the FAC asserts that, by including the General Fund Support Charge, the Water and Sewer Rates are arbitrary, capricious and unreasonable in violation of common law rate-setting requirements. Finally, Count V alleges that the General Fund Support Charge violates the City's own Charter, which requires the City to establish "just and reasonable rates" for water and sewer services.

B. The City's Imposition Of A "Rate Overcharge" On Its Water and Sewer Customers

Plaintiffs' FAC also challenges certain components in the Rates that the City has used to create a fund to finance future improvements to the City's water and sewer system (the "Rate Overcharges"). In essence, in addition to imposing Rates which cover the current costs of operating, repairing, maintaining and replacing the City's water and sanitary sewer system, the City has required its **current** water and sewer customers to pay millions of dollars to create a significant "reserve" fund that might be used at

some undefined time **in the future** to pay for still-unplanned improvements to the City's water and sewer system.

Because the City impermissibly has increased the Rates to create a reserve for potential future infrastructure improvements to its water and sewer systems, these "Rate Overcharges" are not legitimate user fees but are "taxes" that have not been authorized by the City's voters in violation of the Headlee Amendment to the Michigan Constitution. *See Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998). Specifically, under *Bolt,* the Rate Overcharges are taxes because they are motivated by a revenue-raising and not a regulatory purpose, the charges to Plaintiffs and the Class are grossly disproportionate to the City's actual costs of providing to Plaintiffs and the Class the purported benefits for which the Rate Overcharges are purportedly imposed, and payment of these Charges is not voluntary.

II. THE FACTS CONCERNING THE GENERAL FUND SUPPORT CHARGE.

The following material facts were adduced and submitted by Plaintiffs:

A. Since at least 2010, the City has allocated up to $3.4 million in General Fund costs to the W&S Fund, purportedly to recover the value of the goods, services and facilities provided by its General Fund departments to support the City's water and sewer function (the "General Fund Cost Allocation"). Smith Dep. at p. 54-55, 127-128 (Exhibit 1.A.3 to Brief in Support of Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) With Respect To Claims Based Upon The "General Fund Support Charge," filed November 30, 2016 **(the "GFB")**). *See also* Exhibit 1.A.1 to GFB (historical cost allocations).

B. The City includes the $3.4 million General Fund Cost Allocation in the City's Rates and therefore that amount is paid by the City's water and sewer customers. Smith Dep. at pp. 127-128 (Exhibit 1.A.3 to GFB).

C. The $3.4 million garnered by the Rates is transferred annually from the Water & Sewer Fund to the General Fund. *Id.*

D. Plaintiff's expert has determined that the fair and reasonable value of the goods, services and facilities provided by the General Fund to the W&S Fund was no more than $1.3 million -- far less that the amount of the General Fund Cost Allocation -- and, therefore, for most of the years at issue, at least **$2.1 million** of the $3.4 million annually transferred from the Water & Sewer Fund to the General Fund was in excess of the fair and reasonable value of the

goods, services and facilities provided by the General Fund. *See* Exhibit 1 to GFB at pp. 3, 7-25.[2]

A full discussion of the various components of the General Fund Cost Allocations that are improper and unlawful is set forth in Plaintiffs' Second Amended Response To Interrogatory No. 6 of Defendant's First Set of Interrogatories (Exhibit 1 to GFB). That analysis is supported by the Affidavit of Plaintiff's Expert, James Olson, a nationally-recognized municipal cost allocation consultant who has managed and prepared local governmental cost allocation plans for dozens of cities, counties and state agencies. *See* Exhibit 2 to GFB. Mr. Olson is familiar with, and regularly applies, established cost allocation standards and methodologies in preparing those plans. Plaintiffs incorporate that extensive analysis and Mr. Olson's opinions by reference here.

Mr. Olson opines that the City's cost allocations violate established methodologies for allocating general fund support costs to the W&S function. Established water and sewer rate methodologies allow for such transfers, but prohibit the use of such transfers as a disguised method of utilizing water and sewer funds for purposes unrelated to water and sewer functions. In this regard, the American Water Works Association's M1 Manual "Principles of Water Rates, Fees and Charges," says the following about transfers from water funds to general funds for services provided:

> AWWA's policy statement on Finance, Accounting and Rates that that "**Water utility funds should not be diverted to uses unrelated to water utility services**. Reasonable

[2] The City's financial statements confirm that revenues of the City's Water and Sewer Fund exceeded the City's expenses in every fiscal year since July 1, 2011, even **after** the City transferred $3.4 million from the Water and Sewer Fund to the General Fund. *See* Exhibit 12 to Plaintiffs' Brief In Opposition To Defendant's Amended Motion for Summary Disposition **("Plaintiffs' S.D. Opp. Br.")**, filed March 8, 2017. Significantly, the City indisputably covered **all** of its water and sewer expenses during that time notwithstanding the transfers. In other words, if the City had **not** included $3.4 million in the Rates to finance the General Fund transfers, the City **still** would have amply covered **all** of the expenses of the Water and Sewer Fund. By including the General Fund Support Charge in the Rates, the Rates indisputably exceeded the City's actual costs of service by at least $3.4 million per year.

In fact, between June 30, 2010 and June 30, 2016, the City increased the unrestricted cash and investments in its Water and Sewer Fund from **$777,622** to **$13.4 million, notwithstanding the annual transfers to the General Fund**. *See* Exhibit 12 to Plaintiffs' S.D. Opp. Br. If the City had not transferred $3.4 million to the General Fund in each of those 6 years (a total of $20.4 million), the unrestricted cash and investments would total a whopping **$33.8 million**.

> taxes, payments in lieu of taxes, and/or payments for services rendered to the water utility by a local government or other divisions of the owning entity may be included in the water utility's revenue requirements after taking into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity.' **Accordingly, payments made to a municipality's general fund should reimburse the general fund for the necessary cost of goods and/or services required by the water utility to provide water service**. [Exhibit 3 to GFB (emphasis added)].

The AWWA policy statement on Finance, Accounting and Rates applies to both water and sewer rates and provides:

> Utilities should account for and maintain their funds in separate accounts from other governmental or owning entity operations. **Water and wastewater utility funds should not be diverted to uses unrelated to water or wastewater utility services**. Reasonable taxes, payments in lieu of taxes, and payments for services rendered to the utility by a local government or other divisions of the owning entity may be included in the utility's revenue requirements after taking into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity. [Exhibit 4 to GFB (emphasis added)].

The City's representatives have confirmed that it is improper to charge the Water and Sewer Fund for amounts that do not fairly reflect the value of services provided by the General Fund to the Water and Sewer Fund. For example, the City's finance director, Steve Smith, testified as follows:

> Q: And I want to see if we can come to some understandings about these cost allocations and the principles of cost allocation. Is the purpose of compiling a document like Exhibit 2 to reflect the fact that other City departments provide services to the Water and Sewer function?
>
> A: That is correct.
>
> Q: And is a cost allocation sheet an attempt to estimate the value of those services and goods?
>
> A: That is correct.
>
> Q: And for at least for the fiscal year that's reflected in Exhibit Number 2, that amount was roughly three point four million dollars?
>
> A: Correct.
>
> Q: Would you agree with me that it would be inappropriate to include costs that weren't actually related to the Water & Sewer function in these cost allocations? …
>
> A: Inappropriate. Well, these are estimates, mind you, so **if it was not related to Water & Sewer, then it should not be included, that's correct**.
>
> Q: Right. And I understand that estimates are estimates, they may be off, **but it would be inappropriate to intentionally include in the transfer from Water & Sewer to**

the General Fund amounts that did not fairly reflect the value of services that were actually provided to the Water & Sewer function?

A: **Correct** [Smith Dep. (Exhibit A to Plaintiffs' Reply Brief in Support Of Motion in Limine to Strike and Exclude Expert Opinions and Testimony, filed June 1, 2017) at pp. 6-7].

The City's Budget Director confirmed that it is improper to charge Rates which allow a water and sewer utility to divert water and sewer revenue to the general fund. Peck Dep. at p. 23 (Exhibit 1.B.3 to GFB). Yet, that is exactly what the City has been doing for years. In fact, that diversion of funds is a violation of the City's Charter, which provides that the proceeds of sewer-related charges "**shall be exclusively used for the purpose of the sewage disposal system.**" City Charter, Section 16.10 (emphasis added). The evidence of the improper diversion of these funds is compelling, as discussed below and in Exhibit 1 to the GFB.

Moreover, Mr. Olson opines that the City's cost allocation methodology is completely arbitrary and unreasonable because the City does not support its cost allocations by reference to objective and existing actual cost data but instead relies upon alleged "historical" and undocumented allocations, ostensibly updated by periodic conversations in the City's hallways between the City's finance director and employees of the General Fund departments which have certain of their costs allocated to W&S. *See, e.g.*, Smith Dep. at pp. 78-80 (Exhibit 1.A.3 to GFB). The GFOA cost allocations guidelines cited by the City in its interrogatory answers, and recognized as "authoritative and appropriate to guide" the City in its cost allocation methodologies" provide that "Governments should also regularly review their internal charge rates against actual experience for appropriate adjustments." *See* GFOA "Pricing Internal Services" (February 2013) (Exhibit 5 to GFB). The City clearly has not "regularly reviewed" its cost allocations "against actual experience" and seemingly had no interest in doing so at any time prior to the filing of this suit.

Mr. Olson, applying well-established industry standards and methodologies for allocating intergovernmental costs, has determined that, through June 2016, the amount of the unlawful charge is approximately **$13 million**.

A summary of the components of the General Fund Cost Allocations which result in gross overcharges to the City's water and sewer customers is as follows:

Retiree Insurance (Exhibit 1.A to GFB)[3] – The City includes in the General Fund Cost Allocation hundreds of thousands of dollars per year to cover the cost of health insurance for retired General Fund employees that have no relationship with the City's W&S Fund. Mr. Olson has determined that the overcharge of retiree health insurance expense between July 1, 2009 and June 30, 2016 is **$5,727,868.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson, appears at pp. 7-10 of Exhibit 1 to GFB.

City Hall Grounds (Exhibit 1.B to GFB) – As of 2014-15, the W&S department occupied 3% of the total square footage of the City Hall Building (13.55% in prior years), yet the City allocates 25% of the operation, maintenance and utilities expense for City Hall to the W&S department. *See* Smith Dep., pp. 47-48 (Exhibit 1.B.1 to GFB); June 17, 2016 Smith Tx. at pp. 46-47 (Exhibit 1.B.2 to GFB); Allocation Sheets (Exhibit 1.A.1 to GFB). Mr. Olson opines that building expenses should be allocated according to the square footage occupied by each City department. The City admitted that operation, maintenance and utilities expense should be allocated according to square footage. *See* Peck Dep. at pp. 27-28 (Exhibit 1.B.3 to GFB); June 17, 2016 Smith Tx. at pp. 45-46, 48 (Exhibit 1.B.2 to GFB).

Mr. Olson has determined that the overcharges associated with the City Hall Grounds expense between July 1, 2009 and June 30, 2016 is **$260,479**. A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson, appears at pp. 10-12 of Exhibit 1 to GFB.

[3] The documentary evidence and deposition testimony which supports each type of overcharge that is included in the General Fund Support Charge are attached to Exhibit 1 to the GFB as Exhibits A through I.

DPS Garage (Exhibit 1.C to GFB) – The City allocates up to 50% of the "rent" expense for its 30,594 sq. foot DPS Garage to the W&S Department. *See* Exhibit 1.A.1 to GFB. The "rent" has been as much as $11.90 per square foot annually ($165,000). *Id.* Mr. Olson, however, opined that, under established cost allocation methodologies, it is improper to impute "rent" to W&S. If expense is to be allocated to W&S relating to the DPS Garage, it should be allocated based upon 50% of the annual depreciation expense associated with the DPS Garage, which is less than $10,000 per year.

Mr. Olson has determined that the amount of the overcharges associated with the DPS Garage expense between July 1, 2009 and June 30, 2016 was **$1,080,411.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson and unrebutted by the City, appears at pp. 12-13 of Exhibit 1 to the GFB.

MTT Refunds (Exhibit 1.D to GFB) – the City allocates 15% of the costs of Michigan Tax Tribunal property tax refunds to W&S. Mr. Olson testified that established cost allocation methodologies preclude the allocation of these refunds to W&S, because that expense is wholly unrelated to the City's water and sewer functions. The City's finance director admitted that there is no basis for assessing Tax Tribunal property tax refunds to W&S and that the allocation was a "mistake." *See* June 17, 2016 Smith Tx. at p. 105 (Exhibit 1.D.1 to GFB). Notably, this "mistake" was repeated by the City every fiscal year since 2010. Mr. Olson has determined that the amount of overcharge associated with the MTT Refund expense between July 1, 2009 and June 30, 2016 is **$202,500.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson and unrebutted by the City, appears at p. 13 of Exhibit 1 to the GFB.

Municipal Risk/Reserves (Exhibit 1.E to GFB) – The City claims it incurs up to $1,500,000 annually for "municipal risk/reserves." The City claims that amount excludes building insurance, which the City charges to W&S through separate cost allocations. The City currently allocates 35% of this

purported $1,500,000 cost to W&S ($525,000). See Exhibit 1.A.1 to GFB. In prior years, the City has allocated 25-35% of this expense to W&S. *Id.*

Mr. Olson, applying well-established methodologies, has determined that the City has grossly overstated the amount of insurance expense reasonably associated with the City's water and sewer function and has failed to take into account multimillion dollar premium refunds that the City has received from its insurance carrier, which reduce the City's "net" cost of liability insurance. Mr. Olson has determined that the amount of the overcharge associated with the Municipal Risk/Reserves expense between July 1, 2009 and June 30, 2016 was **$2,483,998.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson and unrebutted by the City, appears at pp. 13-21 of Exhibit 1 to GFB.

IT Department (Exhibit 1.F to GFB) – The City has allocated up to 60% of the IT department expense to W&S. This expense is primarily allocated based upon the percentage of time the City's IT director, Daniel Bourdeau purportedly spends on activities relating to W&S. In his deposition, however, the Bourdeau repeatedly confirmed that the allocations for certain years during the class period grossly overstated the percentage of his time that was actually spent on activities relating to W&S. *See* Exhibit 1.F.1 to GFB at pp. 65-66.

Mr. Olson has determined that the amount of the overcharge associated with the IT Department expense between July 1, 2009 and June 30, 2016 was **$441,730.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson and unrebutted by the City, appears at pp. 21-22 of Exhibit 1 to the GFB.

Attorney Fees (Exhibit 1.G) – The City budgets up to $800,000 per year for attorneys' fees paid to Fausone Bohn for the legal services provided to all of the City's departments and functions and then allocates 30% of that amount ($240,000) to W&S. *See* Exhibit 1.A.1 to GFB. The City has provided no documentary support for its allocation. Mr. Olson opines that under established cost allocation methodologies, attorney fees incurred by the General Fund should be allocated to City departments

based upon the value of the legal services provided to each department and there is no evidence that the City has ever even attempted to make those determinations.

Mr. Olson has determined that the amount of the overcharge associated with the Attorneys Fees expense between July 1, 2009 and June 30, 2016 was **$785,000.** A complete recitation of the facts which demonstrate this gross overcharge and the detailed calculation of the amount of that overcharge, fully supported by Mr. Olson and unrebutted by the City, appears at pp. 22-24 of Exhibit 1 to the GFB.

Rain Event Cleanup and Lawsuit Expenditures (Exhibit 1.H to GFB) – The City experienced a significant rain event in 2010 which resulted in basement flooding in several hundreds of homes in the City. The City paid Belfor $2,000,000 to remediate flood damage to approximately 800 homes. These expenses were incorporated into the water and sewer rates beginning in FY 2012 and ending in FY 2015. *See* Exhibit 1 to GFB, pp. 24-25, Peck Dep. at pp. 18-19 (Exhibit 1.H.1 to GFB). Smith Dep. at pp. 139-141 (Exhibit 1.H.2 to GFB); June 17, 2016 Smith Tx. at pp. 113-122 (Exhibit 1.H.3 to GFB); Dep. Exh. 8 at p. 11 (Exhibit 1.H.4 to GFB).

Services Funded By W&S But Provided To Other Departments (Exhibit 1.I) – Not only has the City grossly misstated the value of the services provided by General Fund Departments to W&S, but the City also has failed to charge the General Fund for services provided or paid for by the W&S Fund which benefitted the General Fund, such as the salary and benefits for a sanitation foreman and 100% of the salary of the DPS director, who services departments other than W&S. *See* Exhibit 1 to GFB at pp. 25-28.

The City's budget director admitted that proper cost allocation methodologies require such charges, but that the City has not done so. Peck Dep. at pp. 23-26. *See* Exhibit 1.B.3 to GFB. Moreover, Section 17.6 of the City's Charter mandates that "Charges for all service furnished [by W&S] to … other City departments or agencies shall be recorded." *See* Exhibit 9 to GFB.

III. THE FACTS CONCERNING THE RATE OVERCHARGES

The following material facts were adduced and submitted by Plaintiffs:

The City includes in its annual W&S Budget and, therefore, in the Rates, significant amounts to finance repairs and improvements to its water and sewer system in the ensuing fiscal year (the "Current Period Capital Improvement Charges"). October 2015 Steven Smith Dep. ("Smith Dep. 1") at p. 142 (Exhibit 1 to Brief in Support Of Plaintiff's Motion for Summary Disposition With Respect To Rate Overcharges, filed November 30, 2016 (**the "ROB"**). In each of the two fiscal years beginning July 1, 2014 and July 1, 2015, the City included approximately $1.7 million in Current Period Capital Improvement Charges in the Rates. *Id.* *See also* Dep. Exh. 8 at Deerhurst002056, 002068 and 002069 (Exhibit 2 to ROB). The Current Period Capital Improvement Charges financed, among other things, hundreds of thousands of dollars in water main replacements and sewer main replacements. June 17, 2016 Steven Smith Dep. ("Smith Dep. 2") at pp. 124-126 (Exhibit 3 to ROB). Plaintiffs do not challenge the City's inclusion of the Current Period Capital Improvement Charges in the Rates.

Since FY 2011-12 – in addition to the Current Period Capital Improvement Charges – the City has incorporated $500,000 per year into its Rates to create a "cash reserve." As Smith testified:

> Q. Turning again to Exhibit Number 8, the very first page, which is Deerhurst 2056 there's a cover sheet that says attached is the 2016 Water & Sewer Rate Analysis. Do you see that?
> A. Yes.
> Q. There's a couple of bullet points. There's one that says capital outlay estimated at one point seven million for fiscal year '16. Do you see that?
> A. Yes.
> Q. Then it says include adding to cash reserve of five hundred thousand dollars. Do you see that?
> A. Yes. …
> Q. Is that after the capital outlay?
> A. Yes
> Q. **So you are going to set a rate sufficient to pay the one point seven million dollars of capital outlay for fiscal year '16 and create a cash reserve of a half a million dollars.**
> A. **Estimated, yes.** [Exhibit 1 to ROB, Smith Dep. 1 at pp. 142-143] (emphasis added).

Significantly, the purpose of the $500,000 annual addition to cash reserves is to fund **future** improvements to the W&S system. Smith Dep. 1 at pp. 132-136 and Exhibit 2 to ROB at pp. 10-11. As Smith testified:

Q. Is that the plan to set a rate so that after paying all the expenses there's an increase in cash of about a half a million dollars a year for future capital improvements?

