

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMILA YOUMANS,

Plaintiff,

vs

Case No. 2016-152613-CZ

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant.

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MOTION

BEFORE THE HONORABLE DANIEL PATRICK O'BRIEN

Pontiac, Michigan - Monday, March 18, 2019

APPEARANCES:

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None.

EXHIBITS

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None.

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Pontiac, Michigan

Monday, March 18, 2019

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(At 1:34 p.m., proceedings begin)

THE CLERK: The Court calls Youmans versus Bloomfield Township, case number 2016-152613-CZ.

THE COURT: Gentlemen.

MR. HANLEY: Good afternoon, Your Honor. My name is Greg Hanley, and I'm with Ed Kickham, III; we represent the Plaintiff and the class.

THE COURT: Thank you.

MR. YOUNG: Good morning -- good afternoon, Your Honor. Rodger Young and Mark Roberts representing the Defendant, Bloomfield Township. Henry Saad, who is with my firm, is not here today, and I regret to inform the Court that Mr. Hampton has retired --

THE COURT: So I've heard. Wish him the best.

MR. YOUNG: -- and gone forth, so --

THE COURT: So thank you.

I do note that there is folks here as well. Certainly welcome. I don't know if that changes things, but the Court's thought would be if -- put out an invitation if anybody is interested, whether you call this naïve or not, in talking informally, certainly, the Court would make himself -- itself available in chambers. Any

1 interest? Yes from the Plaintiff?

2 MR. HANLEY: Yes, always.

3 THE COURT: How about -- thank you. Mr. Young,  
4 Mr. Roberts?

5 MR. YOUNG: We have no objection, Your Honor.

6 THE COURT: Would you elevate to that a yes,  
7 we're interested, or no objection? I'm not going to pull  
8 teeth.

9 MR. YOUNG: We -- Mr. Roberts informs me that --

10 MR. ROBERTS: Plaintiff did not plead a cause of  
11 action --

12 MR. YOUNG: Well, what -- I -- I guess --

13 THE COURT: The answer is yes or no? You guys  
14 interested or not?

15 MR. YOUNG: We will say no, Your Honor.

16 THE COURT: Okay. All right.

17 On my round table right by the door is my stack  
18 of papers; if you'd get them for me?

19 THE CLERK: Yes, Your Honor.

20 THE COURT: Any -- anybody have any preference  
21 on how to proceed? They've declined and I won't force  
22 them to, Mr. Hanley, so --

23 MR. HANLEY: Well, I think the -- the motions  
24 that are filed are intertwined.

25 THE COURT: Mm-hmm.

1 MR. HANLEY: Ours was filed first, and I think  
2 we have a -- a gentlemen's agreement that we'd present our  
3 motion first. I'm sure there's going to be a lot of  
4 overlap, and it's not my intent to just repeat everything  
5 that's in our briefs.

6 THE COURT: Sure. No need.

7 MR. HANLEY: I know the Court gets very actively  
8 involved, so I'll -- I'll just amplify some of the -- the  
9 highlights.

10 THE COURT: Go ahead; I'm -- I'm good.

11 MR. HANLEY: Oh, okay.

12 Well, it's been over a year since we tried the  
13 case, and there's been some significant post-trial  
14 activity.

15 The -- the issue that has been teed up for today  
16 is in denying our -- one of our motions for  
17 reconsideration, the Court asked the following question.  
18 Is there a legal or equitable doctrine which would yield a  
19 judicial adjudication in favor of one party, because the  
20 other party obscured proofs needed for that judicial  
21 adjudication.

22 And we have submitted authorities that suggest  
23 that there are. Notably, principles of estoppel,  
24 principles of spoliation of evidence, and presumptions  
25 under the Revised Judicature Act, and I'd like to focus on

1 that, because it was referenced in the briefs, but I'd  
2 like to amplify it a little bit here.

3 There's -- as the Court has applied in probably  
4 ever case that's -- every business case it's tried,  
5 there's a -- there's a -- a court rule that allows a  
6 business record to be admitted into evidence if certain  
7 prerequisites are shown, but there's also a specific  
8 provision of the Revised Judicature Act that also speaks  
9 to that issue, and it talks about, you know, a written  
10 record in the form of a book or otherwise, made as a  
11 memorandum of an act around the time that it occurred, is  
12 admissible.

13 Well, one of the big things that we had at the  
14 trial were all these rate memos, right? And those rate  
15 memos clearly are business records, they were admitted,  
16 they were stipulated to be admitted, and they are the  
17 classic business record. They're contemporaneous  
18 recitations of -- of whatever they're showing within the  
19 bounds of those.

20 So why is that important? Because not only is  
21 the -- the document that has those entries of a regularly-  
22 conducted activity admissible, but when there's a lack of  
23 an entry, and I want to read this specifically, the lack  
24 of an entry regarding an act, transaction, occurrence or  
25 event, in a writing or record so proved, may be received

1 as evidence that the act, transaction, occurrence or event  
2 did not, in fact, take place, okay?

3 So if you remember, only when they got to 2016  
4 and '17 did they start showing their work about the non-  
5 rate revenues and the sewer-only revenues, okay? There  
6 was a lack of entry in all the prior rate memos, which  
7 were admitted into evidence, and so under the Revised  
8 Judicature Act, the Court can take the lack of an entry as  
9 evidence that the transaction, occurrence, event did not,  
10 in fact, take place; i.e., that they did not in fact take  
11 into account non-rate revenue and sewer-only revenue.

12 All right. So there's that.

13 On top of that, on a -- from a spoliation  
14 standpoint, Judge, we -- we understand that this is not a  
15 traditional spoliation type event, where you're -- you're  
16 threatened with lawsuit or there's actual lawsuit and you  
17 destroy your records, okay? That's the -- that's the  
18 paradigm for spoliation. But there are cases,  
19 particularly in the federal system, that say when you have  
20 an independent duty to preserve the record through a  
21 regulation, or a -- a -- an EEOC regulation, for example,  
22 or a statute, you can be responsible for spoliation, even  
23 if there's no whiff of litigation at the time that you  
24 dispose of it, if that -- there was a continuing  
25 obligation to hold onto that record.

