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

KELLY GOTTESMAN  
individually and as  
representative of a  
class of  
similarly-situated  
persons and entities,  
Plaintiffs,

vs. Case No. 17-014341-CZ

CITY OF HARPER WOODS  
a Michigan municipal  
corporation,

Defendant.

\_\_\_\_\_ /

MOTION  
BEFORE THE HONORABLE SUSAN L. HUBBARD  
Detroit, Michigan - Thursday, June 7, 2018

APPEARANCES:

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INDEX

WITNESSES:

None

EXHIBITS:

None

1 Detroit, Michigan

2 Thursday, June 7, 2018

3 9:49 a.m.

4

5 THE COURT: The Court is now calling case  
6 17-014341-CZ. Your name now, sir.

7 MR. HANLEY: Yes, good morning, your Honor,  
8 Greg Hanley on behalf of plaintiff and the certified  
9 class.

10 MR. COLAIANNE: Good morning, your Honor,  
11 Joseph Colaianne, Clark Hill, representing the City  
12 of Harper Woods.

13 THE COURT: Okay. And we're here on  
14 plaintiff's motion for partial SD as to counts one,  
15 two and three, defendant's response and defendant's  
16 request for SD for the same counts. So why don't we  
17 begin with you.

18 MR. HANLEY: Okay.

19 THE COURT: Okay.

20 MR. HANLEY: First of all, I appreciate the  
21 Court's indulgence in allowing us to have oversized  
22 briefs in this matter, but I think that the issues  
23 warrant it and I do appreciate that.

24 Your Honor, it's our belief that this case  
25 is controlled exclusively by the recent County of

1 Jackson versus City of Jackson case which dealt with  
2 stormwater charges imposed by that city.

3 The scheme that's been setup here is  
4 virtually identical to the Jackson scheme. The  
5 residential properties are all basically charged a  
6 uniform rate, regardless of the property  
7 characteristics.

8 As part of our reply brief, we attached a  
9 chart that went kind of line by line with the  
10 characteristics of the taxes that were found in  
11 Jackson versus the characteristics of the charges in  
12 Harper woods and they're -- all the way down the  
13 line, they're the same.

14 So in terms of the Bolt factors, I think  
15 that all three of them are amply satisfied and that  
16 Jackson not only warrants but it mandates the Court  
17 to find that these are taxes.

18 The alternative argument to get around the  
19 fact that they are taxes is this Headlee  
20 preauthorization argument, which is the Charter  
21 authorized these charges before Headlee went into  
22 effect or the drain code authorized these charges  
23 before Headlee went into effect.

24 There's three problems with that, your  
25 Honor.

1           The first is, they have to concede it's a  
2 tax in order to avail themselves of the  
3 preauthorization argument.

4           If they concede it's a tax, then they  
5 concede it violates the prohibited taxes by Cities  
6 and Villages Act, which is MCL 141.91.

7           And that's a simple one-sentence law that  
8 says, a city cannot impose a tax other than ad  
9 valorem tax, which this isn't, unless it was actually  
10 imposing that tax on January 1st, 1964.

11           We know that these charges were not imposed  
12 until the '90s, so therefore, for that reason,  
13 they're not authorized.

14           The second thing is, their charter  
15 provision, if they were going to rely on that, it  
16 still requires the charges to be fair and reasonable.

17           And under the Jackson case, these charges  
18 are per se, unreasonable because they're not  
19 proportionate and they're not regulatory and all  
20 that.

21           Finally, there's an attempt to kind of rely  
22 on the Drain Code. And I would submit that the Drain  
23 Code is completely inapplicable here because as the  
24 City fails to either recognize or understand, there  
25 are very strict provisions that the Drain Code

1 imposes before you can impose user fees as opposed to  
2 taxes to pay for drain projects.

3 And before filing a position, the  
4 legislative body of the public corporation shall  
5 first determine whether the drain project  
6 contemplated may necessitate the levy of the special  
7 assessment fee or charge. Okay.

8 Barred from doing that, they passed a  
9 resolution in 1991 which resolved and this is  
10 obviously binding upon the city, that the cost of the  
11 project that we're talking about here will not  
12 necessitate the levy of a special assessment fee or  
13 charge against the land specially benefitted.