A. As of this – this document, yes. …

Q. But the rates, we'll get into the calculations, but the rates are intended to generate an extra half a million dollars of cash that can be used as a reserve for future improvements to the system.

A. Correct. [Smith Dep. 1 (Exhibit 1 to ROB) at pp. 134-135].

In his first deposition, Smith could not identify any specific future projects that would be funded by the accumulated cash reserves or what those improvements would cost. *See generally* Smith Dep. 1 at pp. 132-135. In his second deposition **in June 2016**, he confirmed that the City had been accumulating the cash reserves since **July 2011** ($2.5 million as of June 2016) without **any** defined plan for the use of those monies:

Q. The cash that's been accumulated as part of the five hundred thousand dollar annual reserve charge that's in the rate, is that earmarked for any particular project at this point?

A. **They're working on a capital improvement plan in the next year.** [Exhibit 3 to ROB, Smith Dep. 2 at pp. 124 (emphasis added)].

For the reasons discussed below, the Rate Overcharge which funds the cash reserves for still-unidentified future improvements to the City's water and sewer system constitutes an unlawful tax and otherwise renders the City's Water and Sewer Rates unreasonable.

IV. THE CIRCUIT COURT'S RULINGS

A. The Circuit Court Grants Summary Disposition In Favor Of The City With Respect To The Claims Based Upon The General Fund Support Charge.

Plaintiffs moved pursuant to MCR 2.116(C)(10) for summary disposition in their favor as to the City's liability under each of Plaintiffs' claims as they relate to the General Fund Support Charge. Plaintiffs supported their allegations that the City had engaged in inappropriate General Fund Transfers with voluminous admissible evidence, including the affidavit of their expert. Plaintiffs meticulously detailed each type of improper General Fund Transfer, and cited to the testimony and City-authored documents which demonstrated that the Transfer did not simply represent fair compensation to the General Fund for "services" allegedly provided by the General Fund to the Water and Sewer Fund

but instead constituted a subsidy that was used by the City to cover shortfalls in its General Fund budget. *See* Exhibits 1.A through 1.I to GFB. The City filed a cross-motion for summary disposition seeking judgment in its favor. Significantly, in its cross-motion, the City did not directly contest Plaintiffs' evidence concerning the General Fund Transfers but instead primarily argued that Plaintiffs' claims should fail because Plaintiffs had not proven that the City's overall Water and Sewer Rates were "unreasonable."

At a status conference on May 3, 2017, the Circuit Court set a hearing date of July 6, 2017 for the motions. However, on June 28, 2017, the Circuit Court inexplicably issued an Opinion denying Plaintiffs' Motion for Summary Disposition and granting the City's motion. *See* Exhibit A hereto.

Significantly, the Circuit Court did not address the legal issue of whether the City could lawfully transfer monies from the Water and Sewer Fund to support the General Fund. Instead, the Court, ignoring all of Plaintiffs' evidence and crediting all of the City's "evidence," simply held that no such transfers had occurred. In making this determination, the Court relied solely upon the "evidence" submitted by the City and wholly ignored the meticulously documented contrary evidence submitted by Plaintiffs. The Court's "analysis" of the General Fund Support Charge consists of the following passage from p. 14 of the Opinion:

> In this case, Plaintiffs complain that funds generated by water and sewer rates were improperly transferred to the General Fund to support other expenses. For example, the Finance Director, Mr. Smith, testified that funds budgeted for Water and Sewer retiree healthcare expenses are transferred to the General Fund and then paid out to insurers. [Plaintiffs' Motion, Exhibit 2, p. 28-29]. He explained that some costs are allocated to Water and Sewer when an employee has worked in other departments and then later retires from the Water and Sewer Department. These costs get charged to the General Fund and are allocated back to the Water and Sewer Fund. [Id.] Funds allocated for these expenses derive from the operation and maintenance of the system because those former employees maintained and operated the system. Plaintiffs present no evidence to support the notion that the rates, although charged to the General Fund, are for General Fund services. [Opinion at p. 14].

The Court will note that the Circuit Court did not refer **at all** to the extensive analysis provided by Plaintiff's expert, Mr. Olson, which, among other things, showed that the amount transferred to the

General Fund for purported Water and Sewer retiree healthcare expenses was grossly inflated. *See* discussion, *infra*, at pp. 20-23. The Court will further note that the Circuit Court didn't address any of the other purported General Fund costs that were allocated to the Water and Sewer Fund, such as City Hall Grounds expense, DPS Garage expense, MTT Refunds expense, Municipal Risk/Reserves expense, IT expense and/or attorney fee expense.

Based upon its review of this "evidence," the Circuit Court made the following findings of fact concerning the General Fund Support Charge:

1. "Water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large." Opinion (Exhibit A hereto) at pp. 14-15 and again at p. 19.
2. "Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other services for the public at large." *Id.* at p. 16 and again at pp. 19-20.
3. "This Court already has determined that the water rates are reasonable and the water and sewer fund reserves have not been inappropriately transferred to the General Fund." *Id.* at pp. 16-17.

Based on these findings of fact, the Circuit Court granted the City's motion for summary disposition as to Plaintiffs' claims arising from the General Fund Support Charge. *See* Opinion, p. 16.

B. The Circuit Court Grants Summary Disposition In Favor Of The City With Respect To Plaintiffs' Claims Based Upon The Rate Overcharge.

With respect to Plaintiffs' motion for summary disposition as to the Rate Overcharge, the Circuit Court considered the testimony of the City's finance director, Steve Smith, whom the Court said "is aware of a plan for future improvements" that "is intended to set a rate that would add $500,000.00 per year, after expenses such as employee wages and benefits, to fund current capital improvements to the system." Opinion (Exhibit A hereto), p. 7. The Circuit Court also considered the testimony of Plaintiffs' expert, James Olson, whom the court acknowledged had "testified that, because the City of Westland's Water and Sewer Fund has seen an increase over the last couple years, the water and sewer rates charged to the City's customers are excessive or above a reasonably determined actual cost of service." *Id.* The Court found, however, that "Mr. Olsen [sic] fails to take into account the expenses of maintenance and

future capital improvements. In fact, he stated that he had no opinion as to the overall reasonableness of the Water and Sewer expenditures." *Id.* The Circuit Court thus ignored Olson's testimony about cost components in the Rates, which can render the Rates unlawful regardless of their overall reasonableness, as discussed in detail below.

The Circuit Court also considered the untimely opinion testimony of the City's expert, Mark Beauchamp, and found that according to him "[t]he only way to determine if the rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis", and that Beauchamp "concluded that, for fiscal years 2009 through 2016, the revenues generated by the City's Water and Sewer Department 'fell below the revenue requirements.'" Opinion, p. 8.

In light of the above testimony, the Circuit Court found that "Plaintiffs have not shown any improper use of the reserved funds and have not demonstrated that it is unreasonable to anticipate costs for required maintenance and improvement to the system. Hence, they have not overcome the presumption that the City's rates are reasonable." *Id.*, p. 8. In granting the City's cross-motion for summary disposition as to the Rate Overcharge, the court again found that "Plaintiffs have not demonstrated that the water and sewer rates are unreasonable. **No evidence has been presented** which would establish appropriate rates for operation and maintenance of the system." Opinion, p. 16 (emphasis added).

By flatly stating that Plaintiffs had presented "[n]o evidence" of inappropriate rates, the Circuit Court ignored the extensive and weighty evidence Plaintiffs in fact presented on that issue, as described in detail below at pp. 34-41.

C. The Circuit Court Further Finds That Plaintiffs' Claims Are Barred By The Statute Of Limitations

In its motion for summary disposition, the City claimed that "Plaintiffs' claim that the alleged rate overcharges violates the Headlee Amendment is barred by the statute of limitations," and "that the statute of limitations should apply to Plaintiffs' equitable claims." Opinion at p. 15.

In applying the statute of limitations to Plaintiffs' Headlee claim, the Circuit Court, apparently *sua sponte*, ruled that Plaintiffs' claim accrued in March 2013, when "the City changed how it assessed these fixed charges, by creating different rates based upon the size of the water pipe that served each customer." Opinion, p. 15. This standard is not based on any statute or case law, and the Circuit Court appears to have created it out of thin air. The Circuit Court further found that Plaintiffs' assumpsit claims, which are governed by a 6 year limitations period, were untimely without providing any analysis whatsoever. *Id.*, pp. 15-16.

D. The Circuit Court Allows The Opinion Testimony Of the City's "Expert" And Then Essentially Finds That The Testimony Is Dispositive

Discovery ended in November 2016. The parties' cross-motions for summary disposition were filed in November 2016. However, at no time prior to March 8, 2017 did the City indicate that it had even retained testifying experts, much less disclose any expert opinions, although Plaintiffs' interrogatories and this Court's scheduling orders required such disclosures long before that date.[4]

In its March 8, 2017 responses to both of Plaintiff's motions for summary disposition, the City finally offered the affidavit of an expert witness, Mark Beauchamp. *See* The City's General Fund Support Charge Response Brief at Exhibit 2; the City's Water and Sewer Fund Balance Response Brief at Exhibit 4. **Importantly, the City's March 8, 2017 briefs were the first inkling that it had retained an expert witness in this case.** Mr. Beauchamp's affidavit was wildly untimely and is the equivalent of litigation by ambush. It also relied on facts that were not in evidence and that were contrary to the facts that **were** in evidence.

The City further relied on an affidavit by Debra Peck, its budget director, wherein she refers to a revised analysis of the allocation of costs between the City's Water and Sewer Fund and General Fund,

[4] The facts relating to the untimely-disclosed opinion testimony are set forth in detail in the Brief in Support of Plaintiffs' Motion in Limine to Strike and Exclude Expert Opinions and Testimony, filed on May 16, 2017 (the "Expert Br.") and the Reply Brief in Support of Motion in Limine to Strike and Exclude Expert Opinions and Testimony, filed on June 1, 2017.

which she claims to have prepared and provided to Mr. Beauchamp for use in forming his expert opinions. Plaintiffs took Peck's deposition during discovery and questioned her about the City's then-existing cost allocation analysis. Peck's new affidavit was unrelated to any actual practice by the City or any facts in evidence and was not disclosed in her deposition or otherwise prior to March 8, 2017. Moreover, Plaintiffs obviously did not have a chance to question Peck about her purported new cost allocation analysis. In fact, Plaintiffs did not (and still do not) even know what the new cost allocation analysis says because the City did not produce the analysis to Plaintiffs or attach it to its briefs or to Mr. Beauchamp's affidavit.

On May 16, 2017, Plaintiffs filed a motion asking the Circuit Court to exclude from evidence Mr. Beauchamp's affidavit, any testimony Mr. Beauchamp might give at trial, Ms. Peck's affidavit, and the purported new cost allocation analysis Ms. Peck referred to in her affidavit. In its Opinion, the Court denied the motion, finding as follows:

> . . . Ms. Peck's affidavit states a disagreement with Mr. Olson and demonstrates that he had not accounted for all costs and expense associated with the Water and Sewer Fund including costs that pass to retired employees after their service in the department. Therefore, the Court finds her affidavit sufficient and she may testify as a lay witness at trial, if necessary.
>
> With respect to Mr. Beauchamp, Plaintiffs claim that his analysis is an unacceptable [sic] in the industry. His qualifications are extensive as can be seen on his curriculum vitae. . . . Plaintiffs' contention is that Mr. Beauchamp has not used reliable principles and methods.
>
> * * *
>
> In the Court's view, Mr. Beauchamp's analysis is reliable and his explanation of methods used by the City will assist the trier of fact.
>
> * * *
>
> Thus, both Ms. Peck and Mr. Beauchamp averred their disagreement with Mr. Olson's analysis and can serve as rebuttal witnesses. Mr. Beauchamp used reliable accounting principles to express his opinion. Therefore, the Court will deny Plaintiffs' motion.
>
> The Court notes also that, regarding Plaintiffs' contention that the City has refused to produce Ms. Peck's analysis, rather than striking the evidence, the more appropriate remedy would be a motion for an order compelling production. [Opinion, pp. 18-19.]

As the Court can see, the Circuit Court did not consider the gross untimeliness of Beauchamp's affidavit or the absence of Peck's underlying data. It was an abuse of discretion for the Circuit Court to allow Beauchamp's affidavit into evidence under circumstances that amounted to an ambush of the Plaintiffs.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING THE CITY'S MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE CLAIMS BASED UPON THE GENERAL FUND SUPPORT CHARGE.[5]

A. The Standard of Review

Summary disposition under MCR 2.116(C)(10) is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment in its favor as a matter of law. In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* "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." MCR 2.116(G)(4). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto*, 451 Mich. at 363.

B. The Circuit Court Improperly Found, As A Matter Of Fact, That There Was No General Fund Support Charge.

The Circuit Court did not conduct a legal analysis of whether the General Fund Support Charges were taxes or otherwise unlawful if the amount of the Transfers in fact exceeded the value of any services provided by the General Fund to the Water and Sewer Fund. Instead, the Court simply and repeatedly found, as a matter of fact, that there were no such improper transfers. For example, the Court made the

[5] This issue was preserved in the GFB at pp. 10-20.

following findings of fact on this point:

> "Water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large." Opinion at p. 14-15 and again at p. 19.
>
> "Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other services for the public at large." Id. at p. 16 and again at pp. 19-20

The Circuit Court's "analysis" that led to its findings of fact, however, ignores the actual facts adduced by Plaintiffs. In fact, in totally disregarding Plaintiffs' evidence concerning the General Fund Transfers, the Court ignored the dictate that when deciding a summary disposition motion under MCR 2.116(C)(10), the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Moreover, the Circuit Court disregarded the requirement that a "**trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)**." *Id.* (emphasis added) (citing *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994)). Here, the Court just accepted the City's bald assertions that there were no improper General Fund Transfers.

Given this simple basis for the Court's ruling concerning the General Fund Support Charge, the only question the Court must resolve in Plaintiff's favor in order to reverse the Circuit Court on this point is this: **Did Plaintiffs submit admissible evidence creating a genuine issue of material fact as to whether certain amounts transferred from the Water and Sewer Fund to the General Fund were improper?** When the Court applies the proper standard for deciding a (c)(10) motion – i.e., views the evidence in the light most favorable to Plaintiffs, draws all reasonable inferences in favor of Plaintiffs, does not assess the credibility of witnesses, does not weigh the evidence or resolve fact disputes – the Circuit Court's finding of fact that there were no such transfers is manifestly erroneous and must be reversed. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

Notably, the Circuit Court devoted just one paragraph of its Opinion to the facts adduced by the

parties concerning the Transfers. At p. 14 of the Opinion (Exhibit A hereto), the Court notes that Plaintiffs "complain that funds generated by water and sewer rates were improperly transferred to the General Fund to support other expenses." The Court then fails to address **any** of the plaintiff's evidence of such improper transfers. Instead, the Court merely references some benign testimony by the City's finance director, Steve Smith, concerning the retiree health care expenses. The Court then concludes that "Plaintiffs present no evidence to support the notion that the rates, although charged to the General Fund, are for General Fund services." *Id.*

With all due respect to the Circuit Court, this last sentence is indecipherable. It's hard to even imagine what the Court was trying to say. The Water and Sewer Rates are not "charged to the General Fund." Perhaps the Circuit Court meant this: "Plaintiffs present no evidence to support the notion that the rates, although charged to the **Water and Sewer Fund**, are **not** for General Fund services." In any event, the Court ultimately concluded that "water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large." *Id.* at pp. 14-15.

The Circuit Court utterly failed to even note Plaintiff's evidence of improper General Fund transfers, which was painstakingly laid out in Plaintiffs' briefs and supporting exhibits. The Court simply concluded there was no such evidence. With all due respect to the Circuit Court, this was patently erroneous. Here, in concluding that "water and sewer rate funds are not being improperly transferred to the General Fund," the Circuit Court impermissibly "assessed credibility," "weighed the evidence," and "resolved factual disputes."

Let's take just one example of the Circuit Court's utter disregard of the (C)(10) standard – Retiree Health Care Expenses. The City budgets up to $3,274,000 per year for health insurance for retired employees that were not police, fire or library employees. The City then allocates up to 42% of this amount to W&S. *See* Dep. Exhs. 2, 13, 14, 15, 16 (Exhibit A.1 to GFB). The City has provided no documentary support for this allocation. *See e.g.* June 17, 2016 Smith Tx. at pp. 28-32 (Exhibit A.2 to GFB). The City's finance director stated that the 42% allocation is intended to recover the retiree health

insurance costs associated with retirees of the W&S Division. Smith Dep. at pp. 78-80 (Exhibit A.3 to GFB). *See also* January 15, 2015 letter (referring to "retiree's health insurance of former DPS water employees") (Exhibit A.4 to GFB).

For the FY 2015, the City allocated $1,375,259 of its health insurance costs for retired non-police and fire employees to the W&S fund. However, the actual amounts that the City has spent for health insurance for retired W&S employees are far less than the amounts allocated by the City to W&S in the General Fund Support Charge. *See* Kolar deposition at pp. 16 et seq. (Exhibit A.5 to GFB) and Dep. Exhibits 23-25 (Exhibit A.6 to GFB). While the City has consistently allocated **42%** of the retiree health insurance costs for general fund employees to W&S, in 2015, the cost of health insurance for retired W&S employees represented no more than **18%** of the total costs.

As of December 2015, all of the City's retired W&S employees were covered by one of three health care plans: (1) Blue Care Network, (2) Health Alliance Plan ("HAP"), and (3) Blue Cross/Blue Shield. As of December 2015, the maximum monthly and annualized cost of health insurance for retired W&S employees (as reflected in records produced by the City) was as follows:

	Monthly Charge	**Annualized Charge**	**Source**
Blue Care Network:	$4,493	$53,916	Dep. Ex. 24
HAP:	$11,044	$132,528	Dep. Ex. 23
Blue Cross/Blue Shield:	$33,418	$401,016	Dep. Ex. 25
Total	$48,955	**$587,460**	

Ms. Kolar confirmed all of these figures in her deposition at pp. 16-25. Exhibit A.5 to GFB.

Plaintiffs' expert, Mr. Olson, opined that, according to established cost allocation methodologies, retiree health insurance expense should be allocated to W&S based upon W&S's percentage of full time equivalent employees ("FTEs") of all covered departments. Excluding Police, Fire and Library, there were 145 total FTEs in the departments that are included in the retiree health insurance expense as of FY 2015. *See* Exhibit A.7 to GFB. W&S has 34 FTEs, representing 23.4% of the total applicable FTEs. *See* Exhibit A.7 to GFB. Therefore, a conservative calculation of the overcharge can be made using 23.4%

instead of the 42% that the City actually applied (smaller percentages in some prior years). Note that the use of 23.4% in the calculation is conservative because, as of December 2015, the City's had determined that the amount of actual retiree health insurance costs for retired W&S employees was just 18% of the total expense.