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Now what is the -- the source of that here?

Well, we have the Charter Township Act, which requires them to prepare a detailed budget and present that budget to the township board 120 days prior to the commencement of the fiscal year, and under MCL 42.25, the budget proposal shall present a complete financial plan for the ensuing fiscal year. It shall include at least all of the following information: A, detailed estimates of all proposed expenditures for each function and office of the township; C, detailed estimates of all anticipated income of the township from sources other than taxes and borrowing. This non-rate revenue information was not just required to be maintained as sticky notes, it was required to be put in the budget that was presented and on which they had a public hearing. 42.26 requires the township to hold a public hearing on the budget, and make a copy of the proposed budget available before the public hearing, okay?

We know all the budgets are in, they were in evidence; the budgets don't show the -- an accounting for non-rate revenue, and that is a revenue from another source, other than taxes and borrowing. So there's a -- there's a detailed statutory requirement that on an annual basis to -- to set this forth.

So whether you look at it from a spoliation



1 standpoint, or whether you look at it as they didn't do it  
2 in the first place, you get to the same spot, which is  
3 that the -- the Court is allowed to assume, particularly  
4 tying back to 600.2146, the Revised Judicature Act, that  
5 the lack of an entry regarding this information may be  
6 received as evidence that the act, transaction,  
7 occurrence, or event did not, in fact, take place. It's a  
8 very simple sentence in 600.2146.

9 So beyond that, we contend that they have an  
10 obligation under the -- under the Michigan Constitution to  
11 preserve these records, because again, these records are  
12 the only record that was created on this -- on these  
13 points. It wasn't like the sticky notes were compiled  
14 into another document and they showed what the sticky  
15 notes showed. The sticky notes and cocktail napkins are  
16 the source documentation, and -- and for which we did --  
17 were not provided this, and for which you found a failure  
18 of proof as a result of their obfuscation.

19 So whether you want to call it estoppel, because  
20 there's an estoppel case that we cited in -- in our -- in  
21 our brief where an insurance company impeded the plaintiff  
22 from making a proper notice of claim by not giving them  
23 the policy, and they said you can't rely upon your own  
24 malfeasance or misconduct in order to defeat an essential  
25 element of the claim.

1                   If you recall, Judge, when we first made our  
2 motion for reconsideration, we were relying upon cases  
3 that say where the defendant obfuscates damages, you --  
4 you can assume the damage, basically, and what you ruled  
5 in your reconsideration order was you had actually ruled  
6 that there was a failure of proof as to liability, okay,  
7 so what we've done here is -- is to say what's the  
8 authority that you can find liability by virtue of their  
9 obfuscation and all the things that you've -- you've  
10 found.

11                   So you can call it estoppel, you can call it  
12 spoliation, you can say under 600.2146, that lack of entry  
13 should be taken as evidence that it didn't occur, and if  
14 it didn't occur, then we've met our burden to prove that  
15 the non-rate revenues and the sewer-only revenues are not  
16 properly accounted for.

17                   And the Court previously recognized that -- that  
18 there had been spoliation on behalf of the -- of the  
19 Township by talking about -- by -- by enjoining them in  
20 the future that -- that any sticky notes, notepads, any  
21 backs of napkins upon which unsumptions are written, upon  
22 which non-rate revenue deductions from commodity costs,  
23 which in fairness should be deducted are written, are to  
24 be made public for all eyes to see. In other words, that  
25 hadn't been done; there was an admitted habitual

1 destruction of this critical evidence and it was done at a  
2 time that is immaterial as to whether they were facing  
3 litigation or not, because they had a duty to preserve.

4 And so you start with the duty to preserve, then  
5 you get to what are the remedies for their failure to  
6 preserve and that's how we get to the point where we  
7 should be found to have met our burden on those issues,  
8 and that's -- I'll have other responses. They -- they're  
9 more appropriate to reply, I think, because they're raised  
10 in -- in their response that -- you know, new cases and  
11 things like that.

12 But if the Court has any more questions --

13 THE COURT: Not right now.

14 MR. HANLEY: Okay.

15 THE COURT: Thank you.

16 MR. YOUNG: Your Honor, I'd like to talk a  
17 little bit about the specifics that he just talked about  
18 in his presentation to the Court, and then I would like to  
19 talk about some over-arching issues that make this entire  
20 line of inquiry irrelevant.

21 And I'll start by saying what is a reasonable  
22 definition of business records and the kind of public  
23 records that we're talking about here is emails at the  
24 Township on water and sewer issues, rate memoranda on  
25 water and sewer issues, Township board of trustees minutes

1 and recordings of the meetings, which this Court saw,  
2 meetings and minutes of meetings outside that, if they  
3 exist, and the financial statements and the work papers  
4 supporting the financial statements.

5 This Court has amended them, and that is  
6 absolutely this Court's prerogative, but I thought it was  
7 interesting, the most core fundamental documents of all,  
8 the financial statements, the audited financial statements  
9 by Plante Moran, and the work papers that support those  
10 financial statements, which are always very voluminous,  
11 and very telling in any case of this nature, were never  
12 even -- work papers were never even asked for by the  
13 Plaintiff's counsel.

14 Your Honor, I think that to now say that we're  
15 going to broaden the definition of the public documents,  
16 of the documents that we're talking about here, and  
17 include sticky notes and scratch paper, and that that  
18 should be a leaping mechanism to spoliation, and that that  
19 should be a leaping mechanism to a judgment -- an  
20 amendment to the judgment and another \$5 million is a  
21 tremendous stretch.

22 Spoliation is fundamentally the destruction of  
23 evidence in anticipation of litigation or doing litigation  
24 to obtain an advantage; none of that was done here. Most  
25 of this was done years before the lawsuit was ever

1 started, so I -- I respectfully suggest that spoliation is  
2 just simply not an issue here.

