STATE OF MICHIGAN
COURT OF APPEALS

JAMES HEOS, individually and as representative of a class of similarly situated persons and entities, Plaintiff/Appellee, v. CITY OF EAST LANSING, Defendant/Appellant.	Court of Appeals No. 361105 (*consolidated with Court of Appeals No. 361138*) *On appeal from:* Ingham County Circuit Court Case No.: 20-199-CZ Hon. Wanda M. Stokes

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APPELLANT CITY OF EAST LANSING'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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REPLY TO PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

I. This Court has now granted leave to appeal on the remaining issues in this case, including the substance and untimeliness of Plaintiff's *Headlee* claims.

On August 17, 2022, this Court granted the City of East Lansing's Application for Leave to Appeal and consolidated that appeal (No. 361138) with this appeal (No. 361105). Thus, in the context of deciding this appeal, this Court will also be reviewing the circuit court's decision concerning the substance and untimeliness of Plaintiff's claims under the Headlee Amendment, along with Plaintiff's other claims. As set forth in the Application-stage briefing, the City maintains that the franchise fee is not an unlawful tax under *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), and further submits that Plaintiff's claims are time-barred under *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005) (holding that one-year statute of limitations runs from the date the defendant first imposes a franchise fee).

In this context, Plaintiff's ongoing accusations of this being a "vexatious" appeal and his promise to file a motion under MCR 7.216(C) ring especially hollow. (Pl. Brief, p. 20, fn 5.) Plaintiff has already made this argument in his motion to lift the automatic stay pending appeal, which this Court rejected in an order dated June 8, 2022. This appeal is a well-founded defense against Plaintiff's craftily titled counts that arise out of alleged statutory violations – counts that appear designed to thwart the statute of limitations that bars Plaintiff's *Headlee* action. *See Morgan, supra; see also Gottesman v City of Harper Woods*, 508 Mich 942; 964 NW2d 365 (Mem Order, Sep 29, 2021) (questioning whether equitable claims under MCR 141.91 may be pursued beyond Headlee's one-year statute of limitations). Given that this Court has granted leave to appeal on the other substantive issues, Plaintiff cannot attribute any undue "delay" to this segment of the appeal.

II. Wright v Genesee County does not control this case.

A key distinction between this case and *Wright v Genesee County*, 504 Mich 410; 934 NW2d 805 (2019), on which Plaintiff relies, is the government's underlying ability to collect the fee in question. If the underlying fee is patently unlawful and could never be collected and retained under any set of facts, then *Wright* would likely apply. But if the underlying fee could be collected and retained through a different mechanism, then *Wright* does not apply, and the plaintiff's claim to recover that fee is a tort claim barred by governmental immunity, not an unjust enrichment claim. *Farish v Dept of Talent & Econ Dev*, 336 Mich App 433, 456; 971 NW2d 1, 14 (2021), app den No. 163146, 2022 WL 135527 (Mich, January 14, 2022).

Although Plaintiff rejects *Farish* in favor of unpublished case law, *Farish* is instructive. *Farish* held that *Wright*[1] does not control in cases where a plaintiff argues that "the mechanism used" to collect the funds is unlawful. *Farish*, 336 Mich App at 456. The plaintiff in *Farish* argued that governmental immunity did not apply because the plaintiff sought restitution rather than damages. *Id.* at 455. This Court rejected that argument, noting that "[r]eceipt of sums to which the state is entitled is not unjust enrichment" and that "[o]ur conclusion that a particular means of collection may not be used does not change the fact that the state has an underlying and undisputed right to the amounts in question." *Id.* at 456.

By contrast, the drain commission in *Wright* received a multi-million dollar refund of insurance premiums from Blue Cross Blue Shield of Michigan based on premiums paid by the plaintiff and other drain commission employees and then refused to share any part of the refund with the plaintiff. *Wright*, 504 Mich at 415. The drain commission had no right to keep the refund, regardless of the mechanism used to collect and retain it. *Id.; see also Farish*, 335 Mich

[1] *Farish* cites *Wright* as *Genesee Co Drain Comm'r v Genesee Co.*

App at 456. The *Wright* defendant's retention of the refund was the type of "unjustified enrichment" that the Restatement of Restitution and Unjust Enrichment advises should be the standard measure of unjust enrichment claims. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011) ("The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called unjustified enrichment").

Here, Plaintiff alleges in his brief that the City "had no right to the sums at all" (as in *Wright*) and that it is not simply challenging the mechanism of assessment (as in *Farish*). (Pl. Brief, p. 20.) But Plaintiff's Complaint alleges that the franchise fees are unlawful "because the Franchise Fees were not approved by the City's voters, as required by Section 31 of the Headlee Amendment." (Complaint, ¶ 2.) If the City's voters had approved the franchise fees as a tax[2], then Plaintiff could not reasonably claim any legal infirmity in the fees. Put another way, nothing prohibits the City from charging a fee to offset the costs of allowing a utility to use its rights of way. The only issue in this case is how that fee was imposed. In that respect, this case aligns with *Farish*, not *Wright.* For the same reasons, Plaintiff's unpublished case law – *Logan v Township of West Bloomfield*, unpublished opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 333452), and *Mercy Services v City of Rochester Hills*, unpublished opinion of the Court of Appeals, issued October 21, 2010 (Docket No. 292569) – are distinguishable because they involved fee amounts that simply could not be charged, regardless of the mechanism.