Moreover, since at least July 1, 2013 (and probably earlier), the City historically included the health insurance costs associated with retirees of the W&S Division in the "OPEB" line item (Other Post Employment Benefits) in its water and sewer rates, **in addition to** incorporating a charge for the **exact same expenses** in the General Fund Support Charge. *See* Deerhurst 001997 (Exhibit A.9 to GFB), Deerhurst 002068 (Exhibit A.10 to GFB), Deerhurst 000958 (Exhibit A.11 to GFB), and Peck Dep. at pp. 16-18 (Exhibit A.12 to GFB). Therefore, the entire amount of retiree health insurance expense allocated to W&S in the General Fund Support Charge since at least July 1, 2013 is improper because it constitutes a "double dip."[6]

A calculation by Plaintiffs' experts of the overcharge of retiree health insurance expense through June 30, 2016 appears below:

2015-16 – total expense -- $3,274,425. Allocated to W&S (42%) -- $1,375,259. Unlawful Charge -- $1,375,259.

2014-15 – total expense -- $3,274,425. Allocated to W&S (42%) -- $1,375,259. Unlawful Charge -- $1,375,259.

2013-14 – total expense -- $3,118,500. Allocated to W&S (42%) -- $1,309,770. Unlawful Charge -- $1,309,770

2012-13 – total expense -- $2,970,000. Allocated to W&S (42%) -- $1,247,400. Actual W&S expense (23.4%) -- $694,980. Unlawful Charge – $552,420

2011-12 – total expense -- $2,700,000. Allocated to W&S (39%) -- $1,053,000. Actual W&S expense (23.4%) -- $631,800. Unlawful Charge -- $421,200

---

[6] Mr. Smith confirmed that the OPEB expense is in the water rate such that when someone pays their water bill, they are paying their portion of the annual OPEB expense. June 17, 2016 Smith Tx. at p. 92 (Exhibit A.2 to GFB). Moreover, Mr. Smith confirmed that OPEB expense is not being set aside for future retirement benefits and is available to pay current expenses of the W&S Fund. *See* June 17, 2016 Smith Tx. at p. 91-94 (Exhibit A.2 to GFB).

2010-11 – total expense -- $2,500,000. Allocated to W&S (39%) -- $975,000. Actual W&S expense (23.4%) -- $585,000. Unlawful Charge -- $390,000

2009-10 – total expense -- $2,235,000. Allocated to W&S (37%) -- $826,950. Actual W&S expense (23.4%) -- $522,990. Unlawful Charge – $303,960

Total Unlawful Charge July 1, 2009 – June 30, 2016 -- **$5,727,868**

The foregoing is just one meticulously documented example of the City's ongoing practice of transferring huge sums of money from the Water and Sewer Fund to the General Fund under the guise of "reimbursing" the General Fund for "services" purportedly provided by the General Fund departments to the Water and Sewer Fund. It is beyond reasonable dispute that Plaintiffs adduced evidence sufficient to at the very least create a genuine issue of material fact as to the propriety of the transfers. Accordingly, the Circuit Court clearly erred in concluding that "[w]ater and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large." Opinion at p. 14-14 and again at p. 19

C. At the Very Least, There Are Genuine Issues of Material Fact As To Whether The City Imposed An Unlawful Tax By Including The General Fund Support Charge In The Water and Sewer Rates

Clearly, Plaintiffs have adduced sufficient evidence to demonstrate that the City transferred money from the W&S Fund to the General Fund that was far in excess of the reasonable value of any "services" provided by the General Fund to the W&S Fund – i.e., that there in fact was a General Fund Support Charge included in the Water and Sewer Rates.

Because the Circuit Court found that there was no General Fund Support Charge, the Circuit Court did not decide whether the General Fund Support Charge constitutes a "tax." If it does, however, the Charge violates the Headlee Amendment to the Michigan Constitution, which precludes municipalities from imposing new taxes without voter approval, and further violates MCL 141.91, which prohibits a city from imposing any tax, other than an ad valorem property tax, unless the tax was being

imposed by the city on January 1, 1964.[7] For the reasons discussed below, if the fact-finder ultimately determines that the City in fact imposed the General Fund Support Charge, that Charge plainly is a "tax" under prevailing Michigan law.

1. The Tax vs. User Fee Distinction Made Under the Headlee Amendment

Section 31 of 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. [Const. 1963, art. 9, § 31]

An application of § 31 is triggered by the levying of a tax. *Bolt,* 459 Mich at 158-159. "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." *Durant v Michigan,* 456 Mich 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt v. City of Lansing,* 459 Mich 152, 158 (1998). However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id.* at 159. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. "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." *Id.* at 161 (quotation marks and citations omitted).

2. The "Bolt Factors" and Application of Those Factors to the General Fund Support Charge

In *Bolt,* the Court, in enforcing the Headlee Amendment, identified "three primary criteria to be considered when distinguishing between a fee and a tax" *see* 459 Mich. at p. 161:

---

[7] The Michigan Prohibited Taxes By Cities and Villages Act, MCL 141.91, provides:

> Sec. 1. 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.

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. Payment of the fee is voluntary. [459 Mich. at pp. 161-62]

Under this standard, the General Fund Support Charges constitute taxes in violation of the Headlee Amendment to the Michigan Constitution.

3. The General Fund Support Charge Component Of The City's Rates Is Not A User Fee Because It Exceeds The Actual Costs of Usage of the City's Water and Sewer System.

With respect to the first two *Bolt* factors, the General Fund Support Charge has a revenue-raising purpose and it is not proportionate to the necessary costs of the water and sewer services provided by the City because the General Fund Support Charge impermissibly allows the City to use revenues generated from water and sewer charges for unrelated purposes. In this regard, the *Bolt* Court quoted the Headlee Blue Ribbon Commission's definition of "user fee" as follows: "A 'fee for service' or 'user fee' is a payment made for the *voluntary receipt* of a measured service, **in which the revenue from the fees are [sic] used only for the service provided.**" *Bolt*, *supra* at 168 n 16 (emphasis added).

Stated another way, if a charge generates revenue in excess of the cost of providing the service, the additional revenues can be utilized for general governmental purposes and therefore constitute a tax. As the *Bolt* court observed: a permissible utility service charge is one that "'reflects **the actual costs of use**, metered with relative precision in accordance with available technology, including some capital investment component . . . ." *Bolt*, 459 Mich at 164-165. However, "[w]here revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise. 459 Mich. at 164 fn. 14 (quoting *Gorney v. Madison Heights*, 211 Mich. App. 265, 268, 535 N.W.2d 263 (1995)). Stated simply, where a municipal utility charge exceeds the "actual costs of use," the charge has a "revenue-raising" purpose and is not proportionate to the actual costs of use and thus fails the first two *Bolt* factors.

Several courts have recognized that where a municipal utility sets water or sewer rates at a level that generates excess revenues that can be transferred to the municipality's general fund, the excess

revenues constitute "taxes." Indeed, as the Ohio Supreme Court stated in *Franklin v. Harrison*, 171 Ohio St. 329, 331-333 (Ohio 1960) (Exhibit 7 to GFB):

> **"The application of funds created by water rentals to the payment of general municipal obligations,** or to expenses of constructing or maintaining sewage disposal plants, **or any purpose other than constructing, maintaining and operating facilities for the supply of water, would result in levying a tax only upon water users to meet the expense of government, …"**
>
> **"If such transfer of funds may be consummated, municipal financial difficulties could be solved by the indefinite increase of water rates followed by such transfer.** If that form of taxation is to be adopted, it should be done directly and openly, and with full consideration of the question of its constitutional validity." [*Franklin*, 170 N.E.2d at pp. 741-42 (emphasis added) (quoting *Hartwig Realty Co. v. City of Cleveland*, 128 Ohio St. 583, 192 N.E. 880 and *City of Lakewood v. Rees*, 132 Ohio St. 399, 8 N.E.2d 250)].

Similarly, in *Fairfax County Water Authority v. City of Falls Church*, 80 Va. Cir. 1, 2010 Va. Cir. LEXIS 10 (2010) (Exhibit 8 to GFB) it was "undisputed that the city's water rates generate[d] surpluses that exceed the cost of service, and that the surpluses [were] also diverted to the City's general fund." Because the amounts transferred to the General Fund to "provide other services to residents of the City," the court held that the "**positive difference between the expenses and revenues constitutes a tax.**") (emphasis added).

Further, it is well-established under controlling Michigan common law principles that, where a municipality establishes a charge for a governmental service that exceeds the costs the municipality incurs to actually provide the service (so that the municipality can use the excess revenue collected to finance other governmental activities), the charge: (a) constitutes an "unlawful exaction," and (b) must be refunded to the persons who paid the charge. *See e.g. Merrelli v. St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144 (1959); *Checker Cab Company v. Romulus,* 371 Mich. 232, 237-238; 123 NW2d 772 (1963); *Theatre Control Corp. v. City of Detroit*, 370 Mich. 382, 121 N.W.2d 828 (1963); *Beachlawn Building Co. v. St. Clair Shores,* 370 Mich 128; 121 NW2d 427 (Mich 1963).

For example, in *Merrelli, supra*, 355 Mich. 575, the city imposed fees for building permits that generated additional revenues which the city used to finance, among other things, the operations of its

police and fire departments. The Court characterized the issue presented as follows:

> "The situation is very simply revealed and it comes down to a very simple question; **does the city of St. Clair Shores have the right to assess a special charge against the purchaser of a new home collected from him by indirectly adding to his building cost for providing police protection, fire protection, the taking care of the streets?**" [355 Mich. at 579].

In evaluating the lawfulness of the charge, the Court first reiterated the standard for determining whether a governmental charge constitutes an unlawful exaction:

> "To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies. … "**Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure**". [355 Mich. at 583 (quoting *Vernor* v. *Secretary of State,* 179 Mich 157, 167-170 (1915)].

After observing the City collected $554,000 per year in building permit fees but the City's building department expenses were only $98,000 per year, the Court concluded that "the revenue derived from the licenses is entirely disproportionate to the cost of issuing the license and the direct and indirect costs of the administration thereof." 355 Mich. at 584.

Similarly, in *Trantham v. MiSDU et al.*, 313 Mich. App. 157; 882 N.W.2d 170 (2015) *rev'd on other grounds*, 500 Mich. 872 (2016), the Michigan Court of Appeals held that the $.25 charge imposed upon child support payors pursuant to MCL 600.2538 (1)(b) and (4) was not a user fee, but a tax "designed to raise revenue for general operating expenses of an unrelated governmental office," expressly stating:

> In contrast, we fail to see any relationship between the benefits plaintiff receives through his participation in the FOC system and the 25-cent portion of the monthly charge going toward the Attorney General's Operations Fund. *MCL 600.2538(1)(b)* and *(4)*. **Rather, it is evident from the face of *MCL 600.2538* that the 25-cent charge is designed to raise revenue for the general operating expenses of an unrelated government office**. …. In any event, the portion of the fee paid to the Attorney General is not restricted to use in the child support arena, but can be used for general operating expenses of the Attorney General's office as the Legislature may see fit in the annual appropriations process. …
>
> **It is therefore facially apparent from *MCL 600.2538* that the 25-cent charge going to the attorney general's operations fund is a revenue raising measure that bears no relationship to plaintiff's use of the FOC system. In light of its predominant revenue**

raising function, we conclude that the 25-cent charge under *MCL 600.2538(1)(b)* and *(4)* is a tax. See *Wheeler, 265 Mich App at 665*; see also *Merrelli, 255 Mich at 584*.

Applying the foregoing standard, it is clear that the General Fund Support Overcharge is revenue raising and not proportionate to the necessary costs of the water and sewer services provided by the City because it is deliberately imposed upon the W&S Department to pay for unrelated General Fund costs.

4. As In Bolt, Charges Are Not Voluntary, But Rather Are "Effectively Compulsory"

Finally, Plaintiffs and the Class are required to pay the General Fund Support Charge by virtue of their mandated "use" of the City's water supply and sanitary sewer systems. At the very least, such use is "effectively compulsory" within the meaning of the *Bolt* court and thus is not voluntary.

As an initial matter, the City requires its residents and business to connect to its sewer system where available by ordinance. *See* City Ordinance Sec. 102-301 (Exhibit 9 to GFB) (providing that "(a) Connection to the public sanitary sewer system for any and all existing on-site sewage disposal systems is mandatory. and (b) **Any and all structures in and from which sanitary sewage originates or passes, which lie or exist within the boundaries of the city, shall be connected to the city's public sanitary sewer system**, so long as a public sanitary sewer system is functional and available for connection to by property owners") (emphasis added).

Furthermore, MCL 333.12753(1) provides that "Structures in which sanitary sewage originates lying within the limits of a city, village or township shall be connected to an available public sanitary sewer in the city, village or township **if required by the city, village or township**." (emphasis added). Pursuant to MCL 333.12753(1), the City requires Plaintiff to utilize the City's water and sewer system by virtue of Ordinance Sec. 102-301 and, by virtue of that connection, requires Plaintiff to pay the Charges imposed by the City.[8]

[8] Additionally, State law imposes a uniform construction code that applies throughout the State and incorporates the international residential code, the international building code, the international

This Court has held that where a person is required to connect to a public sewer, payment of sewer-related charges is not voluntary for purposes of determining whether the charges are "taxes" under the Headlee Amendment. *See, e.g., Meadows Valley, LLC v. Village of Reese*, 2013 Mich. App. LEXIS 1009 (2013) (Exhibit 10 to GFB) ("We agree that the charge is not voluntary, to the extent that one may not own property in the Village of Reese and not connect to the public sewer system. The ordinance requires all owners of 'houses, buildings, or properties used for human occupancy . . . 'to connect to the public sewer system. There is '[a]bsolutely no element of volition" involved.'").

As Justice (then Judge) Markman observed in his dissent that ultimately was adopted by the *Bolt* Supreme Court majority:

> **City ordinances mandate that all property owners connect to the sanitary sewer** and it does not seem unreasonable to assume that Ordinance 925 will eventually be amended to impose the same requirement with respect to the newly separated storm sewer system. **The use of such indispensable services cannot be considered a matter of choice when there is a municipal monopoly and mandate over them**. The property owner wishing not to use the service, or to use another service, has no alternatives. **The charge is effectively compulsory**. [221 Mich. App. at 97 (emphasis added)]

The Charges at the very least are "effectively compulsory." Accordingly, those charges are not "voluntary" within the meaning of the third *Bolt* factor.

In sum, the General Fund Support Charge bears all of the indicia of a tax under *Bolt*. By setting its Rates at a level sufficient to generate surplus revenues that it transfers to the General Fund, the Charge clearly are motivated by a revenue-raising purpose. Moreover, because the Rates raise excess revenues, the Rates are not proportionate to the actual costs of the Class member's use of the City's

---

mechanical code, and the international plumbing code. *See* MCL 125.1504; MCL 125.1508a. Consistent with this State law, Plaintiffs are required to utilize the City's water supply and sewage system.

Finally, the Michigan Residential Code explicitly requires all residential structures to connect to an available public water supply and sanitary sewer system:

> P2602.1 General. The water-distribution and drainage system of any building or premises where plumbing fixtures are installed **shall be connected to a public water supply or sewer system, respectively, if available**. [Exhibit 11 to GFB (emphasis added)].

water and sewer system. Finally, the Charges are "effectively compulsory" due to the mandated use of the City's water and sewer system.[9]

As a tax, the General Fund Support Charge violates the Headlee Amendment because it is undisputed that the Charge was not approved by the City's voters. The Charge also violates MCL 141.91 because it is not an "ad valorem property tax" and was first imposed by the City after January 1, 1964. Accordingly, the Court should have granted summary disposition in favor of Plaintiffs as to Counts II and IV of the FAC. At the very least, the Circuit Court should have found that there were genuine issues of material fact as to whether the General Fund Support Charge constituted a tax.

II. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE GENERAL FUND SUPPORT CHARGE IS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND THUS VIOLATES COMMON LAW RATEMAKING PRINCIPLES AND THE CITY'S OWN CHARTER.[10]

Even if the General Fund Support Charge is not a tax, the City's Water and Sewer Rates "must still be reasonable." *Mapleview Estates v. Brown City*, 258 Mich. App. 412 (2003). Thus, the Court must

---

[9] Finally, the *Bolt* Court observed the presence of "additional factors" which further supported its finding that the Lansing stormwater charges were taxes:

> Additional factors, while not dispositive, also support the conclusion that the storm water charge in this case is a tax. First, for purposes of the storm water share of the CSO control program, the "storm water enterprise fund" replaces the portion of the program that was previously funded by the general fund revenues from property and income taxes. **Second, the fact that the storm water service charge may be secured by placing a lien on property is relevant. While ordinarily the fact that a lien may be imposed does not transform an otherwise proper fee into a tax, this fact buttresses the conclusion that the charge is a tax in the present case, where the charges imposed are disproportionate to the costs of operating the system and to the value of the benefit conferred, and the charge lacks an element of volition**. [*Bolt,* 459 Mich at p. 168.]

Similarly, here, as in *Bolt*, payment of the Charges can be secured by placing a lien on Plaintiffs' properties. Indeed, "[a]ll water and sewer bill charges shall constitute a lien on the property served." City Ordinance Sec. 102-67. Moreover, if water and sewer bill charges go unpaid for 6 months, "the mayor shall place such charges, together with an additional 30 percent penalty, on the next general city or county tax roll and the charges shall be collected as part of the general city or county tax roll on which such charges appear." City Ordinance Sec. 102-68.

[10] This issue was preserved at pages 16-18 of the GFB.

determine whether, by including the General Fund Support Charge, the City's Rates are unreasonable under established municipal rate-making principles.