3 Your Honor, I also want to say the Plaintiff  
4 received every single bit of discovery they requested.  
5 There was never a motion to compel, there was never an  
6 order entered to compel us to do something, because we  
7 fully cooperated with them. So now to say they should  
8 have gotten more during discovery, I think they should  
9 have pursued that some time ago.

10 And finally, Your Honor, I believe that this all  
11 constitutes a waiver by the Plaintiff of these issues.  
12 I'm talking about spoliation, I'm talking about the  
13 Michigan Constitution, which talks about public records,  
14 and that's why my definition of public records is  
15 critical, and -- and certainly MCLA 600.2146, Your Honor.

16 600.2146 involves business documents that are  
17 regularly kept in the course of business. Scratchpads,  
18 scratch paper, sticky notes, are not regularly kept in the  
19 ordinary course of business. Now, they are now, because  
20 this Court has taken a position on that, and prospectively  
21 obviously they will be, but again, they're trying to take  
22 these very narrow esoteric issues and leapfrog into a \$5  
23 million amendment to their judgment against the residents  
24 of Bloomfield Township.

25 So I -- I think that this is a situation, Your

1 Honor, of where we really don't have any issues. *Hopkins*  
2 -- the *Hopkins* case cited in our brief at 294 Mich App  
3 401, and specifically at page 418, discusses the fact on a  
4 very, very similar situation, of where a municipal  
5 official's notes are not considered public documents, so I  
6 think, Your Honor, that portion of their case is simply a  
7 -- an -- an attempt to segue from what I'd like to now  
8 talk about, which are --

9 THE COURT: What's the cite on *Hopkins*?

10 MR. YOUNG: Pardon me, Your Honor?

11 THE COURT: What's the cite on *Hopkins*?

12 MR. YOUNG: The cite on *Hopkins*, Your Honor, is  
13 494 Mich App 401; the discussion occurs at page 418.

14 THE COURT: And that's contained in a -- a  
15 submission from your client when?

16 MR. YOUNG: It is, Your Honor.

17 THE COURT: What -- what document --

18 MR. YOUNG: It is in our brief.

19 THE COURT: -- what's the brief called?

20 MR. YOUNG: Pardon me, Your Honor?

21 THE COURT: What's your brief called that you're  
22 referring to?

23 MR. YOUNG: That's the brief in opposition to  
24 their motion, Your Honor.

25 THE COURT: Is that what it's entitled?

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MR. YOUNG: That's -- that's right.

THE COURT: Okay.

MR. ROBERTS: That's a paraphrase.

THE COURT: That's fine. Go ahead; continue with your argument.

MR. YOUNG: But, Your Honor, the larger issue here is this Court has wisely denied this on two occasions; in the judgment and on the former reconsideration motion, so we are -- we are now left with what is the biggest glaring deficiency in this case, and the biggest glaring deficiency in this case is they have not met their burden of proof as to how to demonstrate that we have done something disproportional between revenues and indirect and direct costs, and I think what they did, Your Honor, they did not assist the Court with another rate model, and you -- you know exactly that the burden of proof on them is to demonstrate that the revenues are disproportionate to direct and indirect costs. First, there's the presumption that it's correct. We -- we think that is overwhelming. Second, Your Honor, there is the requirement, if you get past the presumption, that Bloomfield Township's water and sewer revenues are not reasonably proportional to direct and indirect costs.

Now how do they do that? There's only one way to do it, if that's what you're going to do, and this

1 Court didn't have the benefit of it. In fact, you  
2 remarked the issue posited at the beginning of this case  
3 was unanswered and is still the issue in this case; were  
4 they disproportioned, and the answer is absolutely not,  
5 our rate model stands.

6 THE COURT: Hard to listen to your oration in  
7 keeping with the truncated purpose for which we are here.  
8 It is much easier to receive your comments as closing  
9 arguments in the trial itself, and if you want to, knock  
10 yourself out, but I don't see how in the world you could  
11 enlighten the Court that I'm missing something here, and  
12 that you're just arguing closing arguments in the trial,  
13 and forgetting -- or choosing to ignore everything's that  
14 gone on post July of 2018, and the Court's bench opinion,  
15 but --

16 MR. YOUNG: I understand, Your Honor --

17 THE COURT: -- I -- I say that respectfully.

18 MR. YOUNG: -- and if I may, may I cite the  
19 Court to two recent Court of Appeals opinions.

20 THE COURT: You mean the unpublished ones that  
21 were presented?

22 MR. YOUNG: Unpublished, but in both cases, they  
23 are pending, and they are guidance and useful to the Court  
24 --

25 THE COURT: To what, to the Court's limited



1 invitation to the lawyer -- or the parties, or to the  
2 wisdom of the Court, or lack of wisdom of the Court's  
3 bench opinion back in July of 2018?

4 MR. YOUNG: The first one, Your Honor.

5 THE COURT: Okay.

6 MR. YOUNG: The first one, Your Honor, without  
7 question.

8 THE COURT: Okay.

9 MR. YOUNG: And I think those opinions that are  
10 -- particularly the *City of Westland* case, which is  
11 detailed in our brief, and I know you've seen it, but that  
12 is a very critical opinion that was just rendered five  
13 weeks ago --

14 THE COURT: On what notion, on the wisdom or on  
15 the -- on the con -- on the -- on the question of  
16 proportionality or reasonable rates and so forth, which  
17 sounds like the very -- it sounds like the trial. So --  
18 so what does the Court do with your -- I -- I'm lis --  
19 I've read it all, I've received it all --

20 MR. YOUNG: Right.

21 THE COURT: -- it sounds like --

22 MR. YOUNG: Well --

23 THE COURT: -- you're just seeking  
24 reconsideration of the Court's bench opinion.

25 MR. YOUNG: Well, act -- I -- I think they're

1 the ones here seeking reconsideration --

2 THE COURT: I'm speaking to you right now.

3 MR. YOUNG: Okay.

4 THE COURT: I'm speaking to the Defendant right  
5 now.

6 MR. YOUNG: Well, I felt that the -- the portion  
7 of the *Westland* opinion that we detailed on page 13 of our  
8 brief is utterly critical to this.