In arguing that the franchise fee is patently unlawful, Plaintiff claims that the franchise fee was imposed to raise revenue. (Pl. Brief, p. 2.) That argument is belied by the record below. The franchise fee offsets the costs the City incurred in maintaining the rights of way for the

[2] The City denies that a vote was required to approve the franchise fees because the fees are not a tax.

BWL's use. Since the franchise fee was implemented, the City has received about $1.4 million annually from the BWL. (Exhibit F to City's Brief on Appeal, City's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 2.) The franchise fee directly corresponds with the City's annualized cost of maintaining the rights of way in the BWL service area; the City spends on average between $1.4 to $1.9 million annually in maintaining the BWL service area, which includes, among other things, lighting the rights of way, tree and tree branch trimming and removal, storm water drainage and drain maintenance, and general maintenance fees. *Id.* Thus, any suggestion that the City could never collect a franchise fee based on a purported revenue-raising scheme is factually and legally unfounded.

III. Plaintiff's "unjust enrichment" claims seek damages for statutory violations (even though the statutes provide no private cause of action).

Another distinction between *Wright* and this case lies in the basis of the purported "unjust enrichment" claims. In *Wright*, the plaintiff did not allege any statutory violation or (in tort parlance) any "civil wrong." The plaintiff's unjust enrichment claim was based on traditional principles of a benefit being wrongfully retained by the county drain commission. An unjust enrichment claim seeks to "correct a defendant's unjust retention of a benefit owed to another" and typically "involve[s] remedies other than money judgments, including the establishment of constructive trusts, equitable liens, subrogation, and accounting." *Wright*, 504 Mich at 417, 421.

Here, Plaintiff has engaged in artful pleading to manufacture "unjust enrichment" claims that are, in fact, claims for statutory violations for which no private cause of action exists. Specifically, Plaintiff claims that the City has violated MCL 141.91 (Count III) and the Foote Act (Count V). Neither statute creates a private cause of action, and no private cause of action can be implied against a governmental entity in contravention of governmental immunity. *Lash v City of Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007); *see also Mack v City of*

Detroit, 467 Mich 186, 196; 649 NW2d 47 (2002). Although described as claims for unjust enrichment, this Court is "not bound by the labels the parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012).

Plaintiff cites *Kincaid v City of Flint*, unpublished opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 337972), for the proposition that an unjust enrichment claim can lie even where a statute provides no private cause of action. *Kincaid*, like *Wright*, involved the retention of overpayments that the City of Flint had no basis for keeping. The plaintiffs in *Kincaid* and *Wright* sought the recovery of money that the governmental agencies had no right to collect or keep under any circumstances. In *Wright*, the drain commission received a refund that belonged to the premium payors and refused to share it. In *Kincaid*, the city charged water and sewer rates in plain excess of amounts allowed under the city's ordinance. The plaintiffs' claims in those cases fit within the scope of "unjust enrichment."

But as discussed above, that is not the case here. Franchise fees are generally lawful. *See, e.g., Kowalski v City of Livonia*, 267 Mich App 517; 705 NW2d (2005) (upholding franchise fee for cable television service); 39 Am. Jur. 2d Highways, Streets, and Bridges § 181 ("A city may require compensation for the use of the public streets by a utility company as a condition of granting a franchise, unless this is forbidden by a statute or contrary to public policy"). Plaintiff here attacks the manner in which an otherwise lawful franchise fee was imposed. In that regard, Plaintiff is alleging a "civil wrong" – violation of these statutes – that sounds in tort and is barred by governmental immunity, rather than recovery of money that the City was never entitled to receive. *See In re Bradley Estate*, 494 Mich 367, 381; 835 NW2d 545 (2013) (a "tort" is "a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty").

In short, Plaintiff seeks to be compensated for his monetary injuries caused by the City's alleged wrongful conduct in collecting the franchise fees via ordinance rather than through a vote of the people – even though franchise fees are not *per se* unlawful. Accordingly, both factors for governmental immunity to apply are present here: Plaintiff is asserting claims based on the City's alleged "civil wrong" in collecting the franchise fees via ordinance, and he seeks compensatory damages for that alleged civil wrong. Governmental immunity therefore bars Plaintiff's so-called "unjust enrichment" claims in Counts III and V.

CONCLUSION

For these reasons, the City of East Lansing requests that this Court reverse the circuit court's order denying summary disposition on the grounds of governmental immunity and order that the City is entitled to judgment in its favor on Counts III and V.

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Dated: August 22, 2022

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