In *Trahey v. City of Inkster*, 311 Mich. App. 582; 876 N.W.2d 582 (2015), the Court of Appeals recently reiterated the role of the courts in evaluating the reasonableness of municipal utility rates. There, the Court affirmed the following principles:

1. "[M]unicipal utility rates are presumptively reasonable." 311 Mich. App. at 594;
2. The "presumption of reasonableness may be overcome by a proper showing of evidence." *Id*;
3. Plaintiff meets its burden of proof by showing that "any given rate **or** ratemaking practice is unreasonable." *Id*;
4. Plaintiff meets its burden of proof by providing "**clear evidence of illegal or improper expenses included in a municipal utility's rates**." *Id.* at p. 595; and
5. "The determination of 'reasonableness' is generally considered by courts to be a question of fact"). *Id.*

In applying these principles, Judge John Donahue of the Berrien County Business Court recently invalidated a municipal utility charge where, as here, the municipality was diverting the revenues derived from the charge to its General Fund. In *Charter Township of Niles v. City of Niles*, Case No. 2015-0224-CB (Berrien County Cir. Ct.) (Exhibit 12 to GFB), a township receiving water and sewer services from an adjacent municipality challenged a charge imposed by the municipality on its water and sewer funds which, like the General Fund Support Charge here, purported to reflect the value of services provided by the municipality to those water and sewer funds. After concluding that the charge was intended to generate revenue for the City's General Fund and not merely reimburse the City for services provided, the Court granting the Plaintiffs' motion for summary disposition. In doing so, the Court observed:

> The City argues that "Plaintiffs have produced no evidence to carry their burden that the PILOT is unreasonable" and that "[t]he City has no duty to provide a precise mathematical computation to justify the amount of the PILOT." Defendant's Brief, p. 11. However, Mr. Huff's deposition testimony and the Mayor's email illustrate a clear fact which the City does not dispute**; the 10 percent PILOT charges have nothing to do with the indirect costs that the City's residents pay in supporting the water and wastewater systems**. Paragraph 10a(1) of the Water Agreement and 7a(1) of the Sewer Agreement require that the rates be fair and reasonable. As Plaintiffs' counsel argued at the hearing, "that which has zero relationship to lawful factors cannot have a reasonable relationship to lawful factors," and **the City Administrator's testimony clearly**

> **indicates that the driving purpose of the PILOT transfers was to increase the General Fund revenue**.
>
> … This Court further finds that the Township has demonstrated that the PILOT at issue (1) has no reasonable relationship to lawful factors, (2) was designed to increase revenue to the City's General Fund, and that (3) the Township residents as a result are subsidizing general City services that the City provides to City residents contrary to *Chocolay Twp v City of Marquette*, 138 Mich App 79, 84-85; 358 NW2d 636, 638 (1984). [Exhibit 12 at pp. 9-10 (emphasis added)]

In *Charter Township of Niles*, the Court found that the charge was "arbitrary because it was established without regard to basic principles of ratemaking or specific circumstances." *Id.* at p. 10. The Court further found that the charge was "capricious because it was established contrary to rules of law." *Id.* Finally, the Court found that the charge was "unreasonable because no reasonable mind could find that the [charge] was established in accordance with Michigan law." *Id.* Similarly, in this case, Mr. Olson's opinion testimony and the undisputed facts confirm that the General Fund Support Charge is "arbitrary because it was established without regard to basic principles of ratemaking or specific circumstances," including the AWWA manual and guidance and GFOA standards. The Charge is "capricious because it was established contrary to rules of law," including MCL 123.141 and the City's own Charter.[11] Finally, the General Fund Support Charge is "unreasonable" because "no reasonable mind could find that the [charge] was established in accordance with Michigan law." *Trahey* clearly states that this Court is empowered to invalidate water and sewer charges if Plaintiffs present "**clear evidence of illegal or improper expenses included in a municipal utility's rates**." Because Plaintiff has done so here, the Court should have granted summary disposition in favor of Plaintiff as to Counts III and V of the FAC. At the very least, the Circuit Court should have found that there were genuine issues of

[11] The General Fund Support Charge also has been imposed in violation of at least two City Charter provisions. First, Section 17.3 of the Charter requires that the City establish "just and reasonable" rates for water and sewer services. Second, Section 16.10 of the Charter provides that the proceeds of sewer-related charges "**shall be exclusively used for the purpose of the sewage disposal system.**" *See* Exhibit 13 to GFB.

material fact as to whether the Rates were unreasonable because they included the General Fund Support Charge.

III. BY INCLUDING THE GENERAL FUND SUPPORT CHARGE IN THE WATER RATES, THE CITY HAS VIOLATED MCL 123.141[12]

Finally, in addition to the other limitations on municipal water and sewer rates discussed above, Michigan state law prohibits a municipality which purchases its water from the City of Detroit and which supplies that water to its residents from charging a retail rate that exceeds the municipality's "actual cost of providing the service." MCL 123.141 (Exhibit 14 to GFB). In other words, Michigan law prohibits a municipality like the City from profiting from its sale of water to its citizenry. In this regard, MCL 123.141 provides that "[t]he 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." MCL 123.141(3). Because the City purchases its water from the City of Detroit (now the Great Lakes Water Authority), the City is a "contractual customer" as defined by MCL 123.141(2) and therefore is bound by the provisions of MCL 123.141(3). *See Oneida Charter Township v. Lee*, 485 Mich. 849, 771 N.W.2d 785 (2009) ("MCL 123.141(3) prohibits only 'contractual customers as provided in subsection (2)' from charging retail rates in excess of the actual cost of providing service").

The City has continuously and systematically violated MCL 123.141(3) by imposing Water Rates that exceed the City's actual cost of providing water service by millions of dollars. Specifically, inclusion of the General Fund Support Charge in the City's Water Rates violates MCL 123.141(3)—because inclusion of these charges in the Water Rates necessarily means that these Rates generate revenues which exceed the City's cost of providing service. Simply, the fact that the City is able to divert millions of dollars of W&S Fund revenues for services unrelated to supplying water to its inhabitants and to create a significant reserve to finance future improvements to the water and sewer system is proof that the City is charging Water Rates which exceed the "actual cost of providing the service," in violation of MCL

[12] This issue was preserved at pp. 18-19 of the GFB.

123.141(3). Accordingly, the Court should grant have denied the City's motion for summary disposition and granted Plaintiffs' motion for summary disposition as to Count I of the FAC.

IV. THE RATE OVERCHARGE CONSTITUTES AN UNLAWFUL TAX IN VIOLATION OF THE HEADLEE AMENDMENT AND MCL 141.91 AND ALSO RENDERS THE CITY'S RATES UNREASONABLE.[13]

A. The Circuit Court Improperly Found That The Rate Overcharge Was Used To Finance Current Improvements When The Evidence Was Undisputed That The Charge Was Intended To Finance Future Capital Improvements.

As an initial matter, the Circuit Court made a critical factual error which undermines its finding that the Rate Overcharge was not a tax and was not unreasonable. The Court apparently believed that revenues obtained through the Rate Overcharge claimed by Plaintiffs were being used for current period capital improvements. This is apparent at page 7 of the Opinion, where the Court states:

> In short, according to Mr. Smith, the plan is intended to set a rate that would add $500,000.00 per year, after expenses such as employee wages and benefits, to fund **current** capital improvements to the system." [Opinion at p. 7 (emphasis added)].

The factual error was critical because Plaintiffs do **not** challenge the City ability to finance capital improvements through Rates imposed during the year the improvements are undertaken, but instead challenge the City's practice of collecting funds that will purportedly be used for yet-unidentified capital improvements at some yet-identified time in the future. In stating that "[p]laintiffs have also failed to establish that the reserve funds are used for anything other than the maintenance and operation of the system," (Opinion at p. 11), the Circuit Court again failed to understand the nature of the reserve funds. As noted below, the Plaintiffs adduced evidence that the City had no current plan for the use of the reserves. In other words, the reserves are not being "used" at all, but rather were being horded by the City purportedly to finance future capital improvements to the water and sewer system.

As noted above, the City includes in its annual W&S Budget and, therefore, in the Rates, significant amounts to finance repairs and improvements to its water and sewer system in the ensuing fiscal year (the "Current Period Capital Improvement Charges"). October 2015 Steven Smith Dep.

[13] This issue was preserved at pp. 4-13 of the ROB.

("Smith Dep. 1") at p. 142 (Exhibit 1 to ROB. The Current Period Capital Improvement Charges financed, among other things, hundreds of thousands of dollars in water main replacements and sewer main replacements. June 17, 2016 Steven Smith Dep. ("Smith Dep. 2") at pp. 124-126 (Exhibit 3 to ROB). Again, Plaintiffs do not challenge the City's inclusion of the Current Period Capital Improvement Charges in the Rates.

Since FY 2011-12 – in addition to the Current Period Capital Improvement Charges -- the City has incorporated $500,000 per year into its Rates to create a "cash reserve." Exhibit 1 to ROB, Smith Dep. 1 at pp. 142-143] (emphasis added). The purpose of the $500,000 annual addition to cash reserves is to fund **future** improvements to the W&S system. Smith Dep. 1 at pp. 132-136; Exhibit 2 to ROB at pp. 10-11.

Importantly, however, the City has not identified **any** specific future projects that will be funded by the accumulated cash reserves, when those projects will be undertaken, or what those improvements would cost. *See generally* Smith Dep. 1 at pp. 132-135 (Exhibit 1 to ROB); Exhibit 3 to ROB, Smith Dep. 2 at pp. 124 (emphasis added)]. Thus, the City has accumulated millions of dollars to purportedly to finance future infrastructure projects it has not yet identified during periods of time it has not yet determined.

As will be seen below, the Michigan courts prohibit municipal utilities from including charges in Rates intended to create a reserve fund for future improvements under these circumstances, which is precisely what the Rate Overcharge is designed to do.

B. The Rate Overcharge Component Of The City's Rates Is Not A User Fee Because It Is Being Used To Create A Reserve Fund For Potential Future Capital Improvements To The City's Water and Sewer System.[14]

When one considers that the avowed purpose of the Rate Overcharge is to create a reserve for still-undetermined future capital improvements to the City's water and sewer system, it becomes clear that the Rate Overcharge is an unlawful tax imposed upon the City's water and sewer customers.

[14] This issue was preserved at pp. 6-10 of the ROB.

In *Bolt*, the city of Lansing sought to limit the polluting of local rivers that resulted when heavy storm water precipitation caused the city's combined storm water and sanitary sewer systems to overflow and discharge into those rivers combined storm water and untreated or partially treated sewage. *Id.* at 154-155. To this end, the city decided to separate the remaining combined storm and sanitary sewer system, at a cost of $176 million. *Id.* at 155. As a means to fund the costs of the sewer system separation, the Lansing City Council adopted Ordinance 925, which provided for the creation of a storm water enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system . . . ." The ordinance provided that costs for the storm water share of the CSO [combined sewer overflow] program (fifty percent of total CSO costs, including administration, construction, and engineering costs) would be financed through an annual storm water service charge. This charge was imposed on each parcel of real property located in the city using a formula that attempted to roughly estimate each parcel's storm water runoff. The *Bolt* plaintiff challenged the stormwater charge under Section 31 of the Headlee Amendment.

With regard to the first two criteria, the *Bolt* Court concluded that the Lansing storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service. Rather, the Court concluded that the service charge served a revenue-raising purpose. *Id.* at 163-167. According to the Court, "'the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.'" *Id.* at 164 (quoting *Bolt v City of Lansing,* 221 Mich. App. 79, 91; 561 N.W.2d 423 (1997) (Markman, J., dissenting)).[15] The Court reached this conclusion, in part, because:

> [i]n instituting the storm water service charge, the city of Lansing has sought to fund fifty percent of the $176 million dollar cost of implementing the CSO control program over the next thirty years. A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. **This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity**. [*Bolt,* 459 Mich at 163. (Emphasis added.)]

[15] Justice Markman's dissent in the *Bolt* Court of Appeals' decision is noted in this Brief because the Supreme Court ultimately adopted it in the majority opinion in *Bolt*.

After *Bolt*, this Court has twice ruled that a water or sewer-related charge that is intended to finance future repairs or improvements to water and sewer infrastructure assets constitutes a tax. These rulings are based on a finding that such charges have a revenue-raising (as opposed to a regulatory) purpose and render the resulting rates disproportionate to the actual costs of providing water and sewer services to current ratepayers (because improvements undertaken at unspecified points of time in the future will benefit future users and may not benefit the current payers at all).

First, in *Grunow v. Frankenmuth Township*, 2002 Mich. App. LEXIS 1440 (2002) (Exhibit 4 to ROB) a township adopted a resolution that required new users of the Frankenmuth Township Water System to pay a $7,500 connection "fee" to access city water. The Court observed that the "asserted purpose of the charge was to 'establish a reserve fund to provide for the maintenance and repair of the Frankenmuth Township Water System' when the eventual need arises." *Id.* at *4.

In assessing whether the fee constituted an unlawful tax under Headlee, the Court first concluded that the fee did not serve an underlying regulatory purpose:

> **First, the connection "fee" does not serve or support a regulatory purpose instituted for the protection of the health, safety, and general welfare of the community**. Defendant admits that the revenue collected from imposing the charge is placed in a "reserve fund to provide for the maintenance and repair of the Frankenmuth Township Water System. This fund would minimize the need to levy any additional assessments from the users within the Water System for any future maintenance and repair work," considering the pipe used in the construction of the water system has a useful service life of fifty years. **Consequently, the principal purpose of the charge is not regulatory,** e.g., to control access to the System, to prevent overburdening the System, to expand use of the System, or to change the System, although it may incidentally have a regulatory effect.

Id. at *4-5, (emphasis added).

The Court then explicitly held that a charge used to fund future capital improvements had a revenue-raising purpose, for purposes of the first *Bolt* factor:

> The facts of the instant case are more similar to those of *Bolt, supra*, where the defendant instituted a storm water service charge for the purpose of funding an investment in infrastructure, a sewer overflow control program, by an ordinance that lacked a "significant element of regulation." **Here, the connection "fee" was instituted to fund maintenance and repairs projected to be necessary at some time in the**

> **future with regard to the existing Water System that was constructed in the 1970s--clearly a revenue-raising, not regulatory, purpose**.

Id. at *6, (emphasis added).

The Court proceeded to conclude that the charge was not proportionate to the necessary costs of providing water service to the payers of the charge because, among other things, the reserve fund did not provide a current benefit to any of the payers:

> **In the instant case, the revenue collected does not confer a benefit on anyone because it is not used but, rather, is placed in a reserve fund that may eventually be spent on repairing any of the existing water mains within the Water System**. Further, the Water System was constructed in the early 1970s and the resolution to impose the $ 7,500 charge on new users was adopted in 1995. Consequently, the possible future benefits conferred by the imposition of the charge on new users of the System will eventually, and impermissibly, flow to users of the Water System who were not required to pay the charge. See *Bolt, supra at 164-165*. In sum, **the charge is not proportionate to the necessary costs of a regulatory service and it confers benefits on users of the System who were not required to pay the charge**. [Id. at ** 7-8 (emphasis added)]

Similarly, in *In re Foreclosure of Certain Parcels of Property*, 2014 Mich. App. LEXIS 943 (2014) (Exhibit 5 to the ROB), the Court considered a Headlee challenge to a "sewer privilege fee" imposed by Chesterfield Township. After concluding that the purpose of the fee was to create a reserve for future capital improvements to the Township's sewer system, the Court found that the fee had a revenue-raising, and not a regulatory, purpose:

> On its face, Article III, Division 4, § 64-214(a), clearly falls within the purpose set forth in § 64-122(6) because it is expressly intended to be considered "payment of the applicant's fair share of major capital improvements of the wastewater system such as trunk sewers and master sewage meters." **As a whole, it reflects a primary purpose to raise revenue for capital improvements to the wastewater system**. Cf. *Bolt, 459 Mich at 163* (stating that a storm water service charge established to fund a combined sewer control program, with a major component of capital expenditures, over the next 30 years "constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of regulatory activity").

In re Forfeiture, at **16-17 (emphasis added).

The Court went on to find that, because the revenues garnered by the fees would not be used until some indeterminate time in the future, the fees failed to satisfy the proportionality requirement of *Bolt*:

> All of these "tap units" are clearly based on expected future uses and estimates. As with "dwelling units," payment of the fee is only triggered by an application for a permit to connect to the wastewater system or an application for a building permit. As applied to Fox, the "tap units" used to compute the sewer privilege fee accounts for the prior "tap units" paid by the prior owner at $1,500 per "tap factor," but applies the current fee of $2,000 to the "tap units" attributable to the 5,700-square-foot addition. While there is merit to the Township's argument that the fee accounts for the increased discharge to the system, **the fee for the building as a whole nonetheless remains an attempt to raise capital for improvements based on assumptions regarding the future use of the wastewater system, and without any indication that the fees will ever be used in a manner that will provide a benefit to a fee payer**. *In re Forfeiture,* at **18-19 (emphasis added).
>
> ****
>
> But considering the lack of correspondence between the fee and any particularized benefits conferred on the person paying the fee, it fails to satisfy the proportionality criterion. "A true 'fee' . . . is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed." *Bolt,* 459 Mich at 165. [*In re Forfeiture,* at **21-22].

The foregoing authorities compel a finding that the Rate Overcharge at issue here is a tax. First, as in *Grunow* and *In re Foreclosure*, the principal purpose of the Rate Overcharge is not regulatory. As noted by the *Grunow* court, a charge that creates a reserve for future improvements to a system does not "control access to the System," "prevent overburdening the System," "expand use of the System," or "change the System." Instead, the purpose of the charge is to "minimize the need to levy any additional assessments from the users within the Water System for any future maintenance and repair work," which is not a regulatory purpose.

Second, in the absence of a regulatory purpose, the Rate Overcharge clearly has a revenue-raising purpose. Again, as in *Grunow* and *In re Foreclosure*, the Rate Overcharge "reflects a primary purpose to raise revenue for capital improvements to the [water supply and] wastewater system."

Third, the Rate Overcharge is not proportional because it fails to confer any "particularized benefits" upon the City's current water or sewer customers who are forced to pay the Overcharge. Instead, the Overcharge is "**an attempt to raise capital for improvements based on assumptions regarding the future use of the wastewater system, and without any indication that the fees will ever be used in a manner that will provide a benefit to a fee payer**." *In re Foreclosure.* Moreover, as in *Grunow*, because the cash reserves accumulated through the Rate Overcharge will not be used until some undefined time in the future, those reserves not only may not benefit the current payers, but also will necessarily confer benefits on future water and sewer customers who were not required to pay the Rate Overcharge. *See Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits **only** upon the particular people who pay the fee, not the general public **or even a portion of the public who do not pay the fee**.") (emphasis added) (citing *Bolt,* 459 Mich. at 164-165).

Clearly, the Rate Overcharge fails both of the first two *Bolt* factors, and, as discussed further above, because payment of the Rate Overcharge is not "voluntary," the Rate Overcharges constitute taxes under all three of the *Bolt* factors.

In sum, the Rate Overcharge bears all of the indicia of a tax under *Bolt*. By setting its Rates at a level sufficient to generate surplus reserve funds to finance yet undefined future infrastructure projects, the Charge clearly is motivated by a revenue-raising purpose. Moreover, because the Rate Overcharges raise excess revenues not necessary for current operations of the City's water and sewer systems and will benefit persons who do not pay the Rate Overcharges, the Rates are not proportionate to the actual costs of the Class member's use of the City's water and sewer system. Finally, the Charges are "effectively compulsory" due to the mandated use of the City's water and sewer system.

As a tax, the Rate Overcharge violates the Headlee Amendment because it is undisputed that the Charge was not approved by the City's voters. The Charge also violates MCL 141.91 because it is not an "ad valorem property tax" and was first imposed by the City after January 1, 1964. Accordingly, the

Circuit Court should have granted summary disposition in favor of Plaintiffs as to Counts II and IV of the FAC, and at the very least should have found that questions of fact existed that precluded summary disposition in favor of the City.

V. WHEN THE CIRCUIT COURT FOUND THAT PLAINTIFFS' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS, IT DISREGARDED CONTROLLING PRECEDENT FROM THIS COURT AND THE MICHIGAN SUPREME COURT

A. Plaintiffs' Headlee Amendment Claim Is Timely[16]

The Circuit Court, apparently *sua sponte*, ruled that Plaintiffs' claim accrued in March 2013, when "the City changed how it assessed these fixed charges, by creating different rates based upon the size of the water pipe that served each customer." Opinion, p. 15. But that is not the law. Headlee Amendment claims are subject to a one year statute of limitations which runs from the date a plaintiff becomes obligated to pay the challenged charge. *See* MCL 600.308a(3) ("A taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued."); *Taxpayers Allied for Constitutional Taxation [TACT] v. Wayne County*, 450 Mich. 119, 124; 537 N.W.2d 596 (1995) ("a cause of action for a tax refund accrues at the time the tax is due"). This action was filed on May 15, 2015. Thus, Plaintiffs' Headlee Amendment claim properly seeks refunds for Overcharges in the Rates billed to Plaintiffs after May 15, 2014.