9 THE COURT: Go -- go ahead.

10 MR. YOUNG: The -- the Court did not have the  
11 benefit of those opinions, did not have the benefit of the  
12 *Taylor* case, and *Westland* clearly says the presumption is  
13 there, and after that, you must present a rate model.  
14 This Court did not have a rate model from them. This  
15 Court only had the cherry-picking of two or three  
16 components within the Bloomfield Township rate model, and  
17 that, Your Honor, is -- was very unfair to the Court, and  
18 I think the Court of Appeals has pounced on that and said  
19 --

20 THE COURT: So what should the -- what should  
21 this Court do? Let's say this Court embraces every single  
22 thing that you say about that case, what -- how should it  
23 manifest on paper that this Court should sign an order and  
24 rescind the judgment that it entered?

25 MR. YOUNG: That is correct, Your Honor.

1 THE COURT: Okay. So --

2 MR. YOUNG: First --

3 THE COURT: -- now we're on the same page; that  
4 you are seeking reconsideration of this Court's judgment?

5 MR. YOUNG: Well, first we're seeking denial of  
6 their motion. Second, we're -- we're seeking a -- a  
7 reconsideration of the Court's judgment --

8 THE COURT: And that is again why I asked --  
9 it's -- it's -- it's form over substance; what pleadings  
10 Defendant has submitted following this Court's -- I think  
11 it was November of 2018 order that set forth two  
12 invitations, one to the Plaintiff, one to the Defendant?  
13 I think you submitted one -- one submission, which is not  
14 entitled -- and that's okay; I didn't -- I figured as  
15 much.

16 MR. YOUNG: Mm-hmm.

17 THE COURT: But what Defendant is seeking is  
18 reconsideration of its judgment; it's beyond the scope --  
19 that's okay, I can handle it -- beyond the scope of what  
20 this Court invited counsel to do, one thing to the  
21 Defendant, one thing to the Plaintiff, but I just want to  
22 make sure that we're all recognizing what's taking place  
23 here.

24 MR. YOUNG: I think --

25 THE COURT: You're -- you're -- you're not even

1 within the Court's November 2018 order. You're outside of  
2 it seeking reconsideration of the Court's judgment.

3 MR. YOUNG: I -- I --

4 THE COURT: Just so we're clear. I can handle  
5 it, but --

6 MR. YOUNG: Yes, yes --

7 THE COURT: Okay.

8 MR. YOUNG: -- Your Honor --

9 THE COURT: That's fine.

10 MR. YOUNG: -- we are. We're seeking --

11 THE COURT: It's articulated, it's not pled  
12 anywhere. I can -- the -- let the proofs conform to the  
13 pleadings certainly, but let's make sure --

14 MR. YOUNG: We actually have --

15 THE COURT: -- we're all aware of what's going  
16 on here.

17 MR. YOUNG: Yeah.

18 THE COURT: Okay.

19 MR. YOUNG: So Your Honor, I think the *Westland*  
20 case and the *Taylor* case absolutely -- involving the same  
21 law firm, the same lawyers, the same theories, where the  
22 two dist -- district judges -- the two circuit judges  
23 dismissed the case, and then the Court of Appeals, in two  
24 separate opinions, affirmed, and said you can't do that;  
25 you just -- you need to present a rate model. You don't

1 get to say ah-ha, we have found an issue involving sewer-  
2 only revenues, and this in -- and the sewer-only revenue,  
3 there are -- if there are A through Z components in the  
4 Bloomfield Township model, there could be a component C  
5 that does things in a different way. And by the way, it's  
6 instructive in *Taylor*, where they say no municipality is  
7 bound by any regulations or any manuals or standards as it  
8 relates to their -- the presentation of their -- the  
9 development of their model, and that's at page 12 of our  
10 brief, Your Honor, that's exhibit E to our brief. And  
11 pages 13-14 talk about the *Westland* case, and what they  
12 have -- there's just simply no -- and on top of that, Your  
13 Honor, there's not only the fundamental structural problem  
14 of *Westland* and *Taylor* that they are facing, there's the  
15 overwhelming issue that the testimony -- they presented no  
16 testimony to refute the testimony that was presented by  
17 the Defendant, which is detailed at page six of our brief  
18 submitted to the Court, and that was very simply that the  
19 -- by Mr. Theis, Mr. Domine, and Mr. Trice, basically  
20 saying we accounted for these revenues; one was subtracted  
21 -- one was subtracted from the top, and that would be, of  
22 course, non-rate revenue, and the other one was accounted  
23 for, the sewer only revenues was accounted for. That was  
24 never refuted.

25 And why wasn't it refuted? It's simple, Your

1 Honor; in order to refute it, they would have to do what  
2 they should have done in the first place, go out, hire an  
3 economist, hire a team of financial people, go inside  
4 Bloomfield Township and get whatever they need, and then  
5 basically come forward with their own model and be able to  
6 say to the Court, Your Honor, on this side of the  
7 courtroom is a summary of the blue model, that's ours,  
8 that's the Plaintiff's, on this side of the courtroom is a  
9 summary of the red model, that's Bloomfield Township's;  
10 that's what the Court did not have in this case, and  
11 that's why I respectfully suggest it's unfair, and I  
12 respectfully suggest that these two unpublished Court of  
13 Appeals decision, while they are unpublished as of now,  
14 are extremely instructive and accurate in terms of their  
15 summary of the case law that is applicable to what we are  
16 grappling with here.