14 So back in 1991, they bound themselves to  
15 pay for this through means other than user charges.

16 A year later they then implement an  
17 ordinance that went completely against the resolution  
18 that is still in effect today.

19 So for those reasons, the -- this is a tax  
20 that violates either -- or both of MCL 141.91 or the  
21 Headlee amendment.

22 The distinctions between this case and  
23 Jackson are meaningless distinctions without a  
24 difference.

25 And for that reason, we'd ask you to rule

1 in our favor as to counts one, two, three.

2 THE COURT: Thank you.

3 MR. COLAIANNE: Good morning, your Honor.

4 Obviously, the City of Harper woods  
5 disagrees with Mr. Hanley's perspective on this  
6 matter.

7 We believe this is a valid user fee and it  
8 complies with the -- in terms of the criteria for  
9 both.

10 A little bit different kind of a situation  
11 we have here.

12 Every drop of storm water from the City of  
13 Harper Woods gets treated. It has end-of-the-pipe  
14 treatment. Because the configuration of the sewer  
15 spot, it's both a sanitary and stormwater system.

16 It's -- when it rains, the stormwater is  
17 diverted to a system called the Milk River  
18 Intercounty Drain System, which is a Chapter 21  
19 system, a system established from Chapter 21 of the  
20 Michigan Drain Code.

21 In fact, the ordinance that was adopted was  
22 originally adopted with that in mind to pay for the  
23 debt, service, operation and maintenance cost due to  
24 the assessment coming -- that is made by the  
25 Intercounty Drain Board.

1                   We believe this case is very -- is  
2                   analogous to the Downriver Plaza Group versus City of  
3                   Southgate case, which is cited at 444 Mich 656. And  
4                   I'll go into that in one moment.

5                   The truth is that this is a case  
6                   involving -- where unlike in the Bolt case, which  
7                   found a user fee inappropriate or illegal, an illegal  
8                   tax, the reason why that was found to be illegal is  
9                   because they were using it to fund a separation of  
10                  the sewer system in the City of Lansing, \$178 million  
11                  project at the time, and spread that cost to the  
12                  entire city, when only a portion of the city was  
13                  going to benefit from that sewer separation.

14                  Similarly, in City of -- County of Jackson  
15                  versus City of Jackson case that Mr. Hanley has  
16                  indicated, that was a system where there is no  
17                  end-of-the-pipe treatment.

18                  The system is supported solely for  
19                  operation and maintenance and does not -- did not  
20                  serve -- or serve what the Court indicated in that  
21                  case, minimum regulatory purposes.

22                  Now, here's where it gets really important  
23                  because one of the aspects of a user fee is, it must  
24                  serve a regulatory purpose.

25                  The regulatory purpose in here began with



1 an order of determination filed by the Michigan  
2 Department of Environmental Quality that requires \$37  
3 million improvements to the Milk River Intercounty  
4 Drain.

5 That's the resolution and that's the  
6 purpose of this current fee at this point that's  
7 being charged to the City -- the City residents, to  
8 pay for cost of which Harper Woods, I believe 44.7  
9 percent or close to \$17 million.

10 That's the regulatory purpose by which  
11 under the Drain Code, is perfectly reasonable to set  
12 up a user-based system on.

13 In fact, the City of Southgate case that I  
14 mentioned earlier, the same argument Mr. Hanley is  
15 making here, is that the plaintiffs in that case  
16 relied -- indicated that the City at that time did  
17 not comply with Section 489(A) and 490 of the  
18 Michigan Drain Code before having its fees -- its  
19 user fee and formula setup.

20 And basically the City said in that case --  
21 made a point that the construction had already been  
22 completed in 1980 when the City adopted its user fee.

23 And said consequently, it would not have  
24 been possible for the Southgate to have complied with  
25 489(A)'s requirement.

1                   Clearly, the legislature intended that  
2                   489(A), would have only a perspective effect.

3                   Thus, we agree with the trial Judge's  
4                   conclusion that, quote, that 489(A) is without  
5                   meaning in this case.

6                   Further, and this is the second part that's  
7                   important. We conclude that Southgate had a valid  
8                   authority to levy user charges under the appropriate  
9                   Drain Code sections.