The Circuit Court also noted that "[a] Headlee Amendment claim brought on behalf of the public would accrue at the time the resolution implementing the tax is passed." Opinion, p. 15. But Plaintiffs' Headlee claim is not brought on behalf of the "public" but on behalf of a **defined class** and, thus, the limitations period for the claims of the class members is not dependent upon the date the contested water and sewer rates were adopted. A class defined under the principles of MCR 3.501 is not the "public." In this action, Plaintiffs are not suing for injunctive or declaratory relief on behalf of the public at large to vindicate a public wrong or enforce a public right. Plaintiffs seek to disgorge from the

[16] This issue was preserved at pp. 4-7 of Plaintiffs' S.D. Opp. Br.

City the improperly imposed and collected Charges on behalf of a class of persons defined under MCR 3.501 and specifically identified in Plaintiffs' complaint.

The Circuit Court apparently found that Plaintiffs had brought a claim on behalf of the public. *See generally* Opinion, pp. 15-16. The Court found that Plaintiffs' claims accrued at the time the City implemented a billing change in 2013 in reliance on *Taxpayers Allied for Constitutional Taxation [TACT] v. Wayne County*, 450 Mich. 119 (1995) and *Briggs Tax Serv. v. Detroit Pub. Schs.*, 2007 Mich. App. LEXIS 682, 26-28 (2007) (Exhibit C hereto). The Circuit Court's apparent reliance was misguided, however, because neither case supports the argument that the certified class in this case is the equivalent of the" public." In *Taxpayers Allied*, the class plaintiff asserted three claims under the Headlee Amendment: (a) injunctive relief, (b) declaratory relief, and (c) for a refund of the tax he was overcharged. Notably, the Michigan Supreme Court determined the statute of limitations for each individual claim separately, and expressly held that "a cause of action for a refund of [a] tax accrues at the time the tax is due," and **not** at the time the tax was enacted. *Taxpayers Allied*, 450 Mich. at 123.

Likewise, *Briggs* held that when the class representative seeks a refund (or disgorgement of overcharges), his or her claim accrues **at the time the challenged tax is due**. This is a far cry from the trial court's apparent belief that *Briggs* stands for the premise that a class representative who seeks a refund brings an action on behalf of the "public":

> A Headlee Amendment claim must be brought within one-year after the cause of action accrued. MCL 600.308a(3); *Taxpayers Allied for Constitutional Taxation [TACT] v Wayne Co*, 450 Mich. 119, 124-125; 537 N.W.2d 596 (1995). In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action **accrues on the date that the tax is due**. *Id.* at 123-124. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed. *Id.* at 124 n 7. [*Briggs*, 2007 Mich. App. Lexis at * 26-28 (emphasis added)].

Thus, in both *Taxpayers Allied* and *Briggs,* the court did not find a "class" as defined under MCR 3.501 to be "the public" for purposes of the Headlee Amendment's one year statute of limitations; each court determined that, for purposes of claim limitation, the claim accrued at the time the tax was due.

The *Taxpayers Allied* decision clarified that a suit on behalf of the "public" is one authorized by Article 9, Sec. 32 of the Constitution, which states that "[a]ny taxpayer of the state shall have standing to bring suit" under Headlee. The decision makes clear that Plaintiffs' Headlee Claim here is not a suit on behalf of the "public" because Plaintiffs have paid the tax and have brought a refund action:

> In fact, **the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax**. Such a plaintiff does not confront a danger of irreparable harm, which is typically a requirement for injunctive relief. … **Nor would such a plaintiff suffer damages, the requisite for a damages action**. Thus, while that plaintiff has been granted standing by Sec. 32 of the Headlee Amendment, the only wrong that could give rise to a cause of action is the enactment of the resolution – an action that is not continuing in nature. [450 Mich. at 124 (emphasis added)].

Clearly, Plaintiffs have not brought this case "merely on behalf of the public," but instead on behalf of rate payers who have been subject to, and have paid, the unlawful tax in their Water and Sewer Rates. They have not filed "the only type of Headlee claim that would accrue at the time the resolution is passed," but instead have properly filed an MCR 3.501 class action, which is not an action on behalf of the "public" for statute of limitations purposes. *Bolt v. City of Lansing*, 238 Mich. App. 37, 54 (Mich. App. 1999) (*Bolt II*) held ***both*** that "taxpayers may sue for a refund within one year of the date the tax was assessed. (Even if taxpayers cannot obtain refunds for past tax payments exceeding the constitutional limit because they did not dispute them within one year of the date the taxes were assessed…)" ***and*** that MCR 3.501's "[c]lass action procedures are designed for" Headlee Amendment actions (*Id.*, 238 Mich. App. at 55). And under MCR 3.501(F)(1) the "statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action." Thus, in this matter, as to Plaintiffs' Headlee Amendment claim, the same statute of limitations period applies to Plaintiffs and all members of the class as defined in the complaint under MCR 3.501.

Under *Bolt II*, Plaintiffs "may sue for a refund within one year of the date the tax was assessed." Thus, Plaintiffs and the Class can sue under Headlee to recover Charges assessed on or after May 15,

2014. Moreover, the Circuit Court failed to consider that the Charges at issue have been imposed on an ongoing basis, continuing through the current date. Therefore, claims to recover Charges assessed on or after May 15, 2014 – including Charges imposed while this case has been pending – are timely under the one-year statute of limitations governing Headlee Amendment claims.

Additionally, the Circuit Court incorrectly found that Plaintiffs did not seek injunctive relief. The court correctly noted that "the statute of limitations 'does not prevent a taxpayer from seeking to enjoin a governmental unit from imposing on him in the future taxes that violate the Headlee Amendment.'" Opinion, p. 15 (quoting *Taxpayers Allied for Constitutional Taxation v. Wayne Co.*, 450 Mich. 119, 127; 537 N.W.2d 596 (1995)). But the Circuit Court erred when it found that "Plaintiffs herein do not seek to enjoin the City . . ." Opinion, p. 15. In their FAC, Paragraph J of the prayer for relief, Plaintiffs asked the court to "permanently enjoin the City from imposing or collecting the General Fund Support Charges and the Rate Overcharges". FAC, p. 14. Thus, even if Plaintiffs' claims related to past Charges were not timely (which they are), they could and did sue to enjoin future Charges.

Finally, the City did not even attempt to argue – and the Circuit Court did not find – that claims relating to Overcharges imposed **after the filing of the case** could somehow be barred by the statute of limitations. Regardless of the length of the applicable statutes of limitations and regardless of the events which trigger the running of the statutes of limitation, there is simply no way the Circuit Court could have properly concluded that **all** of Plaintiffs' claims are time-barred.

B. Plaintiffs' Separate and Independent Assumpsit Claims Are Timely[17]

Plaintiffs' assumpsit claims are subject to a six year statute of limitations. *See* MCL 600.5813. 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,* No. 292569, 2010 Mich. App. LEXIS 2044 (Oct. 21, 2010) (Exhibit D hereto); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for

[17] This issue was preserved at pp. 7-10 of Plaintiffs' S.D. Opp. Br.

sales tax refund subject to six year statute of limitations); *Diponio Const. Co. v. Rosati Masonry Co.*, 246 Mich. App. 43, 631 N.W.2d 59 (2001) (claims for statutory violations subject to the six year statute of limitations of MCL 600.5813 unless the statute itself provides a limitations period).

In their claims for assumpsit, Plaintiffs seek refunds for Overcharges in the Rates billed to Plaintiffs and the Class after May 15, 2009. In their FAC, Plaintiffs defined the classes in accordance with these time periods, and, by granting Plaintiffs' motion for class certification, the Circuit Court necessarily defined the class periods in the same manner.

Unfortunately, although the Circuit Court noted in its Opinion, p. 15, that "[t]he City also contends that the statute of limitations should also apply to Plaintiffs' equitable claims" (as well as their Headlee claim), the Court did not provide any analysis of the statute of limitations as applied to Plaintiff's equitable claims for assumpsit. This was error compelling reversal of the Circuit Court on this point.

VI. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' MOTION IN LIMINE AND CONSIDERING THE AFFIDAVIT OF MR. BEAUCHAMP AND MS. PECK.[18]

A. The Circuit Court Should Have Excluded Mr. Beauchamp's Opinions Because They Are Not Based Upon A Well-Accepted And Reliable Rate-Making Methodology[19]

As discussed at length in the Expert Brief, the City's submission of the affidavits of Mr. Beauchamp and Ms. Peck was untimely under the Court's scheduling orders and the Michigan Court Rules. This untimely disclosure, and the failure to produce Ms. Peck's underlying analysis, caused great prejudice to Plaintiffs because (1) they were unable to test the opinions by deposing these witnesses or

---

[18] "The decision whether to admit evidence is within the trial court's discretion." *People v. Lukity*, 460 Mich. 484, 488; 596 N.W.2d 607 (1999). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.* The Court of Appeals has found an abuse of discretion where a trial court allowed a party to withhold an expert opinion until after the close of discovery. *See Beach v. State Farm Mut. Auto. Ins. Co.*, 216 Mich. App. 612, 620; 550 N.W.2d 580 (1996) ("we find that the trial court abused its discretion in permitting plaintiff to withhold Dr. Shiener's evaluation without sanctions until one business day before trial when defendant would have little time to address or rebut the doctors opinions before trial").

[19] This issue was preserved at pp. 13-15 of Plaintiffs' Expert Br.

even reviewing Ms. Peck's underlying analysis, (2) the briefing on the summary disposition motions was complete before the opinions were even disclosed, and (3) the Court ultimately relied upon those opinions in granting the City's motion for summary disposition. The City's abuse of the discovery process, coupled with the extreme prejudice visited upon Plaintiffs, should have caused the Circuit Court to exclude these opinions.

But even if the City had timely disclosed Mr. Beauchamp's opinions, the Circuit Court still should have excluded those opinions because they do not meet the standards for admitting expert testimony. In this regard, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) **the testimony is the product of reliable principles and methods**, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). There, the Supreme Court held:

> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert*, 470 Mich at 782 (footnote omitted).]

Mr. Beauchamp's opinion fails to satisfy the reliability requirement because the methodology he employs, the "utility basis of ratemaking," is wholly inapplicable to a municipal water and sewer utility like that operated by the City.

There are two generally accepted methods for accumulating costs for the revenue requirements of a municipality, specifically, the "cash-needs approach" and the "utility-basis approach." *See* Exhibit R to Expert Br., excerpt from the American Water Works Association's M-1 manual, "*Principles of Water, Rates, Fees and Charges,* 7th Edition at pp. 12-15. A "cash needs" approach, which is the method the City admittedly employs, provides "revenues sufficient to recover the total cash requirements for a given period of time. Generally, the cash-needs approach is used by government-owned utilities…" *Id.* p. 12.

A "utility-basis" approach to measuring revenue requirements is typically required for investor-owned water utilities or municipally owned utilities that have customer bases outside of its geographical limits. *Id.* p. 14.

> When a government-owned utility provides services outside of its geographical limits or corporate boundary, the situation is similar to the relationship of an investor-owned utility to its customers because the owner (political subdivision) provides services to nonowner customers (customer outside its geographical limits). In this situation, the government owned utility, like an investor owned utility, is entitled to earn a reasonable return from its nonowner customers….[*Id.*]

Moreover, while the two methods may be similar "in some ways," the methods "diverge" in regards to how capital infrastructure is funded within the rates. *Id.* "The cash-needs approach uses debt service and capital expenditures funded from the rates. In contrast, the utility-basis approach uses depreciation expense and a return on rate base." *Id.*

Even though the City has always used the "cash-needs" approach to set its rates, the City's expert purports to apply the utility basis of ratemaking in order to show that the City undercharged its residents during the class period. The Michigan Supreme Court, however, has recognized that the utility basis of ratemaking is inapplicable to "wholesale" customers, like Westland, which do not sell water outside their city limits.

In *City of Novi v. City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), the Court observed:

> "The "utility basis" of rate-making is a methodology that is designed to produce relatively accurate estimates of revenue requirements **for investor-owned utilities and for publicly owned utilities providing service to customers outside their corporate limits**. A utility-rate method also seeks to allocate to different customers a just and

> reasonable share of the operating and capital costs of the system. **The fundamental purpose of a "utility basis" method is to compensate the proprietary interest in a public utility with a reasonable rate of return from nonowner, nonresident customers, commensurate with the value of the facilities required to provide service to these customers.**" [433 Mich. at 419-21 (emphasis added)].

The City is not an "investor-owned" utility, nor is it a publicly owned utility providing service to customers outside its corporate limits. There is no need to give the City a "reasonable rate of return from nonowner, nonresident customers," because there are no such customers. Accordingly, the Circuit Court erred in relying upon Mr. Beauchamp's opinions, because the City has not shown, and cannot show, that his opinions are reliable and based upon an appropriate rate-setting methodology.

B. The Circuit Court Should Have Excluded The City's Expert's Testimony, Debra Peck's Affidavit, And The City's Purported New Cost Allocation Analysis Because They Are Based On "Facts" Not In Evidence[20]

Further, the 11th hour affidavits of Mr. Beauchamp and Ms. Peck were inadmissible because they do not meet the standard for admission of expert opinion testimony.

MRE 703 provides:

> **The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence**. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter. [emphasis added]

In *People v. Unger*, 278 Mich. App. 210, 248 (2008), the Michigan Court of Appeals confirmed that MRE 703 means precisely what it says:

> "The facts or data ... upon which an expert bases an opinion or inference shall be in evidence." MRE 703. It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence. An expert witness need not rule out all competing and alternative theories, but **he or she must have a sound evidentiary basis for his or her conclusions**. *Green v. Jerome-Duncan Ford, Inc.,* 195 Mich.App. 493, 498-499, 491 N.W.2d 243 (1992). An expert witness's opinion is objectionable if it is based on assumptions that do not accord with the established facts. *Id.* at 499, 491 N.W.2d 243. [emphasis added.]

[20] This issue was preserved at pp. 16-17 of Plaintiffs' Expert Br.

These standards for admissibility clearly apply not only at trial, but also in the context of motions for summary disposition under MCR 2.116(C)(10). See MCR 2.116(C)(10)(G) (6) ("Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) **shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion**.").

Here, the application of MRE 703 and *People v. Unger* is simple. Peck claims to have prepared a new cost allocation study which she provided to Beauchamp to serve as the basis of his expert opinion. *See* Peck Affid., attached as Exhibit S to Expert Br, ¶¶ 7, 12. Beauchamp confirms that he based his opinion on Peck's new cost allocation study. *See* Beauchamp Affid., ¶ 9 ("I have reviewed the revised cost allocations and believe the revised allocations accurately and reasonably reflect the cost of goods, services and facilities provided by the City's General Fund to the Water and Sewer Department. **These revised results were included in my review of utility revenue requirements.**") (emphasis added). But the City has not produced the new cost allocation study. Therefore, the crucial piece of "evidence" which underlies both Beauchamp's and Peck's "expert" opinions is simply not in the record. This fact alone compelled the exclusion of their affidavits.

Not only is this "evidence" not in the record, but it has been withheld from Plaintiffs and the City refused to produce its "experts" for deposition, as required by MCR 2.302. In the instant matter, after the untimely disclosure of the "opinions" of Mr. Beauchamp and Ms. Peck, Plaintiff sought to mitigate the prejudice associated with the City's untimely disclosure of its purported experts by noticing the depositions of these witnesses. The City flatly refused to produce Beauchamp and Peck for deposition, even though the Court Rules require a party to produce its testifying experts for deposition. See Exhibit K to Expert Br., email correspondence from the City's counsel stating, among other things:

> Discovery in this case closed on November 17, 2016, and there is no basis to take the depositions of Mr. Beachamp (sic) or Ms. Peck at this time. Further, Plaintiffs have

> already taken the deposition of Ms. Peck. Accordingly, I do not intend to produce either Mr. Beauchamp or Ms. Peck for depositions you scheduled on April 27, 2017.

This outrageous abuse of the discovery rules should not have been countenanced by the Court. Worse, the Circuit Court went on to expressly rely upon the improper "opinions" of the City's experts in granting summary disposition in favor of the City.

In rejecting Plaintiffs' contentions concerning the experts, the Circuit Court suggested that Plaintiffs should have brought a motion to compel the production of Peck's analysis. With all due respect, however, Plaintiffs had no such burden. The City brought a motion for summary disposition and it was incumbent upon the City to support that motion with admissible evidence. An absolute prerequisite to the admissibility of Beauchamp's opinions was the production of the underlying data – i.e., Peck's purported analysis – upon which he relied. It is undisputed that the underlying data was not in evidence and in fact was withheld from Plaintiff and the Court.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Circuit Court's Order granting summary disposition in favor of the City and denying Plaintiffs' motion in limine, and remand this matter for further proceedings.

Respectfully submitted,

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Counsel for Plaintiffs

FOLEY & ROBINETTE, P.C.
/s/ Dean C. Robinette
Dean C. Robinette (P54197)
Co-counsel for Plaintiffs

Dated: October 30, 2017

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC. a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly situated persons and entities,

Plaintiffs,

-v-

CITY OF WESTLAND a municipal corporation,

Defendant.

Case No. 15-006473-CZ

Hon. Craig S. Strong

OPINION

This certified class action is before the Court on four motions for summary disposition. Two motions for summary disposition were filed by Plaintiffs, Deerhust Condominium Owners Association, Inc. ("Deerhurst") and Woodview Condominium Association ("Woodview") against Defendant, City of Westland ("the City" or "Westland") and two motions for summary disposition were filed by Defendant. Also before the Court is Plaintiffs' motion to strike Defendant's expert opinions and testimony. For the reasons stated below, the Court will deny both of Plaintiffs' motions and will grant Defendant's motion as to the statute of limitations and deny its motion as to governmental immunity. The Court will also deny Plaintiffs' motion in limine.

I. FACTUAL AND PROCEDURAL BACKGROUND

Westland operates and maintains a water supply system to provide water to its residents and a sewer system. Plaintiffs, Deerhurst and Woodview, are condominium homeowners associations, which are Westland water consumers. The City of Detroit supplies water at wholesale rates to local governments, pursuant to MCL 123.141(1), while Wayne County provides sewer services to local governments. After purchasing water, the local governments are contractual customers of the City of Detroit. The municipalities then establish their own retail rates and directly bill to their inhabitants for water consumption.

Westland water customers are divided into three categories: (1) residential; (2) commercial (including commercial, apartment, and industrial properties); and (3) associations (condominium properties). Customers are billed according to the size of their meters. Larger water meters provide larger water volumes. According to Defendant, there are approximately 27,000 current water customers. These include 22,000 residential customers, 5,000 commercial customers, and 60 to 70 associations. Plaintiffs are association water accounts. Defendant asserts that, in response to the City of Detroit's increase in rates in March, 2013, Westland increased fixed costs for customers with certain sized meters, one of which was Deerhurst. Defendant claims that the increase allocated fixed costs to different customers based upon the quantity of water used. A two-inch meter provides four times the water that a one-inch meter provides. Deerhurst has a two-inch meter and, thus, receives four times the water volume of the water volume received by a customer with a one-inch meter.