17 So I think that is -- that is something, Your  
18 Honor, that is fundamental.

19 Yeah, this -- this is the fallacy here. They  
20 have got to prove by a rate model, and that's exactly what  
21 they say in *Westland* -- by a rate model that our revenues  
22 are disproportionate to our direct and indirect costs. In  
23 other words, that we're skimming some money somewhere;  
24 never, never presented, and you can't do that, as I say,  
25 when there are 25 factors in a model by saying ah, look at

1 factor three, look at factor twelve. No, the case law is  
2 clear; you look at the overall model and you must -- if  
3 it's proportionate, if it's -- revenues are proportionate  
4 to costs, both direct and indirect, then there's not a  
5 problem, and that's why cherry-picking components of the  
6 model is so fundamentally unfair to a fact-finder like  
7 Your Honor, and they know that, that's why you've denied  
8 their -- their motion twice, and now they've come back  
9 with, as I say, these evidentiary arguments that simply  
10 are -- are -- are inappropriate.

11 And look at -- I thought it was really  
12 interesting what their expert said in this case. At page  
13 eight of our brief, we said somebody said you made no  
14 effort to obtain the full -- information fully, the  
15 preferred study; in other words, build a model. This is  
16 in footnote nine on page eight of our brief: It's  
17 virtually impossible, I can't say it's absolutely  
18 impossible, but it in an adversarial setting, when you're  
19 relying on the production of billing data, accounting  
20 data, usage data, it is virtually impossible for an  
21 outside party to prepare a fully allocated cost of service  
22 study. Baloney, Your Honor. That is absolute nonsense.  
23 And he admits by saying -- first he says I can't say it's  
24 impossible.

25 In the antitrust world, in the patent world,

1       it's done all the time. The difference is, Your Honor,  
2       instead of cherry-picking two components and attacking  
3       them out of a model with many, many, many components, they  
4       decided in order to get past that, they would have to  
5       retain a -- a team to build a model and that would cost a  
6       lot of money, as it should. But it's done all the time in  
7       patent and antitrust areas. So that's what they need to  
8       do. They don't get to say -- they don't get to pick a  
9       couple of these and -- and then -- and -- and then really  
10      entice the Court, with all due respect, unfairly.

11               And -- and the other thing is, Your Honor, the  
12      Township testified that the -- that non-rate revenues were  
13      deducted from the gross number, and that the account --  
14      and that sewer only was accounted for. End of game on  
15      their two components. Why? Because nobody came forward  
16      from the Plaintiff and said that's not true. That's not  
17      true. That puts their two components -- that's the death  
18      knell for the two components that they selected out of 25.

19               But I don't even want to get there, Your Honor.  
20      They should have done a rate analysis, and that's what  
21      they didn't do, and they didn't do it, because they didn't  
22      want to pay for it, and that's what you need to do when  
23      you're going into townships and municipalities and trying  
24      to take 7 million, 9 million, 10 million dollars. It's --  
25      that's -- that's just absolutely critical, Your Honor, and



1 -- and I think the case law says that.

2 Let me just look at my notes, Your Honor, and  
3 see if -- I guess one other thing I want to say is the  
4 Township's expert, Joe Heffernan, stated quote, I think  
5 the cash inflows are proportional to the township costs,  
6 unquote. Unrefuted. Not refuted by one of their experts,  
7 and that's the whole ballgame. That's the whole ballgame,  
8 Your Honor.

9 So with that, Your Honor, thank you, and I'll --  
10 I'd like to respond to any else.

11 Oh, Your Honor, I did present a -- I had a  
12 board, if I could --

13 THE COURT: Is this for the trial court or for  
14 the appellate court that you're -- that you're arguing  
15 before right now?

16 MR. YOUNG: For you. For you.

17 THE COURT: Yeah.

18 MR. YOUNG: Settled law in Michigan on the  
19 presumption of reasonableness; no testimony by Plaintiff  
20 as to non-rate revenue or sewer-only customers; both were  
21 deducted before costs, were spread over the customers; and  
22 *City of Westland, City of Taylor*.

23 THE COURT: Thank you.

24 MR. YOUNG: That -- that sort of sums up the  
25 main points.

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THE COURT: Thank you.

MR. HANLEY: Your Honor, I'm not prone to histrionics, but number two is just a complete falsehood. We proved it to the penny through our expert witness. I repeatedly chastised the Bloomfield Township witnesses at every turn to tell me where it's at, to -- to show your own calculation; they never did it, and -- and you were charitable, very charitable in your findings on -- on that issue.

How would we do a rate study when they destroyed all the source documentation. The *Trahey* standard -- they want to talk about the new *Westland* and *Taylor* case, I understand that they want to do the -- they want to talk about those unpublished opinions, but when you made your decision in this case, and currently through today, *Trahey* is a published case that's binding on the Court, and what it says is we can meet -- we have to prove that either the rate or the rate-making practice is unreasonable, that term or. How do you prove that the rate-making practice is unreasonable? You provide clear evidence of illegal or improper expenses in the rates, okay? That's what we did with the -- the -- the -- the water use issue, which you've already found, and it's also what we did with the non-rate revenues and the sewer-only revenues; that -- that by -- there are expenses associated with non-rate

1 revenues, Your Honor. The non-rate revenues might be a --  
2 a tap-in fee. A township incurs a cost to -- to get that  
3 -- and if they're building a rate model that recovers that  
4 tap-in fee from its residents through their water rate,  
5 and also through the person who pays the tap-in fee,  
6 that's a double recovery.

7 THE COURT: Do you -- are you also of the mind  
8 to retry the case?

9 MR. HANLEY: No, absolutely not. The -- the --

10 THE COURT: So what are -- what are you saying,  
11 other than just retrying the case --

12 MR. HANLEY: All I'm -- to the extent that the  
13 Court is being beguiled at all by their --

14 THE COURT: Do you think the Court is?

15 MR. HANLEY: -- and -- I don't think so.

16 THE COURT: Okay, so --

17 MR. HANLEY: So let me -- let me address two  
18 issues that relate to the specific issue that's before  
19 you.

20 He said we never asked for this. Please produce  
21 -- this is a quote -- please produce all documents  
22 reflecting or referring to the Township's methodologies  
23 for establishing water or sewer rates at any time after  
24 April 21st, 2010. Very clear request. They responded  
25 they've reviewed its records and now states that all

1 responsive documents have been produced or are available  
2 on the Township's website, okay? Why would we move to  
3 compel, Your Honor? They told us they had produced  
4 everything, and we clearly asked for it.