10                  So in this case the operative order -- let  
11                  me back up.

12                  In order to initiate a project under the  
13                  Michigan Drain Code in section -- in Chapter 20 of  
14                  the Michigan Drain Code, requires a petition filed by  
15                  two municipalities, minimum of two municipalities,  
16                  both under Chapter 20 and 21, in order to initiate a  
17                  project.

18                  The original project that was (inaudible)  
19                  goes back to actually to the '50s, late 1950's when  
20                  they built the RTV to solve a number of their  
21                  stormwater issues back then.

22                  Then in 1990, it was an improvement.  
23                  (Inaudible) for the improvement was filed.  
24                  Mr. Hanley indicated in 1994, this -- the  
25                  improvements of the RTV that subsequently lead to the

1 adoption of the ordinance to help pay for the cost.

2 But subsequently, 20 years some years  
3 later, the Milk River was cited by the Michigan  
4 Department of Environmental Quality in violation of  
5 its national -- National Elimination -- National  
6 Pollutant Elimination permit, NPDES permit, under  
7 both the Clean Water Act and the State and  
8 Environmental Office.

9 That lead to not having the City of Harper  
10 Woods, St. Clair Shores and Grosse Pointe Woods, who  
11 all make up the communities that are served by the  
12 Milk River System, none of those communities  
13 petitioned for the improvements that are now  
14 before -- that the City apparently faced.

15 It was actually ordered to termination  
16 filed by the MBEQ. That was filed pursuant to  
17 section -- which is cited also in my brief, Section  
18 434 of the Michigan Drain Code, Subsection three.

19 That's MCL 280, 423 Subsection 3. The  
20 provision that lead to the most recent improvements  
21 that were required of the Milk River, were filed  
22 pursuant to this Act, this section.

23 It says, if the Department of Environmental  
24 Quality determines that sewer or waste carried by a  
25 county or intercounty drain constitutes an unlawful

1 discharged as prescribed by Section 3109 or 3112 of  
2 part 31 of the Natural Resource and Environmental  
3 Protection Act, that's MCL 324.3109 and 3.4.3112, or  
4 more -- that one or more of the users of the drain  
5 are responsible for the discharge of sewerage or  
6 other waste into the drain and that cleaning out the  
7 construction or disposal of (inaudible) or other  
8 mechanical devices to purify the flow of the drain is  
9 necessary, the Department of Environmental Quality  
10 may issue to the drain commissioner an order of  
11 determination identifying (inaudible) and pollutants  
12 under those same sections.

13 THE COURT: Okay. Thank you. Anything  
14 else you'd like to add?

15 MR. COLAIANNE: Well, where I'm going with  
16 this is there's three aspects of this --

17 THE COURT: What I should have said, is  
18 there anything other than what's in your brief that  
19 you'd like to add? But I've allowed both of you an  
20 ample amount of time. If you want to wrap it up you  
21 can.

22 MR. COLAIANNE: Sure. I'll wrap it up,  
23 your Honor.

24 I think there's a couple of things that  
25 Mr. Hanley brought up in his reply brief that I'd

1           like to respond to. One is that the issue  
2           regarding --

3                     THE COURT: Well, let me go through  
4           everything and then if you'd like you can --

5                     MR. COLAIANNE: That's fine.

6                     THE COURT: -- add. Okay. Because it  
7           seems to me it's just getting more and more diluted  
8           and complex here, so let's just talk about the  
9           background of this case.

10                    The plaintiff filed this class action case  
11           against the City as to the mandatory storm water  
12           service charge imposed by the City.

13                    This Court did grant class certification by  
14           order entered May 29th of '18.

15                    This case was also removed from case  
16           evaluation.

17                    The Court will need some direction from the  
18           parties on how this case proceeds because both sides  
19           here are seeking SD here on only part of the  
20           complaint, correct?

21                    MR. HANLEY: Yes.

22                    MR. COLAIANNE: Correct.

23                    THE COURT: So we're going to have to have  
24           some idea at the end of this motion, whether you plan  
25           to go to trial, whether you arbitrate, et cetera.

1           Anyway.

2                       So the plaintiff's position is, count one  
3           alleges a violation of Headlee amendment.

4                       Count two alleges the assumpsit for money  
5           had and received violation of the prohibited taxes by  
6           Cities and Villages Act, which is MCL 141.91.