Plaintiffs first filed a complaint and motion for class certification. Plaintiffs amended the complaint. The Court then granted the motion for class certification. Subsequently, Plaintiffs filed a second amended complaint in assumpsit for money had and received, alleging: (1) that

Westland violated MCL 123.141(3)[1] by selling water to Plaintiff at a retail rate in excess of the actual cost of providing water; (2) that the alleged water rate overcharges violate the Headlee Amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31; (3) that by virtue of the City's inclusion of the General Fund Support Charge and the Rate Overcharges in the Rates, the water and sewer rates are unreasonable; and (4) that Westland has violated MCL 141.91 by imposing and collecting the General Fund Support Charges and Rate Overcharges. Plaintiffs then filed a motion for class certification, which the Court granted. The instant motions followed.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), MCR 2.116 (C)(8), AND MCR 2.116 (C)(10)

The parties bring their motions for summary disposition pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence

---

1 MCL 123.141 provides in relevant part:

> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. ...
>
> (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.

2 MCL 600.308a provides that a claim for a Headlee Amendment violation may be brought in the court of appeals or in the circuit court:

> (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
>
> ***
>
> (4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. ...

filed or submitted by the parties." *Haliw v Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001). When deciding a motion for summary disposition under MCR 2.116(C)(7), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). "'If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.'" *Moraccini v Sterling Heights,* 296 Mich App 387, 391; 822 NW2d 799 (2012), quoting *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Moraccini, supra.*

A motion for summary disposition on the basis of untimeliness is also governed by MCR 2.116(C)(7). Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by expiration of the statute of limitations. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). When reviewing such a motion, a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion

should be granted if no factual development could possibly justify recovery." *Beaudrie, supra* at 130.

In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "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." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. Id.; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

III. ANALYSIS

A. Plaintiffs' Motions for Summary Disposition

Plaintiffs contend that they are entitled to summary disposition because the alleged rate overcharges violate the Headlee Amendment, Michigan Constitution of 1963, Article 9, Section 31, and MCL 141.91.

As an initial matter, before it can be determined whether the alleged overcharge is a tax, Plaintiffs must first establish that there is, in fact, a rate "overcharge." Municipal utility rates are presumptively reasonable. *Trahey v City of Inkster*, 311 Mich 582, 594; 876 NW2d 582 (2015). "This presumption exists because 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. *Id.* Plaintiffs have the burden of establishing that the sewer rate is unreasonable. *Id.*

The City's Finance Director, Steven Smith, testified in deposition that the City includes in its annual water and sewerage budget significant amounts to finance repairs and improvements to the water and sewer system in the ensuing fiscal year. These amounts are included in the water rates. [Plaintiffs' Motion on Rate Overcharges, Exhibit 1, p 142]. He also confirmed that water and sewer customers pay rates to generate revenue "for the current period capital improvements." [Id]. Mr. Smith also stated that the rates are intended to generate an additional $500,000 per year for future improvements to the system. [Id at p 135]. He said that as part of the rate structure the City included in its rate structure a projected $1.7 million in improvements for the 2016 fiscal year. [Id at p 142] [See also Exhibit 2]. He explained that repairs to the system or replacements of water mains are in the annual capital outlay budget and are incorporated into the water rate. [Id, Exhibit 3, p 126]. He said that the reserve fund, which includes the yearly

$500,000.00, is intended to pay for similar, but more expensive repairs or improvements to the system. [Id]. He also stated that he is aware of a plan for future improvements in the Capital Improvement Plan and that some improvements will be funded out of bond sales. In short, according to Mr. Smith, the plan is intended to set a rate that would add $500,000.00 per year, after expenses such as employee wages and benefits, to fund current capital improvements to the system.

Under MCL 123.141, "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making..." and "[t]he retail rate ... shall not exceed the actual cost of providing the service." MCL 123.141(2) and (3).

Plaintiffs' expert, James Olsen is an analyst for MGT of America Consulting Group ("MGT"). MGT specializes in indirect cost allocation for cities, counties, agencies, or any state government that requires cost allocation analyses. Mr. Olsen testified that, because the City of Westland's Water and Sewer Fund has seen an increase over the last couple years, the water and sewer rates charged to the City's customers are excessive or above a reasonably determined actual cost of service. However, Mr. Olsen fails to take into account the expenses of maintenance and future capital improvements. In fact, he stated that he had no opinion as to the overall reasonableness of the Water and Sewer expenditures. [Defendant's Response to Plaintiffs' Motion for Claims Based on General Fund Support Charge, Exhibit 1, p 18]

Defendant's expert, Mark Beauchamp, is President of Utility Financial Solutions, which conducts cost of service studies, feasibility studies, financial rate analyses, load research analyses, and other financial projection studies for various utilities. He prepared an assessment of revenue requirements for the years between 2009 and 2015 for the water and wastewater

departments to identify if ratepayers were under or overcharged for the utility services provided by the City. [Defendant's Response to Motion Concerning Water and Sewer Fund Balance, Affidavit, Exhibit 4]. According to Mr. Beauchamp, the only way to determine if the water and sewer rates charged by the City were reasonably related to the actual cost of service is to first determine the revenue requirements of the Water and Sewer Department. Then one must determine if the revenues generated by the Water and Sewer Department meet those requirements. The only way to determine if the rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis. Mr. Beauchamp concluded that, for fiscal years 2009 through 2016, the revenues generated by the City's Water and Sewer Department "fell below the revenue requirements." [Id]. Here, it should be noted that Plaintiffs have filed a motion in limine requesting the Court strike Mr. Beauchamp's expert testimony. The Court will fully address that motion below.

"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." [Authority omitted] *Trahey v City of Inkster*, 311 Mich App 582, 595; 876 NW2d 582, 589 (2015). Plaintiffs have not shown any improper use of the reserved funds and have not demonstrated that it is unreasonable to anticipate costs for required maintenance and improvement to the system. Hence, they have not overcome the presumption that the City's rates are reasonable.

Next, Plaintiffs claim that the rate increases violate the Headlee Amendment. Michigan Constitution of 1963, Article 9, Section 31, also known as the Headlee Amendment, provides in relevant 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. ...

Under Article 9, Section 32, "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit." Hence, under the Headlee Amendment, taxpayers have standing to sue when the rate of existing taxes are increased without being approved by a majority of voters.

MCL 141.91 provides that, "[e]xcept 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." This means that local governments have no power of taxation unless that power is given by the legislature. "Unless authority for the defendant township and cities to make the reassessments demanded by plaintiffs can be found in the statutes, it does not exist." *City of Berkley v Royal Oak Tp*, 320 Mich 597, 601; 31 NW2d 825 (1948).

Plaintiffs first argue that the overcharges are a violation of the Headlee Amendment because they constitute a tax as determined by the factors enunciated in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). In *Bolt*, *supra* at 154-155, the Court considered whether a particular storm water service charge, "imposed on each parcel of real property" located in Lansing, was a "user fee" as opposed to a "tax" levied in violation of the Headlee Amendment, Const 1963, art 9, § 31. Lansing enacted an ordinance for imposition of an "annual storm water service charge." The charge was to be imposed over thirty years to partially pay for a project to separate the city's combined storm and sanitary sewer lines. Lansing was seeking to limit the

polluting of local rivers that resulted when heavy precipitation caused the city's combined storm water and sanitary sewer systems to overflow and discharge into those rivers. *Id* at 154-155. The charge was imposed on each parcel of property located in the city using a formula that attempted to estimate each parcel's storm water runoff.

The question posed here is whether the alleged water and sewer overcharges charges are user fees or whether they constitute taxes. Because an increase in local taxes requires voter approval, analysis of the difference between a tax and a user fee must be conducted. There are three primary criteria enunciated in *Bolt* to be considered when distinguishing between user fees and taxes, for purposes of the Headlee Amendment analysis. The test of the difference between a user fee and tax includes the following: (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 service; and (3) A user fee must be for a service voluntarily undertaken by the consumer. *Bolt, supra* at 161-162. "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." [Internal quotation marks and citations omitted] *Id* at 161.

The first two criteria are closely related and will be analyzed together. While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying purpose. *Merril v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). A fee also confers benefits only on the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee. *Bolt, supra*, at 164-165. Thus, revenue derived from regulation, i.e., a fee, must be proportionate to the cost of the regulation, although it is presumed that the amount of the fee is reasonable unless the contrary is established. *Vernor*

Secretary of State, 179 Mich 157, 167; 146 NW 338 (1914). In contrast, a tax is designed to raise revenue for general public purposes. *Bray v Dep't of State*, 418 Mich 149, 162; 341 NW2d 92 (1983).

In *Bolt*, the Supreme Court found that the storm water service charge failed to satisfy the first and second criteria because the charges imposed did not correspond to the benefits conferred. *Bolt*, *supra* at 165. That is, seventy-five percent of the property owners in Lansing were already served by a separate storm and sanitary sewer system. Those property owners would be charged the same amount for storm water service as the twenty-five percent of property owners who would enjoy the full benefits of the new construction. *Id.* The Supreme Court further noted that the goal of the ordinance was improved water quality in two local rivers and avoidance of federal penalties for discharge violations. These goals benefit everyone in Lansing, not just property owners. *Id* at 166.

In the present case, Plaintiffs have failed to establish that any funds intended for repairs and upgrades to the sewer system would benefit the City in any other general way, and not just property owners who used the sewer system. Plaintiffs have also failed to establish that the reserve funds are used for anything other than the maintenance and operation of the system. Furthermore, the City's Water and Sewer Ordinance provides for such maintenance and operation. Section 102-61 provides in relevant part:

> (a) It is hereby declared to be the intent and purpose of the city council to maintain reasonable and uniform rates and charges applicable to various classifications of users of the water system and sewer system so as to provide funds to, as far as possible:
>
> (1) Operate and maintain the water system and sewer system in a reasonable, proper and efficient manner; and

> (2) Make the water contracts debt retirement payments and sewer contracts debt retirement payments as they become due.
>
> ***
>
> (c) The rates and charges established under this article shall be based upon a methodology which complies with applicable federal and state statutes and regulations. 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 system in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.
>
> [Emphasis added].

Thus, water and sewer rates are intended for system operation, maintenance, and equipment replacement expenses and are intended to be reasonable in light of the costs associated with operation and maintenance. In addition, the ordinance also mandates that users, based on their usage, pay for their proportionate share for these expenses. As noted above, the City's Finance Director stated that repairs to the system or replacements of water mains are in the annual capital outlay budget and is incorporated into the water rate. This rate structure comports with the ordinance and is, therefore, presumptively reasonable.

Plaintiffs also argue that the sewer charge is not voluntary and, therefore, is a tax. However, there is no support for this assertion in the record. The City contends that it only charges residents for their actual use of the sewer system, and Plaintiffs have presented no evidence to the contrary.[1] Clearly, these rates confer a benefit of efficient operation of the water

---

[1] In *Ripperger*, this Court articulated a third criterion: voluntariness. Quoting from *Jones v. Detroit Water Comm'rs*, 34 Mich. 273, 275 (1876), the *Ripperger* Court stated:

and sewer system to its users as contemplated by *Bolt* and not a tax which confers a benefit to the general public. "Taxes are designed to raise revenue for the general public, while a fee 'confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.'" *Westlake Transp, Inc v Pub Serv Com'n*, 255 Mich App 589, 613; 662 NW2d 784, 799–800 (2003). "Thus, there is a direct benefit to the one who pays the fees." *Id.* Those who use water and sewer services derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user. Hence, the amount and frequency of usage is a choice and is voluntary. Therefore, in this Court's view, the City's water and sewerage rates are reasonable user fees and not taxes and do not violate the Headlee Amendment.

Plaintiffs also contend that the charges violate MCL 141.91 because they are not ad valorem property taxes. Because Plaintiffs cannot establish that the alleged rate overcharges are unlawful taxes, the City has not violated MCL 141.91. Accordingly, the Court will deny Plaintiffs' motion as to the alleged rate overcharges.

Plaintiffs' second motion for summary disposition is grounded in the notion that reasonable minds could not differ on the conclusion that the water rates' inclusion of a "General Fund Support Charge" does not comport with Michigan law. This motion is essentially the same as the first motion, but characterizes the water and sewer rates as a way to support the City's

---

> "The water rates …are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness…. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them."
>
> *Bolt v City of Lansing*, 459 Mich 152, 162; 587 NW2d 264 (1998).

General Fund. Plaintiffs contend that it is improper for monies derived from the rates to be transferred to the General Fund. They claim that these monies were then used to finance other City expenses and services.

Defendant counters Plaintiffs by arguing that there is no evidence deeming the rates and expenditures as unreasonable. The City contends that, even if the rates are determined to be unreasonably high and the expenditures unreasonable, the relief sought should be a transfer of monies from the General Fund back to the Water and Sewer fund, and not money damages to Plaintiffs. As indicated above, the rates do not qualify as taxes and, as such, are presumptively reasonable. The court in *Kowalski v City of Livonia*, 267 Mich App 517, 520, fn 2; 705 NW2d 161 (2005) noted:

> We would hold that such a contract price for a governmentally owned commodity could never qualify as a "tax" even if the government sets the contract price high enough to glean a substantial profit and generate revenue to replenish its general fund or refund money to its citizenry.

In this case, Plaintiffs complain that funds generated by water and sewer rates were improperly transferred to the General Fund to support other expenses. For example, the Finance Director, Mr. Smith, testified that funds budgeted for Water and Sewer retiree healthcare expenses are transferred to the General Fund and then paid out to the insurers. [Plaintiffs' Motion, Exhibit 2, p 28-29]. He explained that some costs are allocated to Water and Sewer when an employee has worked in other departments and then later retires from the Water and Sewer department. These costs get charged to the General Fund and are allocated back to the Water and Sewer Fund. [Id]. Funds allocated for these expenses derive from the operation and maintenance of the system because those former employees maintained and operated the system. The transfers are made quarterly. [Id, Exhibit 3, p 54]. Plaintiffs present no evidence to support the notion that the rates, although charged to the General Fund, are for General Fund services. Therefore, water and sewer

rate funds are not being improperly transferred to the General Fund to support services to the public at large.

B. Defendant's Motions for Summary Disposition

In its first motion, the City argues that Plaintiffs' claim that the alleged rate overcharges violates the Headlee Amendment is barred by the statute of limitations. The City also contends that the statute of limitations should also apply to Plaintiffs' equitable claims. It asserts that Plaintiffs cannot overcome their burden to demonstrate that the rates are unreasonable. The City further states that the equitable claims should be dismissed because Plaintiffs received the benefit of City services in exchange for the rates paid and there is an adequate remedy at law.

Under MCL 600.308a(3), an action based on a Headlee Amendment violation must be "commenced within 1 year after the cause of action accrued." However, the statute of limitations "does not prevent a taxpayer from seeking to enjoin a governmental unit from imposing on him in the future taxes that violate the Headlee Amendment." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127; 537 NW2d 596, 600 (1995). Plaintiffs herein do not seek to enjoin the City, but instead seek money damages. "In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action accrues on the date that the tax is due. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed." *Briggs Tax Serv, LLC v Detroit Pub Sch*, No. 271631, 2007 WL 750338, at 9 (Mich Ct App March 13, 2007), citing *Taxpayers Allied for Constitutional Taxation* at 123-124, 124 n 7.

According to Plaintiffs, in March 2013 the City changed how it assessed these fixed charges, by creating different rates based upon the size of the water pipe that served each customer. Plaintiffs' condominium units are serviced by two inch pipes. Due to the dramatic

increases in the fixed charges, Plaintiffs' water bills "skyrocketed" in 2013. Hence, Plaintiffs' claims accrued in 2013, and the present action was filed on May 15, 2015, almost 2 years after the City changed the way it charged consumers. This is outside the statute of limitations.

Even if Plaintiffs' claims were made within the statute of limitations, as indicated above, Plaintiffs have not demonstrated that the water and sewer rates are unreasonable. No evidence has been presented which would establish appropriate rates for operation and maintenance of the system. Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other services for the public at large. Therefore, pursuant to MCR 2.116(C)(7) and (10), the Court will grant the City's motion as to all of Plaintiffs' claims.

Defendant's second motion is an amended motion for summary disposition as to alleged monetary damages. In that motion, Defendant argues that Plaintiffs' claim for monetary damages is barred by governmental immunity. Conversely, Plaintiffs argue that their claim for monetary damages is not based on tort, but is based on breaches of the statute, constitution, and ordinance. The Court agrees and where the public is empowered to make claims based upon constitutional breaches, no immunity exists. See *Durant v State*, 456 Mich 175, 205; 566 NW2d 272 (1997) [Footnotes omitted] ("We conclude that the people's directive "to enforce" § 29 was intended as a general directive, giving the Court the duty and authority to enforce § 29 in the way that would most effectuate the balances struck by the people in the Headlee Amendment. We have followed that directive in the past and now must apply it to the remedy in this case.") The Durant court also noted: "This grant of authority in the specific authorization of suits to enforce the provisions of art. 9, §§ 25 through 31 waives sovereign immunity." *Id* at 285, fn 31. Nevertheless, because this Court has already determined that the water rates are reasonable and

the water and sewer fund reserves have not been inappropriately transferred to the General Fund, it is of no consequence whether or not the City is entitled to immunity. Therefore, the City's motion as to governmental immunity will be denied.

C. Plaintiffs' Motion to Strike Defendant's Expert Opinion and Testimony

The last motion before the Court is Plaintiffs' request to have the opinions and testimony of City's experts excluded. They request that the Court strike the affidavits of Debra Peck and Mark Beauchamp because they allegedly used a new type of analysis and the City has refused to produce Ms. Peck's new analysis. Ms. Peck is the City's Budget Director and testified, not as an expert, but as a lay witness who was a participant in the budget process. They claim that Ms. Peck has not been qualified as an expert witness. Because she is a lay witness with first-hand knowledge of the City's budgetary needs, she need not be qualified as an expert. MRE 701.[2] She also testified in rebuttal as to her disagreement with Plaintiffs' expert, Mr. Olson, that the increase in the Water and Sewer Fund indicated that the rates were excessive and unreasonable. She stated:

> Rather, the only way to determine if the water and sewer rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis.
>
> For example, it was determined that certain unfunded OPEB (Other Post Employment Benefits) expenses for General Fund employees that provided services to the Water and Sewer Department had not been allocated to the Water and Sewer Department, but should have been allocated. For Fiscal Year 2015/16 alone, this resulted in an additional $185,658 that should

---

2

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
>
> MRE 701.

> have been allocated to the Water and Sewer Department and paid to the General Fund.

In other words, Ms. Peck's affidavit states a disagreement with Mr. Olson and demonstrates that he had not accounted for all costs and expenses associated with the Water and Sewer Fund including costs that pass to retired employees after their service in the department. Therefore, the Court finds her affidavit sufficient and she may testify as a lay witness at trial, if necessary.

With respect to Mr. Beauchamp, Plaintiffs claim that his analysis is an unacceptable in the industry. His qualifications are extensive as can be seen on his curriculum vitae. An expert witness is qualified under MRE 702 if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Plaintiffs' contention is that Mr. Beauchamp has not used reliable principles and methods.