5 So the reality here is that there's -- there's  
6 ample authority for you to do what we've asked you to do,  
7 and we'd ask for the Court to grant our motion to reopen  
8 the judgment.

9 THE COURT: Thank you.

10 Anything further from anyone?

11 MR. YOUNG: Just quickly, Your Honor.

12 THE COURT: Sure.

13 MR. YOUNG: Not really trying to argue the  
14 appeal, Your Honor, it's that they're in here trying to  
15 get five more million dollars, and that's what I'm here to  
16 argue about.

17 THE COURT: Thank you.

18 MR. YOUNG: *Trahey* is perfectly consistent with  
19 everything I've said, and -- thank you, Your Honor.

20 THE COURT: Thank you. Be with you all in just  
21 a couple of moments.

22 THE CLERK: All rise.

23 (At 2:10 p.m., court recessed)

24 (At 2:54 p.m., court resumed)

25 THE CLERK: The Court recalls *Youmans* versus

1 Bloomfield Township, case number 2016-152613-CZ.

2 THE COURT: Counsel.

3 MR. HANLEY: Good afternoon, Your Honor. Greg  
4 Hanley and Ed Kickham, III on behalf of Plaintiff and the  
5 class.

6 THE COURT: Thank you.

7 MR. YOUNG: Thank you very much, Your Honor.  
8 Rodger Young on behalf of Bloomfield Township, along with  
9 Mark Roberts.

10 THE COURT: Thank you.

11 The matter was called earlier, and that record  
12 speaks for itself, referring to today.

13 The Court has considered the arguments of  
14 counsel, the pleadings that have been submitted, and the  
15 Court opines and adjudges as follows.

16 Despite anyone's beliefs or efforts to the  
17 contrary, what is left for this trial court, by virtue  
18 singularly of the trial court and through its equitable  
19 powers, is two and only two remnants. See the Court's  
20 November 29, 2018 order. One was an inquiry to Plaintiff,  
21 which Plaintiff responded to, and which Defendant uttered  
22 nary a word, and the other was an inquiry to Defendant,  
23 which Defendant's only response to it was that Plaintiff  
24 was being unreasonable; nary a word from the Defendant  
25 about this inquiry to it. Rather, Defendant invests

1       itself in a decision over how it will to proceed to eschew  
2       the Court's inquiries, eschew, perhaps I can't tell, its  
3       previous concession, and instead, in a response to a  
4       motion inaptly titled motion for relief from judgment,  
5       it's more a supplement to a judgment, rather than relief  
6       from it, and in its own motion to enter a judgment argue  
7       effectively reconsideration with post-bench opinion  
8       unpublished Court of Appeals decisions.

9                 Retaining procedural fidelity to this  
10       litigation, this Court addresses the only two remnants.  
11       The inquiry to the Defendant will stand unaddressed and  
12       abandoned. The inquiry to Plaintiff, heretofore ignored  
13       by the Defendant, will be adjudicated today.

14                I expect that there is no response; for the  
15       third time, the Court will invite Defendant -- will give  
16       you leave, in the interests of justice, to speak to the  
17       cases of *Struble*, *Hanley*, and *Crowley*. Any comment?

18                MR. YOUNG: Which -- which three cases again,  
19       Your Honor; I'm sorry?

20                THE COURT: *Struble*, *Hanley*, and *Crowley*.

21                MR. YOUNG: No --

22                THE COURT: Any comment?

23                MR. YOUNG: -- we think -- we think they're  
24       distinguishable, and I think that's our position.

25                THE COURT: In Plaintiff's pleading brief called

1 Plaintiff's motion for relief from judgment, Plaintiff,  
2 Roman numeral one, introduction, at the beginning quotes  
3 the Michigan Constitution: All financial records,  
4 accountings, audit reports, and other reports of public  
5 moneys shall be public records open to inspection. The  
6 Court will ask rhetorically: Plaintiff, what constitutes  
7 as quote, record? A sticky note on the back of a napkin  
8 may contain data that comprises a record, but a record, it  
9 seems to this Court, is that which its creator says a  
10 record is. This Court might write on a sticky note, for  
11 example, 18 months to 4 years for criminal defendant John  
12 Smith, but unless the Court places that data in a document  
13 it deigns to call a record, i.e., a judgment of sentence,  
14 neither the data nor the sticky note would seem to  
15 constitute a record. Unlike Court musings, such as  
16 presentence, pre-allocation deliberation of the Court of  
17 say 18 months to 4 years written on a sticky note, the  
18 judgment of sentence, which contrary to the 18 months to 4  
19 years musing pronounces 24 months to 4 years, is the  
20 record, as is the corresponding official public  
21 transcript, which supplies the quote, underbelly, the  
22 rationale, the constituent to the conclusion of 24 months  
23 to 4 years. The sticky notes mentioned in this case,  
24 assuming they existed, were never records, in this Court's  
25 opinion. They are analogous to the sticky note example of

1 a criminal court presentence musings. They are not  
2 analogous to either the sentencing transcript, a record,  
3 nor the judgment of sentence, a record.

4 Moving on to the Plaintiff's brief under the  
5 Charter Township Act. Paraphrasing -- it's entitled  
6 Charter Township Act, and then it provides a citation to  
7 MCL 42.24, but in any event, that language excerpted by  
8 the Plaintiff is further paraphrased here: Each township  
9 officer shall submit to the supervisor an itemized  
10 estimate of the anticipated expenditures of the township  
11 for the next fiscal year for the township activities under  
12 his or her charge. The supervisor shall prepare a  
13 complete itemized budget proposal. The word expenditure  
14 does not include anticipated receipts, but rather only  
15 refers to expenditures. Plaintiff -- or yeah, Plaintiff  
16 concludes that that directive carries with it the  
17 directive to quote, account for non-rate revenue and  
18 sewer-only revenue, that's a quote from Plaintiff's brief,  
19 and the Court respectfully disagrees that expenditure does  
20 carry with it reference to receipts. However, of course,  
21 reading further, as this Court just quoted, the supervisor  
22 shall prepare a complete itemized budget proposal.  
23 Surely, a complete itemized budget proposal anticipates  
24 receipts, as well as expenditures.