7                       And count three alleges unjust enrichment,  
8           which is a violation of the same Act.

9                       The plaintiff's summary disposition motion  
10          is not sought on count four, which is assumpsit of  
11          money had and received unreasonable water and sewer  
12          rates.

13                      Count five unjust enrichment unreasonable  
14          water and sewer rate.

15                      Count five is assumpsit money had received  
16          charges imposed in violation of the city ordinance.

17                      And count seven, unjust enrichment and  
18          violation of city ordinance.

19                      I don't know that we need to use the word a  
20          assumpsit. There's no specialized meaning for it.

21                      But nonetheless, plaintiff's position is  
22          that the stormwater charges constitute unlawful taxes  
23          and as taxes, the charges violate MCL 141.91 and the  
24          Headlee Amendment.

25                      The defendant's position in counter motion

1 is that the charge for stormwater drainage is not a  
2 tax but a valid regulatory fee proportionately  
3 related to the services or benefits conferred.

4 Defendant's position is that not all fees  
5 charged by a municipality are taxes and persons who  
6 dispute the fee may appeal to the city manager to  
7 obtain an adjustment if circumstances warrant it.

8 There is pre-Headlee authorization in the  
9 City Charter for this fee, thus, it does not violate  
10 the Headlee Amendment.

11 That's their position. And if the Court  
12 determines that the fee is, in fact, a tax, the  
13 plaintiff's claims he argues, are barred by a  
14 one-year statute of limitation, correct?

15 MR. HANLEY: Correct, your Honor.

16 THE COURT: Okay. Harper Woods maintains  
17 two separate sewer systems, one for waste and one for  
18 stormwater.

19 It charges property owners fees for each of  
20 these systems. And this motion concerns the charges  
21 for stormwater, which the City began imposing in  
22 1992.

23 Plaintiff relies on two cases in support of  
24 his position, Bolt versus City of Lansing and County  
25 of Jackson versus City of Jackson.

1           In Bolt, a landowner sued the city alleging  
2           that its stormwater service charges were a disguised  
3           tax for purposes of the Headlee Amendment, which  
4           requires voter approval.

5           As we all know, when there's an increase in  
6           local taxes, the Supreme Court agreed that the charge  
7           was in fact a tax.

8           Jackson involved the same issue and the  
9           Court of Appeals and in that case -- they went to the  
10          Court of Appeals.

11          The Court of Appeals found that the  
12          stormwater management charge was a tax requiring  
13          electorate approval.

14          Defendant, however, distinguishes these  
15          cases from this case at bar arguing that those cases,  
16          if the fee is a user fee and not a tax, then it is  
17          not a violation of the Headlee Amendment.

18          So the issue before the Court here is the  
19          fee being imposed a tax.

20          Section 31 of the Headlee Amendment 1953  
21          Constitution Article 9 Section 31, is triggered by  
22          the levying of a tax.

23          That section prohibits (inaudible) and  
24          local government from levying any new taxes or  
25          increasing any existing tax above authorized rates



1 without the electorate's approval.

2 And in Jackson quoting from Durant versus  
3 Michigan, Michigan, that is the law.

4 However, if the charge is a user fee, then  
5 Headlee is not implicated.

6 So the Court must first determine whether  
7 the charge in this case is a tax or a user fee, which  
8 Durant describes as a fee exchanged for a service  
9 rendered or a benefit conferred where some reasonable  
10 relationship exist between the amount of the fee and  
11 the value of the service or benefit.

12 This is contracted from a tax which is  
13 designed to raise revenue.

14 In both, the Court found that the  
15 stormwater service charge was neither regulatory nor  
16 proportionate to the cost of the service.

17 Instead, it was a revenue-raising charge to  
18 fund a public improvement designed to provide a  
19 long-term benefit to the residents.

20 Jackson sets out a three-prong test to  
21 determine whether a charge is a tax or a user fee.

22 Number one, whether the charge serves a  
23 regulatory purpose rather than a revenue-raising  
24 purpose.

25 Number two, whether the charge is

1 proportionate to the cost of providing the service.

2 And number three, whether the payment of  
3 the charge is voluntarily.

4 If a fee is for a service, then it is a  
5 user fee and not a tax.

6 In support of his position that the charge  
7 is a tax for revenue-raising purposes, the plaintiff  
8 cites the deposition testimony of the city manager  
9 since 2011.