The Court is the gatekeeper of the evidence presented and "it is within a trial court's discretion how to determine reliability." [Footnote omitted] *Elher v Misra*, 499 Mich 11, 25; 878 NW2d 790 (2016). In the Court's view, Mr. Beauchamp's analysis is reliable and his explanation of methods used by the City will assist the trier of fact. MRE 702. For example, Mr. Beauchamp supplied the following in his affidavit:

> Although the City of Westland has previously used the cash basis to determine its revenue requirements for the Water and Sewer Department, the cash basis is subjective and revenue requirements are difficult to defend without adjustments. The utility basis identifies revenue requirements on a consistent basis and helps ensure current ratepayers are paying their use of infrastructure. The cash basis determination does not appropriately identify revenue requirements due to the following: 1) Debt service payments are often over a 20 year period, the infrastructure may be in service for over 50 years. This results in current customers being overcharged for infrastructure installed and financed. 2) Revenue financed capital expenditures, (the amount of capital replacement included in rates) are not incurred consistently from one year to the next.

> Revenue requirements increase in years when capital expenditures are high and decrease when capital expenditures are low. A substantial amount of the charges are related to infrastructure investments and the cash basis does not consistently recognize a customer's use of the infrastructure.
>
> I disagree with and reject Mr. James Olson (sic) conclusion that because the City of Westland's Water and Sewer Fund has seen an increase over the last couple years that the water and sewer rates charged to City's customers are excessive or above a reasonably determined actual cost of service. Rather, the only way to determine if the water and sewer rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis.

Thus, both Ms. Peck and Mr. Beauchamp averred their disagreement with Mr. Olson's analysis and can serve as rebuttal witnesses. Mr. Beauchamp used reliable accounting principles to express his opinion. Therefore, the Court will deny Plaintiffs' motion.

The Court notes also that, regarding Plaintiffs' contention that the City has refused to produce Ms. Peck's analysis, rather than striking the evidence, the more appropriate remedy would be a motion for an order compelling production.

IV. CONCLUSION

The City's water and sewerage rates are reasonable user fees and not taxes and do not violate the Headlee Amendment. Nor do they violate MCL 141.91 because they are not ad valorem property taxes. In addition, the water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large. Accordingly, the Court will deny both of Plaintiffs' motions.

Plaintiffs' claims are outside the statute of limitations. Even if Plaintiffs' claims were made within the statute of limitations, as indicated above, Plaintiffs have not demonstrated that the water and sewer rates are unreasonable. Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other

services for the public at large. Therefore, pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10), the Court will grant the City's motion as to all of Plaintiffs' claims. The Court, however, will deny the City's motion as to governmental immunity as lacking a legal basis and as moot. Finally, the Court will also deny Plaintiffs' motion in limine to strike and exclude the City's expert opinions and testimony.

DATED: 6/28/2017

/s/ Craig Strong

Circuit Judge

Kim Plets

From: efilingmail@tylerhost.net
Sent: Wednesday, June 28, 2017 11:29 AM
To: Kim Plets
Subject: Notification of Service for Case: 15-006473-CZ, Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland for filing Opinion of Court, Signed and Filed, Envelope Number: 1749638

Notification of Service

Case Number: 15-006473-CZ
Case Style: Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland
Envelope Number: 1749638

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	15-006473-CZ
Case Style	Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland
Date/Time Submitted	6/27/2017 3:20:48 PM EDT
Filing Type	Opinion of Court, Signed and Filed
Filing Description	
Filed By	Clara Rector
Service Contacts	Woodview Condominium Association: Dean Robinette (foleyrobinettepc@gmail.com) Deerhurst Condominium Owners Association, Inc.: Dean Robinette (foleyrobinettepc@gmail.com) City of Westland: Michael McNamara (mmcnamara@fb-firm.com) Lisa Paliszewski (lpaliszewski@fb-firm.com) James Pelland (jpelland@fb-firm.com)

	Other Service Contacts not associated with a party on the case: Gregory Hanley (ghanley@kickhamhanley.com) Jamie Warrow (jwarrow@kickhamhanley.com) Kimberly Plets (kplets@kickhamhanley.com) Demetrece Welch (efile@drwelchgroup.com) Edward Kickham III (ekickhamjr@kickhamhanley.com)

Document Details	
Served Document	Download Document
This link is active for 91 days.	

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC. a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly situated persons and entities,

Plaintiffs,

-v-

CITY OF WESTLAND a municipal corporation,

Defendant.

Case No. 15-006473-CZ

Hon. Craig S. Strong

ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 6/28/2017

PRESENT: Hon. Craig S. Strong
Circuit Judge

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that "Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) with Respect to Claims Based upon the 'Rate Overcharge'" is hereby **DENIED;**

IT IS FURTHER ORDERED that "Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) with Respect to Claims Based upon the 'General Fund Support Charge'" is hereby **DENIED;**

IT IS FURTHER ORDERED that Defendant's amended motion for summary disposition based on MCR 2.116(C)(7) as to the statute of limitations, and on MCR 2.116(C)(8) and (C)(10) is hereby **GRANTED;**

IT IS FURTHER ORDERED that Defendant's "Amended Motion for Summary Disposition for Alleged Monetary Damages Based on Governmental Immunity MCL 691.1407 and Michigan Law" is hereby **DENIED;**

IT IS FURTHER ORDERED that "Plaintiffs' Motion in Limine to Strike and Exclude Expert Opinions and Testimony" is hereby **DENIED;**

IT IS FURTHER ORDERED that Plaintiffs' complaint is hereby **DISMISSED** with prejudice;

IT IS FURTHER ORDERED that this resolves the last pending claim and closes the case.

/s/ Craig Strong

Circuit Judge

Kim Plets

From: efilingmail@tylerhost.net
Sent: Wednesday, June 28, 2017 11:29 AM
To: Kim Plets
Subject: Notification of Service for Case: 15-006473-CZ, Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland for filing Order Denying Motion, Signed and Filed, Envelope Number: 1749638

Notification of Service

Case Number: 15-006473-CZ
Case Style: Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland
Envelope Number: 1749638

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	15-006473-CZ
Case Style	Deerhurst Condominium Owners Association, Inc. , et al. v City of Westland
Date/Time Submitted	6/27/2017 3:20:48 PM EDT
Filing Type	Order Denying Motion, Signed and Filed
Filing Description	
Filed By	Clara Rector
Service Contacts	City of Westland: Michael McNamara (mmcnamara@fb-firm.com) Lisa Paliszewski (lpaliszewski@fb-firm.com) James Pelland (jpelland@fb-firm.com) Deerhurst Condominium Owners Association, Inc.: Dean Robinette (foleyrobinettepc@gmail.com) Woodview Condominium Association: Dean Robinette (foleyrobinettepc@gmail.com)

	Other Service Contacts not associated with a party on the case: Gregory Hanley (ghanley@kickhamhanley.com) Jamie Warrow (jwarrow@kickhamhanley.com) Kimberly Plets (kplets@kickhamhanley.com) Demetrece Welch (efile@drwelchgroup.com) Edward Kickham III (ekickhamjr@kickhamhanley.com)

Document Details	
Served Document	Download Document
This link is active for 91 days.	

EXHIBIT C

BRIGGS TAX SERV. v. DETROIT PUB. SCHS.

Court of Appeals of Michigan

March 13, 2007, Decided

No. 271631

Reporter
2007 Mich. App. LEXIS 682 *; 2007 WL 750338

BRIGGS TAX SERVICE, L.L.C., KAY BEE KAY PROPERTIES, L.L.C., and 15651 WARREN AVE CO., L.L.C., Plaintiffs-Appellants, v DETROIT PUBLIC SCHOOLS, DETROIT BOARD OF EDUCATION, CITY OF DETROIT, WAYNE COUNTY TREASURER, KENNETH BURNLEY, KEN A. FORREST, DORI FREELAIN, PAMELA ANSTEY, MICHAEL BRIDGES, MARY ELLIS, ROBERT MOORE, NELIDA BRAVO, MAVIS COFIELD, W. FRANK FOUNTAIN, GERALD K. SMITH, REGINALD TURNER, TOM WATKINS, WILLIAM C. BROOKS, BELDA GARZA, MICHAEL TENBUSCH, GENEVA WILLIAMS, MARK A. DOUGLAS, ALLAN SPOONER, and ALMA STALWORTH, Defendants-Appellees.

Subsequent History: Appeal denied by *Briggs Tax Serv., L.L.C. v. Detroit Pub. Sch., 480 Mich. 949, 741 N.W.2d 378, 2007 Mich. LEXIS 3132 (2007)*

Related proceeding at *Briggs Tax Serv., L.L.C. v. Detroit Pub. Schs, 2008 Mich. App. LEXIS 2580 (Mich. Ct. App., Dec. 23, 2008)*

Prior History: Wayne Circuit Court. LC No. 05-523201-CZ.

Disposition: Affirmed.

Core Terms

plaintiffs', Tribunal, levied, collected, taxes, refund, special assessment, circuit court, trial court, exclusive jurisdiction, summary disposition, non-homestead, assessments, mil[l, property tax law, property taxes, defendants', funds, properties, equitable, accrued, matters, equalization, questions, taxpayers, valuation, tolling, reconsideration motion, school district, discovery rule

Judges: Before: Markey, P.J., and Murphy and Kelly, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying plaintiffs' motion for reconsideration and granting defendants' [1] motion for reconsideration of an earlier summary disposition order. Plaintiffs argue on appeal that the trial court erred in granting summary disposition in defendants' favor on the basis that the Michigan Tax Tribunal (MTT) had exclusive subject-matter jurisdiction over all of plaintiffs' claims, except the Headlee Amendment claims. Further, plaintiffs contend that the trial court erred dismissing plaintiffs' remaining Headlee Amendment claims. We affirm.

[*2] This case involves a dispute over the imposition of a school operating tax on all non-homestead property located in Detroit in tax years 2002, 2003, 2004 and 2005. Plaintiffs own and operate various commercial properties in and around Detroit. The school operating budget for defendants Detroit Public Schools and the Detroit Board of Education (collectively "DPS") is primarily funded by revenue received from property taxes in the district. The property taxes are collected

[1] Unless otherwise noted, Detroit Public Schools, Detroit Board of Education, city of Detroit and Wayne County Treasurer will be collectively referred to in this opinion as "defendants." The individually named defendants are employees and/or executive officers of defendants.

and received by defendant city of Detroit ("City") and any delinquent taxes are collected by defendant Wayne County Treasurer ("Treasurer").

In 1978, the same year the Headlee Amendment was ratified by the Legislature, DPS levied a total of 25.51 mills [2] of school operating taxes against all property taxpayers, of which 8.01 mills were allocated by law and 17.5 mills were approved by voters in the district. From 1978 to 1993, DPS continued to levy taxes in increasing amounts on all property taxpayers in the district based on annual millage renewals approved by a majority of district electors. On September 14, 1993, district electors approved an increase in the limitation on the total amount of taxes that may be **[*3]** imposed on the assessed valuation, as finally equalized, on all property in the district ("1993 Proposal"). The 1993 Proposal attempted to: (1) stabilize the school operating tax at 32.25 mills; and (2) allocate the millageon all district property taxpayers for a period of eight years from July 1, 1994, to June 30, 2002.

However, in a special election held on March 15, 1994, Michigan electors approved "Proposal A," which reduced reliance on local property taxes for Detroit school operating purposes. Proposal A essentially limited the school operating tax to 18 mills for all non-homestead property owners in the district and exempted all homestead property owners. Thus, from July 1, 1994, to 2005, defendants levied, imposed, collected and received the 18 mill tax on all non-homestead property in the Detroit school district, including each of plaintiffs' properties. However, on July 28, 2005, DPS officials became aware that the 1993 Proposal had expired on June 30, 2002, and that DPS was not authorized by a majority vote of district electors to impose the 18 mill tax in the 2002, 2003 and 2004 tax years. Shortly thereafter, a ballot proposal re-authorizing the 18 mill tax on all non-homestead **[*4]** property was placed on the November 8, 2005, general election ballot and was subsequently approved by district voters.

Plaintiffs originally filed this action in Wayne Circuit Court on August 8, 2005, seeking class certification on behalf of all non-homestead owners in the district and requesting a refund of the school operating tax collected in 2002, 2003 and 2004. On May 22, 2006, the trial court granted defendants' motion for summary disposition pursuant to *MCR 2.116(C)(4)*, reasoning that the MTT had exclusive jurisdiction over all of plaintiffs' claims, except the Headlee Amendment claims. The parties each filed a motion for reconsideration of the trial court's order. On June 20, 2006, the trial court entered a written opinion and order granting defendants' motion for reconsideration, denying plaintiffs' motion for reconsideration and dismissing plaintiffs' Headlee Amendment claims. This appeal followed.

[*5] Plaintiffs first argue on appeal that the trial court erred in concluding that the MTT had exclusive subject-matter jurisdiction over all of plaintiffs' claims, except the Headlee Amendment claims. We disagree.

A jurisdictional question is "always within the scope of this Court's review." *Walsh v Taylor, 263 Mich. App. 618, 622*; *689 N.W.2d 506 (2004)*. "The existence of jurisdiction is a question of law that this Court reviews de novo." *Trostel, Ltd v Dep't of Treasury, 269 Mich. App 433, 440*; *713 N.W.2d 279 (2006)*. Further, this Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to *MCR 2.116(C)(4)*. "[T]his Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Bock v Gen Motors Corp, 247 Mich. App. 705, 710*; *637 N.W.2d 825 (2001)*. A decision concerning the meaning and scope of a pleading is within the sound discretion of the trial court, and reversal is appropriate only if **[*6]** the trial court abuses its discretion. *Weymers v Khera, 454 Mich. 639, 654*; *563 N.W.2d 647 (1997)*.

"Jurisdiction is a court's power to act and its authority to hear and decide a case." *City of Riverview v Sibley Limestone, 270 Mich. App. 627, 636*; *716 N.W.2d 615 (2006)*.

> Jurisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending;and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. [*Derderian v Genesys Health Care Sys, 263 Mich. App. 364, 375*; *689 N.W.2d 145 (2004)* (citation omitted).]

The exclusive and original jurisdiction of the Tax Tribunal is provided for in the Tax Tribunal Act, *MCL*

[2] A "mill" is a "monetary unit equal to 1/1000 of a U.S. dollar or one-tenth of a cent. *The American Heritage Dictionary* (2000).

205.701 et seq., which provides, in relevant part, that the MTT has jurisdiction over:

> (a) A proceeding **[*7]** 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 property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws. [MCL 205.731.]

The term "agency" is defined as a "board, official, or administrative agency who is empowered to make a decision, finding, ruling, assessment, determination, or order that is subject to review under the jurisdiction of the tribunal or who has collected a tax for which refund is claimed." MCL 205.703(a); South Haven v Van Buren Co Comm'rs, 270 Mich. App. 233, 238; 715 N.W.2d 81 (2006). Pursuant to MCL 205.774,

> The right to sue any agency for refund of any taxes other than by proceedings before the tribunal is abolished as of September 30, 1974. If a tax paid to an agency is erroneous or unlawful, it shall not be requisite that the payment be made under protest in order to invoke a right to refund by proceedings before the tribunal.

Thus, "[t]he **[*8]** tribunal's jurisdiction is based either on the subject matter of the proceeding (e.g., a direct review of a final decision of an agency relating to special assessments under property tax laws) or the type of relief requested(i.e., a refund or redetermination of a tax under the property tax laws)." Wikman v City of Novi, 413 Mich. 617, 631; 322 N.W.2d 103 (1982).

"The circuit court possesses' broad original jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law.'" Derderian, supra at 375, quoting Campbell v St John Hosp, 434 Mich. 608, 613; 455 N.W.2d 695 (1990). Const 1963, art 6, § 13 provides as follows:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and **[*9]** matters as provided by rulesof the supreme court.

Furthermore, MCL 600.605 provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."

The parties rely on Wikman, supra at 617, and Romulus City Treasurer v Wayne Co Drain Comm'r, 413 Mich. 728; 322 N.W.2d 152 (1982), in support of their respective arguments on appeal. A brief review of each of these cases, and their progeny, is appropriate to resolve the jurisdictional issue in this case.

In *Wikman*, the council of the defendant city passed a resolution confirming special assessment rolls for the paving of a portion of a road. Wikman, supra at 630. The plaintiffs "filed [a class action] suit in circuit court seeking injunctive relief and claiming that the assessments were determined in an arbitrary and inequitable manner." *Id*. The *Wikman* Court noted:

> [MCL 205.731 **[*10]**] grants the Tax Tribunal jurisdiction over proceedings challenging both assessments and special assessments. In the context of taxation, the word "assessment" denotes the determination of the share of the tax to be paid by each taxpayer, Williams v Mayor of Detroit, 2 Mich. 560, 565 (1853). For the purpose of collecting *ad valorem* taxes, or taxes based on the value of property, the word "assessment" means the determination of the value of property for tax purposes [MCL 211.10]. [Wikman, supra at 632.]

The plaintiffs argued that the complaint raised constitutional issues and that they sought "equitable relief which the Tax Tribunal lacks the power to grant." Id. at 646. In response, our Supreme Court noted:

> Generally speaking, an agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional. However, the constitutional claims in this case do not involve the validity of a statute. Rather, plaintiffs' claim is merely an assertion, in constitutional terms, that the assessment was arbitrary **[*11]** and without foundation. [Wikman, supra at 646-647 (citation

omitted).]

Furthermore, the *Wikman* Court noted that the plaintiffs' requests for equitable relief, including preliminary and permanent injunctions against the defendants, did not divest the MTT of exclusive jurisdiction. *Id. at 649*. Finally ,the Supreme Court declined to address the plaintiffs' argument that the circuit court was the only forum to bring a class action suit, reasoning that "[t]he tribunal's exclusive jurisdiction includes all proceedings for review of an agency's decision under the property tax laws" and that the "plaintiffs can obtain in the Tax Tribunal the same relief sought by another name in the circuit court." *Id. at 649*. Accordingly, the Supreme Court held that the Tax Tribunal had exclusive jurisdiction over the proceeding because the plaintiffs sought a "direct review of the governmental unit's decision concerning a special assessment for a public improvement." *Id. at 626*.

In *Romulus, supra at 733*, the plaintiffs, acting in their official capacity as city and township treasurers and as landowners, **[*12]** brought suit alleging that the defendants "committed a constructive fraud by collecting money for administrative expenses through special assessment procedures." The plaintiffs sought an accounting of the drain commissioner defendant's records, a declaration that the defendant's administrative expenses must be paid from the county's general fund, a preliminary injunction enjoining the defendants from enforcing the special assessment and an order that the collected monies held in escrow by defendants be returned to the landowner plaintiffs. *Id. at 734*. The Supreme Court distinguished the case from the *Wikman* proceeding, noting that "[t]he focus of the present claim concerns not the factual underpinnings of the pertinent assessments, but rather how funds collected pursuant to the special assessment laws may be spent." *Romulus, supra at 736*. Regarding the expertise of the MTT, the Supreme Court noted as follows:

> The expertise of the tribunal members can be seen to relate primarily to *questions concerning the factual underpinnings of taxes*. In cases not involving special assessments, the tribunal's membership is well-qualified to resolve **[*13]** the disputes concerning those matters that the Legislature has placed within its jurisdiction: assessments, valuations, rates, allocation and equalization. In special assessment cases, the tribunal is competent to ascertain whether the assessments are levied according to the benefits received. *Although the tribunal, in making its determinations, will make conclusions of law, [MCL 205.751], the matters within its jurisdiction under [MCL 205.731]most clearly relate to the basis for a tax, and much less clearly to the proper uses which may be made of the funds once collected. Questions concerning how the funds collected may be expended do not appear to be implicated in disputes related to assessments, valuations, rates, allocation and equalization*. The question presented here is whether the exclusive jurisdiction of the Tax Tribunal extends to such questions when the funds are collected pursuant to special assessment laws. [*Romulus, supra at 737-738* (emphasis added).]