25 That the Charter Township Act obliges the same



1 thing that other law obliges, parenthetically, proportion,  
2 for example, gets us no further than where we were back in  
3 July at the Court's bench opinion. This Court ordered the  
4 Defendant to be transparent, this Court would call it  
5 florescent; do not merely make the truth visible,  
6 advertise the truth, publicly display the truth. The  
7 Court's order, pursuant to whatever case law, or this  
8 ordinance, remedies that deficiency. All that is at stake  
9 presently is damages for the past -- I don't even think  
10 it's a word -- abstruse is a word, but the Court's calling  
11 it past abstrusity, and this ordinance sheds no light on  
12 that question. We are back to where we were in July and  
13 as singled out in the November 29, 2018 order, the inquiry  
14 to Plaintiff. This ordinance answers not that inquiry.

15 Plaintiff's subject matter on spoliation of  
16 evidence. Plaintiff equates phantom sticky notes -- the  
17 Court calls it phantom, because Plaintiff itself supposes  
18 they never existed, with evidence dis-spoiled. You do not  
19 get an adverse inference from absent evidence if you  
20 dispute the evidence ever existed in the first place.  
21 Spoliation of evidence argument, like a square peg in a  
22 round hole, does not fit. It is not applicable here.

23 It is not lost on the Court that though  
24 segregated in Plaintiff's brief, the quote, duty to  
25 preserve records, close quote, argument, is the handmaiden

1 to Plaintiff's spoliation of evidence argument. From  
2 either an individual or collective analysis, these  
3 arguments fail as not applicable, and are, quite frankly,  
4 counterintuitive.

5 As an example, the jury instruction at issue  
6 here, if -- in this bench trial, but offered here for  
7 analogous purposes, 601, the Court will walk through it,  
8 just simply to exemplify how it cannot apply here. The  
9 first sentence of all four options in that instruction,  
10 when applied to the case here, would read the Defendant in  
11 this case has not offered the sticky notes and napkins on  
12 which the Defendant testified were written duly ordained  
13 water and sewer rates manifesting as constituent  
14 reductions for sewer receipts and non-rate revenue.  
15 Neither Plaintiff nor the Defendant claim this. Plaintiff  
16 disputes such content was ever written on such papers, and  
17 neither Plaintiff nor Defendant propose such phantom  
18 content actually constituted rate constituents. At best,  
19 the Defendant contends they were allusions to the subjects  
20 of non-rate revenue and water receipts, but the Defendant  
21 has never advanced the proposition that these allusions  
22 were even complete sentences containing subjects and  
23 predicates; sentences such as quote, deduct from rate  
24 numerator non-rate revenue, close quote, or quote, deduct  
25 from rate numerator sewer receipts, close quote, and

1 repeating itself from its bench opinion, the Defendant has  
2 both asserted that non-rate revenue and sewer receipts  
3 were components in the rate -- in the rates, bringing the  
4 rates down, and were not components, but did not need to  
5 be in the rates, so long, again, as the rates were  
6 reasonable and proportionate. Neither Plaintiff nor the  
7 Defendant contend such content in the phantom sticky notes  
8 was duly ordained. Again, the Plaintiff claims no such  
9 notes ever existed, and the Defendant at best claims that  
10 if they did exist, they were unofficial musings of  
11 employees of the Defendant, not official decrees of the  
12 Defendant itself.

13 There is no point in moving on to the second  
14 sentences -- the second sentence in 601(a), (b), (c), or  
15 (d), because it's obvious that you can't even make sense  
16 in trying to apply the first sentence in any of those  
17 options to the facts here.

18 The spoliation of evidence argument, in this  
19 Court's opinion, is dead on arrival, or not applicable.

20 Plaintiff recognizes, in fact in argument here  
21 today, as well as in the pleadings what this Court calls  
22 the square peg in a round hole analogy, page 16 of  
23 Plaintiff's brief; however, Plaintiff's attempted  
24 reconciliation only pushes the flaw to a different topic,  
25 it does not eliminate the flaw. Plaintiff refers the

1 Court to the *Bernie* case, but the question shifts to  
2 whether the sticky notes and napkins constitute records.  
3 Plaintiff presumes they do; this Court has adjudged, in  
4 this opinion today, that they do not qualify as records.

5 Plaintiff has supplied the Court with an answer  
6 to the Court's inquiry quote, is there a legal or  
7 equitable doctrine which would yield a judicial -- sic --  
8 adjudication -- that's redundant, which would yield an  
9 adjudication in favor of one party, because the other  
10 party obscured proofs needed for that adjudication. This  
11 Court may be prove persuaded by Plaintiff's authority and  
12 the case law. Defendant offered nothing on this inquiry,  
13 neither case law that would denounce it, nor anything  
14 about Plaintiff's cases, other than to conclude that  
15 they're distinguishable.

16 Not that the Defendant is liable for failing to  
17 retain any phantom notes, rather the Defendant may be  
18 liable because it prevented Plaintiff and in turn this  
19 Court from passing upon the question of reasonable rates,  
20 rates proportionate to costs. As stated in the July bench  
21 opinion, to adjudge otherwise would be to eviscerate the  
22 rebuttable nature of this presumption and render it  
23 irrebuttable or mandatory.