10 At his deposition he was questioned about  
11 the actual numbers for 2015, estimated numbers for  
12 2016 and proposed numbers for 2017.

13 The actual stormwater charges collected in  
14 2015 were 1.9., he testified, and the actual  
15 expenditure was \$956,000. So there's quite a  
16 difference there.

17 That would leave a fund balance of 519,000.  
18 This is Plaintiff's Exhibit 1 pages 27 through 28.

19 Similarly, the estimate for 2016 was that  
20 the revenue over expenditures would be 955,000.

21 In fact, the manager testified that between  
22 2012 and 2016, there were no debt charges for the  
23 Milk River drain, but no reduction was made by the  
24 City in its stormwater charges to the residents.  
25 These are all facts.

1           He also admitted that the charges were not  
2 reduced with the intention to build up a reserve fund  
3 to pay for the planned future improvements of the  
4 Milk River. That's pages 30 through 33 of his  
5 deposition testimony.

6           Plaintiff also cites the City Ordinance  
7 Section 27 through 120, which requires the stormwater  
8 charges to be equivalent to the total cost of the  
9 debt retirement and operation management of the  
10 system.

11           The City Charter requires payment of these  
12 charges by all real property owners, and unpaid  
13 charges are a lien against the property owner.

14           And it seems very clear that under the law,  
15 Jackson, Durant and Bolt, that these fees are, in  
16 fact, taxes.

17           They are clearly at present for revenue  
18 building and they clearly are mandatory, not  
19 voluntary.

20           The amount charged, at least in the recent  
21 past, have not been proportionate to the cost of the  
22 service.

23           And for comparison purposes, we have  
24 Plaintiff's Exhibit B to the reply -- to the reply  
25 brief comparing Jackson to the present case.

1           The other issue is it exempt from Headlee  
2 as a pre-authorized tax, which the defendant argues.

3           They argue that if the fees are taxes, they  
4 are exempt from the Headlee Amendment because they  
5 are taxes that were authorized by law or a charter  
6 prior to the ratification of the Headlee Amendment in  
7 1978.

8           Specifically, the 1951 City of Harper Woods  
9 Charter, allows the City to impose just and  
10 reasonable rates for sewage treatment.

11           In support of this argument, defendant  
12 relies on a ruling made by Judge Kumar in Oakland  
13 County in favor Royal Oak, whose 1942 charter  
14 authorizing the imposition of drainage fees, that  
15 they were not in violation of the Headlee Amendment.

16           Defendant also argues that the fee/taxes  
17 permitted under the Drain Code of 1956 MCL 280.51 et  
18 seq., and not violative of the Headlee Amendment.

19           Even if that's true, plaintiff asserts that  
20 the tax violates, MCL 141.91, which states, except as  
21 otherwise provided by law and notwithstanding any  
22 provision of its charter, a city or village shall not  
23 impose, levy or collect a tax other than an ad  
24 valorem property tax on any subject of taxation  
25 unless the tax was being imposed by the city or

1 village on January 1st of 1964.

2 The stormwater charges were imposed in  
3 defendant City beginning in 1992 and are not ad  
4 valorem based on -- which means, based on the  
5 property value.

6 Plaintiff asserts that the tax also  
7 violated the Drain Code, because pursuant to MCL  
8 280.51 -- 5113 -- 513 sub 1, it states that prior to  
9 filing a petition under this section to establish an  
10 intercounty drain, a city must first determine  
11 whether the project will necessitate a special  
12 assessment, a fee or a charge.

13 In fact, when the Milk River drain project  
14 was started in 1991, the city determined that no  
15 special assessment or charges to residents would be  
16 necessary.

17 And plaintiff quotes the 22091 resolution  
18 by the City Council to that effect.

19 Plaintiff also argues that the fees charged  
20 are not just and reasonable as the Court also found  
21 in Jackson since clearly they're not proportionate to  
22 the expenses as compared -- earlier compared.

23 Now with regard to your argument with the  
24 statute of limitations.

25 Defendant asserts that a claim for

1 violation of the Headlee Amendment must be brought  
2 within one year after the cause of action accrues.