Accordingly, the *Romulus* Court concluded that the circuit court, and not the MTT, had jurisdiction to resolve the plaintiffs' **[*14]** claims and, if appropriate, grant declaratory and injunctive relief. *Id. at 738-739*. The Supreme Court reasoned that the MTT did not have jurisdiction because "questions as to the lawful expenditure of funds do not arise within the other matters within the tribunal's jurisdiction" and "the tribunal's expertise relates much more directly to other questions concerning the lawfulness of challenged special assessments." *Id. at 738*.

More recently, out Supreme Court decided *Highland-Howell Dev Co, LLC v Twp of Marion, 469 Mich. 673*; *677 N.W.2d 810 (2004)*. There, the "[p]laintiff's complaint contained a count alleging that [the]defendant breached a promise to construct a sewer line through [the] plaintiff's property." *Id. at 674*. Holding that the MTT has exclusive jurisdiction over matters "'relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws,'"the Supreme Court concluded that the "[p]laintiff's claims for breaches of promise or contract are not within the scope of [*MCL 205.731*], and therefore are within the circuit court's **[*15]** jurisdiction." *Id. at 676*.

This Court has frequently applied the *Wikman* and *Romulus* decisions to determine whether the circuit court or the MTT has subject-matter jurisdiction over the proceedings. In *South Haven, supraat 241*, this Court

held that the circuit court erred in concluding that the MTT had exclusive jurisdiction to decide the plaintiff'sclaims that the defendant board of county commissioners and the defendant treasurer misallocated the funds generated from a road millage and improperly gave the funds resulting from the millage vote to the defendant county road commission. The *South Haven* Court noted that the case was similar to the facts in *Romulus* and found that "whether defendants were required to allocate the road millage funds . . . is not a question 'relating to assessment, valuation, rates, special assessments, allocation, or equalization,' or involving the 'refund or redetermination of a tax,' under the property tax laws, within the meaning of MCL 205.731." South Haven, supra at 241.

In Meadowbrook Village Assoc v City of Auburn Hills, 226 Mich. App. 594, 597; 574 NW2d 924 (1997), **[*16]** this Court held that the MTT erred in determining that it had jurisdiction to consider the plaintiff's constitutional challenge to the defendant city's determination regarding the taxable value of the plaintiff's property. Specifically, the plaintiff sought"a ruling [by the MTT] that the terms taxable value, assessment, and assessed in Const 1963, art 9, § 3 have the same meaning." *Id*. (internal quotations omitted). This Court found that the MTT did not have jurisdiction to decide the plaintiff's claim because it involved a constitutional question. *Id*.

Finally, in Kostyu v Dep't of Treasury, 170 Mich. App. 123, 126; 427 N.W.2d 566 (1988), the plaintiff appealed a final assessment to the Tax Tribunal and also brought an action in circuit court asserting that the defendant employed a methodology in computing his tax liability under MCL205.21 and requesting that the defendant's policy be declared invalid or unconstitutional as a violation of due process. The *Kostyu* Court looked to the "core" of the plaintiff's complaint and held:

> A review of Kostyu's complaint in the circuit court reveals that the issues **[*17]** raised are squarely within the Tax Tribunal's jurisdiction and the Tax Tribunal can provide Kostyu with the procedural due process he seeks. Since Kostyu's claims involve the methodology employed by the Department in arriving at a taxpayer's final income tax liability, the circuit court correctly ruled that it lacked subject matter jurisdiction. [Id. at 130.]

In this case, plaintiffs raise eight claims on behalf of the affected class, including: alleged violations of MCL 380.1211 (Count I) and City of Detroit ordinances requiring a refund of "unjustly or illegally collected taxes" (CountII); a request for a constructive trust to be imposed on defendants in the amount of the taxes levied since 2002 (Count III); claims for constructive fraud (Count IV) and conversion (Count V); alleged violations of plaintiffs' state rights to due process (Count VI) and *42 USC § 1983* (Count VII); and negligent and intentional misrepresentation by defendants (Count VIII). In their second amended complaint, plaintiffs alleged:

> 44. Defendants knew or should have known that they had no legal right *to levy, collect and/or receive* the **[*18]** illegal 18 mil[l] levy.
> * * *
>
> 50. The ordinances of the City of Detroit require a refund to the taxpayers *of unjustly or illegally collected taxes*.
> * * *
>
> 53. As to the City, Board, DPS and Defendant Wojtowicz in his official capacity, *the collection, receipt and/or retention of funds collected pursuant to the illegal 18 mil[l] levy* was wrongful and inequitable.
> * * *
>
> 56. In *assessing, levying, collecting and/or receiving the illegal 18 mil[l] levy*, Defendants falsely collected the funds under the guise of legal authority.
> * * *
>
> 62. The *receipt and distribution of the illegal 18 mil[l]s* by Defendants in this case amounted to a conversion under common law.
> * * *
>
> 66. In *assessing, levying, collecting and/or receiving the illegal 18 mil[l] levy*, Defendants have violated Michigan Const. art. 9, § 6, and have taken the property of Plaintiff[s] and the Class without due process of law in violation of Michigan Const. art. 1, § 17.
> * * *
>
> 70. The actions of the Defendants in *charging and/or collecting an 18 mil[l] assessment* after authority to do so had expired is a taking of property in violation of the *14th Amendment of the* ***[*19]*** *United States Constitution*.
> * * *
>
> 79. Defendants' representations [that the 18 mill

> school operatingtax was due and payable] were false because *Defendants did not have authorization to impose the illegal 18 mil[l] levy*.
> 80. Upon information and belief, Defendants made the representations innocently, negligently, or recklessly without knowledge of their truth. [Emphasis added.]

Under the section entitled "Relief Requested," plaintiffs stated:

> Plaintiffs individually and on behalf of the Class members requestentry of a judgment for the following relief:
>
> A. Order that Defendants account for all of the revenue levied and/or collected or received as a result of the illegal 18 mil[l] levy;
> B. Order that Defendants pay to Plaintiffs and the Class members the damages incurred as a result of Defendants' unlawful actions alleged above;
> C. Order that Defendants immediately cease all efforts to collect the illegal 18 mil[l] levy;
> D. Order that Defendants pay interest, reasonable attorney fees and costs;
> E. Grant such other and further relief as this Court deems Plaintiffs and the Class to be entitled.

A review of plaintiffs' second amended **[*20]** complaint in its entirety and the evidentiary proof submitted below reveals that plaintiffs request a refund of the tax assessed and levied by defendants on plaintiffs' non-homestead properties from 2002 to 2005. To determine whether the MTT had jurisdiction over the matter, we note that it is important to determine what plaintiffs *do not* request. Plaintiffs do not: (1) request a determination regarding the proper use of taxes that were collected or whether funds collected pursuant to an assessment were properly spent, *Romulus, supra at 736-738*; (2) claim that defendants' actions after the taxes were assessed and collected constituted a breach of promise or contract, *Highland-Howell, supra at 674*; or (3) challenge the constitutionality of specific taxing statute, *Meadowbrook, supra at 597*.

Rather, plaintiffs' allegations are similar to the claims raised by the plaintiffs in *Wikman, supra at 630*, and *Kostyu, supra at 126*. This Court is not bound by a party's choice of labels for its cause of action because this would place form over substance. See *Johnston v Livonia, 177 Mich App 200, 208*; **[*21]** *441 N.W.2d 41 (1989)*. Plaintiffs attempt to couch their request for a refund of the school operating tax assessed and levied by defendants from 2002 to 2005 in tort, equitable and constitutional terms. However, looking to the "core" of plaintiffs' second amended complaint, *Kostyu, supra at 130*, plaintiffs seek a refund of the school operatingtaxes assessed on plaintiffs' properties. Thus, in spite of the labels used in plaintiffs' second amended complaint, we conclude that the trial court correctly found that plaintiffs sought a refund of the taxes collected by defendants from 2002 to 2005. Thus, this Court's next task is to determine whether the MTT had exclusive jurisdiction over plaintiffs' claims under *MCL 205.731*.

Accordingly, we conclude that the MTT has exclusive jurisdiction to hear the matter because plaintiffs request a direct review of a final decision by an agency or an official relating to the assessment of plaintiffs' non-homestead property tax under the property tax laws. *MCL 205.731(a)*. DPS is an "agency" because it is a "board" that is empowered to make an assessment. *MCL 205.703(a)* **[*22]** ; *South Haven, supra at 238*. Treasurer and City are both agencies who have "collected a tax for which [a] refund is claimed." *Id*.

Furthermore, pursuant to *MCL 380.432*, defendants are directed to assess and levy the non-homestead tax on plaintiffs' properties. A "first class school district board," such as DPS, "shall prepare estimates of the amount of taxes necessary for its needs for the ensuing fiscal year." *MCL 380.432(1)*. DPS is also directed to "adopt a budget in the same manner and form as required for its estimates and *determine the amount of tax levy* necessary for that budget and shall certify on or before the date required by law the amount to the city." *MCL 380.432(2)* (emphasis added). Next,

> The proper officials of the city shall apportion the school taxes in the same manner as the other taxes of the city are apportioned, and *the amount apportioned shall be assessed, levied, collected, and returned for the school district in the same manner as taxes of the city*. The tax levied by the school district, in the discretion of the legislative body of the city, may **[*23]** be stated separately on each tax bill. [*MCL 380.432(3)* (emphasis added).]

Finally, the CEO of the school district is directed to fulfill the duties of the school board under sections one through three. *MCL 380.432(4)*. However, in no instance shall the board of a school district collect "more than 18 mills for school operating purposes or the number of mills levied in 1993 for school operating purposes, whichever is less." *MCL 380.1211(1)*. Therefore, the

MTT had exclusive jurisdiction under MCL 205.731(a).

Moreover, in light of our conclusion, *supra*, that plaintiffs' sought a refund of the non-homestead property tax imposed on plaintiffs' properties from 2002 to 2005, the MTT had exclusive subject-matter jurisdiction under MCL 205.731(b) based on the type of relief requested. Wikman, supraat 631. Accordingly, the circuit court was prohibited from exercising jurisdiction over all of plaintiffs' claims, except the Headlee Amendment claims, because the subject matter was within the MTT's exclusive jurisdiction. Id. at 646. **[*24]** A review of the pleadings demonstrates that defendants were entitled to judgment as a matter of law, and the lower court record shows that plaintiffs failed to establish a genuine issue of material fact. Bock, supra at 710. Therefore, the trial court did not err in granting defendants' motion for summary disposition pursuant to *MCR 2.116(C)(4)* and concluding that the MTT had exclusive subject-matter jurisdiction over all of plaintiffs' claims, except the Headlee Amendment claims.

Plaintiffs finally argue that the trial court erred in dismissing their 2002 and 2003 Headlee Amendment claims pursuant to *MCR 2.117(C)(7)* because plaintiffs failed to bring their claims within one-year after the claims accrued. Further, plaintiffs contend that the trial court erred in dismissing their 2004 Headlee Amendment claims pursuant to *MCR 2.116(C)(8)* for failure to state a claim. Because we conclude that defendants failed to bring the Headlee Amendment claims within one year after each accrued, we decline to address the merits of plaintiffs' allegations.

Initially, we note that where the trial court fails to dismiss **[*25]** a claim under the proper subrule to *MCR 2.116(C)*, this Court may review the trial court's decision under the proper subrule. See Spiek v Dep't of Transportation, 456 Mich. 331, 338; 572 N.W.2d 201 (1998). This Court will not reverse a trial court's decision where the right result was reached. *Willett v Waterford Twp,n* 271 Mich. App. 38, 55; 718 N.W.2d 386 (2006). Although the trial court dismissed plaintiffs Headlee Amendment claims under both *MCR 2.116(C)(7)* and *(C)(8)*, we will review the matter under *MCR 2.116(C)(7)*.

This Court reviews de novo the grant or denial of a motion for summary disposition. Cawood v Rainbow Rehab Ctr, 269 Mich. App. 116, 118; 711 N.W.2d 754 (2005). *MCR 2.116(C)(7)* provides grounds for summary disposition where the claim is barred by the statute of limitations. "In analyzing a motion for summary disposition pursuant to *MCR 2.116(C)(7)*, the contents of the complaintare accepted as true unless contradicted by documentation submitted by the movant." Pusakulich v Ironwood, 247 Mich. App. 80, 82; **[*26]** 635 N.W.2d 323 (2001). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in *MCR 2.116(C)(7)* is a question of law for this Court to decide. Huron Tool & Engineering Co v Precision Consulting Services, Inc, 209 Mich. App. 365, 377; 532 N.W.2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

The Headlee Amendment was adopted by referendum, effective December 23, 1978. American Axle & Mfg, Inc v City of Hamtramck, 461 Mich. 352, 355; 604 N.W.2d 330 (2000). The Headlee Amendment states, in relevant 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. [Const 1963, art 9, § 31.]

A Headlee Amendment claim must be brought within one-year after the cause of action accrued. **[*27]** MCL 600.308a(3); *Taxpayers Allied for Constitutional Taxation[TACT] v* Wayne Co, 450 Mich. 119, 124-125; 537 N.W.2d 596 (1995). In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action accrues on the date that the tax is due. Id. at 123-124. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed. Id. at 124 n 7.

In this case, taxes were due on plaintiffs' properties on July 1st of each tax year. See MCL211.44a(2)-(3). Thus, plaintiffs' property taxes for 2002 were due July 1, 2002, plaintiffs' property taxes for 2003 were due July 1, 2003, and plaintiffs' property taxes for 2004 were due July 1, 2004. The lower court record shows that plaintiffs were in receipt of the property tax bills in 2002, 2003 and 2004. Thus, plaintiffs' Headlee Amendment claims began to accrue on July 1 of 2002, 2003 and 2004. *TACT, supra* at 123-124. Plaintiffs' original complaint was not filed until August 8, 2005. Accordingly, because

plaintiffs failed to bring their Headlee Amendment claims **[*28]** within one-year after each of the claims accrued, defendants were entitled to summary disposition pursuant to *MCR 2.116(C)(7)*.

Plaintiffs argue on appeal that the trial court erred in failing to apply the discovery rule, reasoning that the resolutions certifying the imposition of the school operating tax were in the sole possession of defendants. Moreover, plaintiffs urge this Court to apply the doctrine of equitable tolling to avoid an unjust and harsh result. Plaintiffs' arguments are without merit.

Under the discovery rule, the statute of limitations "begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Moll v Abbott Laboratories, 444 Mich. 1, 5*; *506 N.W.2d 816 (1993)*. However, this rule is applied in limited and specific situations. *Lemmerman v Faulk, 449 Mich. 56, 66-68*; *534 N.W.2d 695 (1995)* (noting that the discovery rule is generally applicable in negligence, medical malpractice and products liability actions). Furthermore, the doctrine of equitable tolling has generally been applied to toll the period **[*29]** of limitations in a medical malpractice action. See *Ward v Siano,* __ Mich. App. __; __ N.W.2d __ (Docket No. 265599, issued November 14, 2006). "Equitable or judicial tolling ordinarily applies to a specific extraordinary situation in which it would be unfair to allow a statute of limitations defense to prevail because of the defendant's bad faith or other particular and unusual inequities." *Id*., slip op at 2. Additionally, "[a]bsent statutory language allowing it, judicial tolling is generally unavailable to remedy a plaintiff's failure to comply with express statutory time requirements." *Id*. (citations omitted).

Plaintiffs have failed to cite any authority showing that the discovery rule or the doctrine of equitable tolling is applicable in the context of a Headlee Amendment case. "It is insufficient for an appellant to simply announce a position or assert an error and then leave it up to this Court to rationalize and discover the basis for his claims, or unravel and elaborate for him his arguments." *Mudge v Macomb Co, 458 Mich. 87, 105*; *580 N.W.2d 845 (1998)*. Furthermore, **[*30]** assuming that the discovery rule is applicable to the present case, the lower court record shows thatplaintiffs were in receipt of the property tax bills in 2002, 2003 and 2004. Thus, plaintiffs discovered or should have discovered, through the exercise of reasonable diligence, a possible cause of action when they received a copy of their tax bills in 2002, 2003 and 2004. As defendants correctly note on appeal, the resolutions implementing the challenged taxes were a matter of public record and plaintiffshave failed to show that they did not have access to these records. Accordingly, we conclude that plaintiffs' arguments are without merit and defendants were entitled to summary disposition pursuant to *MCR 2.116(C)(7)*.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

End of Document

EXHIBIT D

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

No. 292569

COURT OF APPEALS OF MICHIGAN

2010 Mich. App. LEXIS 2044

October 21, 2010, Decided

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.

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly-situated persons and entities,

Plaintiffs/Appellants,

v.

CITY OF WESTLAND, a municipal corporation,

Defendant/Appellee.

Court of Appeal No. 339143
Lower Court Case No. 2015-006473-CZ
Hon. Craig Strong

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiffs/Appellant

Dean C. Robinette (P54197)
Foley & Robinette, P.C.
13349 Reeck Court
Southgate, MI 48195
(734) 283-4000
Co-counsel for Plaintiffs/Appellant

James M. Pelland (P51237)
Melissa Anne Cox (P71972)
Fausone Bohn, LLP
41700 W. Six Mile Road, Suite 101
Northville, MI 48168
(248) 380-0000
Attorneys for Defendant/Appellee

PROOF OF SERVICE

The undersigned hereby certifies that he is an employee of Kickham Hanley PLLC and that on October 30, 2017, served a copy of Appellants' Brief on Appeal on all counsel of record via the Court of Appeals' e-filing system.

/s/ Edward F. Kickham Jr.
Edward F. Kickham Jr.

KH151567

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	**Case Number:**
DEERHURST CONDOMINIUM OWNERS ASSOCIATION INC V CITY OF WESTLAND	339143

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	Appellants' Brief on Appeal

2. On 10-30-2017, I served the document(s) described above on:

Recipient	Address	Type
Edward Kickham Kickham Hanley PLLC P70332	ekickhamjr@kickhamhanley.com	e-Service
Gregory Hanley Kickham Hanley PLLC P51204	ghanley@kickhamhanley.com	e-Service
James Pelland Fausone Bohn, LLP P51237	jpelland@fb-firm.com	e-Service
Jamie Warrow Kickham Hanley PLLC P61521	jwarrow@kickhamhanley.com	e-Service
Kimberly Plets Kickham Hanley PLLC	kplets@kickhamhanley.com	e-Service
Lisa Paliszewski Fausone Bohn, LLP	lpaliszewski@fb-firm.com	e-Service
Michael McNamara Fausone Bohn, LLP 48055	mmcnamara@fb-firm.com	e-Service

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

10-30-2017
Date

/s/ Edward Kickham
Signature

Kickham Hanley PLLC