24 *Crowley versus Atkinson's (ph) Estate*; this case  
25 acknowledges the principle that absence of records speaks

1 just like the presence of records speaks. This case is  
2 persuasive for as far as it goes. It could/does supply  
3 evidence that non-rate revenue and sewer-only receipts  
4 were not constituents to the rate equations; however, as  
5 observed and explained in the Court's bench opinion, such  
6 absence is not necessarily repugnant to rate-making  
7 principals. Absences of such receipts may or may not  
8 yield disproportion. What matters, if such receipts are  
9 absent, is whether their absence is accounted for in some  
10 say as to yield proportion nevertheless, i.e., they are  
11 anticipated and are set aside, figuratively, as a buffer  
12 or a reserve building, for example.

13 Again, the Court spoke to this in its bench  
14 opinion. Overlooking the Defendant's inconsistency that  
15 it both did and did not reduce rates though such receipts,  
16 the odyssey aborts at the beginning, because the Defendant  
17 was abstruse recondite, and this reasoning applies as well  
18 to Plaintiff's reference to the RJA, Revised Judicature  
19 Act.

20 Struble versus National Liberty, this case was  
21 tried to a jury, directed verdict was granted; the Supreme  
22 Court directed a new trial, and the defendant at the new  
23 trial would be estopped from advancing the -- what this  
24 Court calls the directed verdict or the legal argument  
25 that plaintiff's tardy proof of loss submission bars his

1 prosecution; the reason, that the defendant withheld from  
2 plaintiff the tool plaintiff needed to timely submit proof  
3 of loss.

4 In *Struble*, it was accepted that the insurance  
5 policies existed. A question remains in this case,  
6 Youmans, whether the rates were disproportionate or not  
7 because of the unclarity; however, the distinction in  
8 these cases bears not difference. In both cases, the  
9 object under equitable scrutiny is not so much the  
10 evidence, *Struble*, insurance policies, Youmans, rate  
11 constituents as a building block to adjudge proportion or  
12 disproportion; rather, the object under equitable scrutiny  
13 is conduct, or more aptly forborne conduct. *Struble*,  
14 defendant not tendering insurance policies to plaintiff;  
15 Youmans, Defendant not manifesting all of its rate  
16 constituents from which the public could test proportion  
17 or disproportion. Rather, Defendant merely proclaims  
18 unchecked its conclusion of proportion, not to mention it  
19 equivocated whether it did or did not account for non-rate  
20 revenue and sewer-only receipts.

21 *Hanley versus Stollman* (ph) in that case,  
22 plaintiff told his neighbor, the defendant, that the  
23 defendant better not doze the roadway on the defendant's  
24 property. The defendant dozed. Plaintiff sued. The  
25 defendant denied that a road existed, and plaintiff could

1 -- could not prove the exact location, description, width,  
2 the course of the entire road, because the defendant  
3 wrongfully destroyed it. The chancellor ruled no cause of  
4 action on adverse possession claim for want of proofs on  
5 the element of physical description of the seized  
6 property. The appellate court in equity ruled in -- in  
7 favor of plaintiff, because it concluded the defendant did  
8 a wrong.

9 In this case, Youmans, the Court remains unsure  
10 if the Defendant committed the singular wrong of passing a  
11 rate disproportionate to costs. This wrong is to be  
12 clearly distinguished from passing a rate designed to  
13 yield a positive cash balance. Parenthetically, such a  
14 view that a positive cash balance means disproportionate  
15 -- means disproportion is clearly myopic. A positive cash  
16 balance could be proportionate as stated at length in this  
17 Court's bench opinion and will not be repeated here. But  
18 neither is it true that unanticipated realized surpluses  
19 in various budget line items may magically metamorphosize  
20 at the end of any fiscal year into an unbudgeted, non-  
21 existed -- non-existent, yet much needed category called  
22 reserves. See the Court's bench opinion.

23 The Court spoke to this before, and it will not  
24 attempt to repeat itself here. The wrong, in this Court's  
25 opinion, as it has not been -- as if it has not been made

1 ab -- abundantly clear, is that the Defendant did do  
2 wrong, and that wrong was wont of clarity. The Court  
3 could not be more clear in its finding that the Defendant  
4 was unclear.

5 Plaintiff has persuaded the Court with its cases  
6 and reasoning that whether the Defendant is wrong beyond  
7 its abstruse recondite rates, such wrong of unclarity  
8 itself in equity in this Court's opinion fulfills the  
9 element Plaintiff needed to prove that the Defendant's  
10 rates were disproportionate to costs in the amount of non-  
11 rate revenue and sewer-only receipts as previously  
12 calculated and adopted now here by the Court -- previously  
13 adopted by the Court and ratified by the Court now.

14 This being dicta, a rate is not complex as the  
15 Defendant would suggest. A rate is simply an equation, a  
16 numerator and a denominator. Any complexity might be  
17 multiplicity of variables in the numerator and/or the  
18 denominator. Even with that, nothing is complex after the  
19 variables and relationships to one another, plus, minus,  
20 multiply, divide, are broken out. Complexity might be  
21 decisions necessary over questions what should be included  
22 in the equation, and what weight each should be accorded  
23 in the equation, but the Defendant presently seems to be  
24 abandoning -- I don't know if this is true or not -- its  
25 earlier acknowledgment that it was unclear, after this



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Court opined that it was, and advancing the wholly different and manifestly false notion that complexity also includes mystery, confidentiality to all but a chosen few, what some of the variables are, or whether some variables even are constituents to the equation.

The Court is persuaded by the Plaintiff's arguments and supplements and amends its judgment, awarding damages in the amount prayed for. Judgment may enter.

Thank you. That'll be the ruling of the Court.

MR. ROBERTS: Judge, will that be a final judgment?

THE COURT: That is -- that'll do it.

MR. ROBERTS: Thank you.

(At 3:15 p.m., proceedings concluded)

- - -

CERTIFICATION

I certify that this transcript, consisting of 42 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable Daniel Patrick O'Brien on Monday, March 18, 2019, as recorded by the clerk.

Videotape proceedings were recorded and were provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceedings, or for the content of the videotape provided.

**Deanna L. Harrison**

/s/ Deanna L. Harrison, CER 7464  
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