3 MCL 600.308(A) sub 3. A cause of action  
4 generally accrues on the date the tax is due.

5 However, pursuant to Taxpayers Allies versus Wayne  
6 County, the Court held that a claim would accrue at  
7 the time the tax resolution was past, if the claim  
8 was brought on behalf of the public as opposed to a  
9 claim brought by a taxpayer.

10 Courts have found that the one-year  
11 limitation is intended to protect fiscal integrity of  
12 the taxing governmental unit, if the tax is  
13 subsequently found to violate the Headlee Amendment.

14 Plaintiff in this case is a taxpayer and is  
15 also a representative of the class of other taxpayers  
16 in the City.

17 He is not like the plaintiff in Taxpayers  
18 Allies, a group formed for the purpose of challenging  
19 a tax.

20 Therefore, his claim and a class members  
21 claims accrue on the date the tax is due, not when  
22 the resolution was past.

23 However, I don't think that plaintiff can  
24 challenge the tax amount for more than one year back  
25 from when he filed the lawsuit.

1           The statute of limitations argument only  
2           applies to count one of the complaint.

3           So with regard to the remaining issues, the  
4           plaintiff also seeks recovery under count two a  
5           assumpsit for violation of MCL 141.91, and count  
6           three unjust enrichment.

7           Neither plaintiff or defendant briefed the  
8           issued in law for count two. Even if the tax is a  
9           violation of MCL 141.91 where the authority for a  
10          taxpayer to sue to get the tax payment refunded.  
11          What are the penalties to the city for violating the  
12          statute.

13          None of this was briefed. Nothing is  
14          stated in the statute. And as noted, plaintiff  
15          argues that the tax is not reasonable and just so  
16          does not equate to unjust enrichment.

17          The elements of a tort are not even set out  
18          in plaintiff's brief.

19          So certainly drains and stormwater  
20          treatment systems are necessary and a public benefit,  
21          but in order to pay for them by assessing taxes,  
22          municipalities must follow the law.

23          And it appears that the City must refund  
24          the 2016 overpayment as a violation of the Headlee  
25          Amendment, and perhaps even more if the Court -- if

1 the parties want to brief this issue about unjust  
2 enrichment.

3 So the City will need to raise the  
4 assessment properly and by according to law in the  
5 near future to pay for the drain.

6 So I suppose they'll ultimately get the  
7 money.

8 So the Court is going to grant plaintiff's  
9 motion as to count one only.

10 The motion as to counts two and three are  
11 denied without prejudice and this does not resolve  
12 the last pending claim. Please e-file an order.  
13 Thank you.

14 MR. COLAIANNE: Are you also granting the  
15 issue on statute of limitations? I'm just --

16 THE COURT: Right.

17 MR. COLAIANNE: Right.

18 THE COURT: Yeah, I do. It's just that  
19 it's not been properly briefed. I think it would be  
20 from the date of the filing of the lawsuit.

21 MR. COLAIANNE: Right. I think that's --

22 THE COURT: I'm not sure when it was filed.

23 MR. HANLEY: One year back from the filing  
24 of the lawsuit.

25 THE COURT: Yes.



1                   MR. HANLEY: And right now because of the  
2 Court's feeling that there was not adequate briefing  
3 on the applicable statute of limitations to the sums  
4 of unjust enrichment and whether there was  
5 (inaudible) claim is denied without prejudice?

6                   THE COURT: Um-hum.

7                   MR. HANLEY: And we can raise that issue?

8                   THE COURT: Yes. Thank you, gentleman.

9                   MR. HANLEY: All right, thank you.

10

11                   (Proceedings concluded at 10:17 a.m.)

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CERTIFICATE OF REPORTER

STATE OF MICHIGAN )  
 ) SS  
COUNTY OF WAYNE )

I, Laurie A. Jefferson, CSR-6909, Official Court Reporter acting in and for the Third Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages 1 through 26 was reduced to typewritten form and comprise a true rendition of the proceedings taken by means of video recordation without the benefit of a court reporter present during the proceedings.

I further certify that I will assume no responsibility for any events that occurred during the above proceedings for any inaudible responses by any party or parties that are not discernable on the video of the proceedings.

Laurie A. Jefferson

Laurie A. Jefferson

CSR-6909