STATE OF MICHIGAN
IN THE 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,
a municipal corporation,

Defendant/Appellant.

Court of Appeals Case No: 361138

Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff/Appellee and the Class

Andrew Abood (P43366)
Abood Law Firm
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900
Counsel for Plaintiff/Appellee and the Class

Charles E. Barbieri (P31793)
Michael Homier (P60318)
Brandon M. H. Schumacher (P82930)
Foster Swift Collins & Smith, PC
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant/Appellant

PLAINTIFF/APPELLEE'S MOTION FOR RECONSIDERATION

Plaintiff James Heos, individually and as representative of a certified class, hereby timely moves the Court, pursuant to MCR 7.215(I), for reconsideration of the Court's April 13, 2023 Opinion (the "April 13 Opinion") (Exhibit A hereto).[1] In support of this Motion, Plaintiff relies upon the following Brief in Support.

[1] MCR 7.215(I) states that "[m]otions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) provides:

BRIEF IN SUPPORT

I. INTRODUCTION

Relying upon the Court's earlier decision in *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387 (2007) ("*Morgan*"), this Court concluded as a matter of law the Franchise Fees at issue in this case are legally imposed on the Lansing Board of Water and Light ("LBWL"), which finding drove the Court's ultimate legal conclusion that Plaintiff's Headlee Amendment claims (and separate claims based upon MCL 141.91) were barred by the one-year statute of limitations established by MCL 600.308a. The Court's April 13 Opinion reversing the Circuit Court's grant of summary disposition in favor of Plaintiff and the certified class is based upon a fundamental factual and legal mischaracterization of the relationships between the City of East Lansing (the "City"), the LBWL, and the citizens of the City as they relate to the Franchise Fees at issue.

The crux of the Court's opinion on the Headlee statute of limitations issue appears at pp. 5-6 of the Opinion:

> Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in Morgan, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich. at 124-125 n 7, which accrued when the franchise fee was passed by

---

> Generally, *and without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion should result from the correction of the error. [Emphasis added.]

Courts have recognized that the rule "allows the court *considerable discretion* to correct mistakes, preserve judicial economy, and to minimize the costs to the parties," despite the "palpable error" language. *Kokx v. Bylenga*, 241 Mich App 655, 659 (2000) (emphasis added).

ordinance. *See Morgan*, 267 Mich. App. at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred.

Plaintiff attempts to distinguish *Morgan*, but his arguments are unpersuasive. Plaintiff argues that this case is distinguishable from *Morgan* because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects . . . ." **Here, however, it appears that the LBWL is "independently liable" to the City for the franchise fees.** Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL, including not only bringing a breach-of-contract claim to recover the fees from the LBWL but revoking the LBWL's franchise.

Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees . . . ." Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. **Agency is a legal doctrine, and plaintiff makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City.** Cursorily reviewing relevant caselaw, it is not apparent that the LBWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the LBWL, or that the LBWL had actual or apparent authority to act on the City's behalf. *See St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Rather, the LBWL and the City were two independent parties with contractual obligations to one another. Accordingly, because we are bound by *Morgan*, we conclude that plaintiff's Headlee claim was time-barred. [*Id.* (emphasis added)].

We respectfully submit that the Court reconsider its April 13 Opinion because it is based upon the following palpable errors:

1. The LBWL – as a matter of law and fact -- is not "independently liable" to the City for the Franchise Fees and the remedies purportedly available to the City that are referenced in the Opinion are not remedies for the LBWL's failure to pay the Franchise Fees but rather are remedies available to the City if the LBWL breaches its contractual obligation to act as collection agent on behalf of the City;

2. Not only did plaintiff "attempt to demonstrate how, as a matter of law, the LBWL was an 'agent' of the City" but Plaintiff conclusively proved that the Franchise Agreement by itself created the agency arrangement;

3. While the Court held that *Morgan* controlled the statute of limitations analysis in this case, the franchise fees in *Morgan*, by federal law, were legally imposed on the cable companies but here they are imposed on the end-users of the LBWL; and

4. To the extent that the statute of limitations inquiry turns on whether the LBWL was an "agent" of the City, at most this Court could find that a fact issue existed as to whether the LBWL was the City's agent. Therefore, the Court erred in deciding as a matter of law on appeal that the LBWL was NOT the City's agent.

In sum, the Court's core and dispositive ruling – that the Franchise Fees are imposed on the LBWL and not Plaintiff and the certified class – is based upon a palpable error, and when that error is corrected, a different result must obtain.

II. THE FRANCHISE FEES ARE IMPOSED ON PLAINTIFF AND THE CLASS AND THEREFORE PLAINTIFF'S HEADLEE CLAIMS ARE TIMELY AND THEY ARE THE PROPER PARTIES TO CHALLENGE THE FRANCHISE FEES.

As the April 13 Opinion demonstrates, the Court's first order of business was to determine who bears the "legal incidence" of the Franchise Fees. There are only two possibilities: (1) the Fees are legally imposed on end-users of the LBWL's electric service in the City and are merely collected by the LBWL, or (2) the Fees are legally imposed on the LBWL, which chooses to incorporate those Fees into its overall electric charges. Because the Franchise Agreement specifically designates the LBWL as a mere collection agent for the Franchise Fees and other provisions of the Franchise Agreement make clear that the LBWL has no legal obligation to pay the Franchise Fees, Plaintiff and other end-users of the LBWL's electric service are the actual "payers" of the Fees.

A. Where As Here, An Entity Collects Taxes From End-Users On Behalf Of The Government, the End-Users Are The Payers Of The Taxes.

The fundamental flaw in the Court's Headlee statute of limitations analysis is the Court's failure to acknowledge the "collection agent" relationship the LBWL has with the City and to properly apply the governing law that applies to such a relationship.

1. The Franchise Agreement Makes Clear That The LBWL Is Not "Independently Liable" To Pay The Franchise Fees.

The Court erroneously concluded that Plaintiff made "no attempt to demonstrate how, as a matter of law, the LBWL was an 'agent' of the City." Opinion at p. 6. Indeed, far from being "flippant" on the agency issue, Plaintiff submitted undisputed evidence conclusively establishing that that the LBWL was the City's "collection agent" for the Franchise Fees.

As an initial matter, Section 2 of the Franchise Agreement requires the LBWL only to "collect and remit" the Franchise Fees. The "collect" language is critical, because it confirms that the LBWL

does not have "primary" or "independent" liability for the Franchise Fees. *See, e.g.,* Merriam Webster Dictionary (defining the transitive verb "collect" as "**to gather or exact from a number of persons or sources**" (emphasis added) and giving the following example: to "collect taxes." Under the Franchise Agreement, the LBWL is obligated to "remit" only what it "collects." The City could only sue the LBWL, as the Court imagines it might, if the LBWL collected the 5% Franchise Fee but failed to remit the entire 5% to the City (minus the LBWL's collection fee). In other words, like any other collection agent, the LBWL cannot keep the principal's money for itself. This alone is dispositive of the "legal incidence" issue.[2]

Further, in concluding that the Franchise Fees are imposed on the LBWL, the Court failed to credit the following **undisputed** evidence that supported the Circuit Court's conclusion that the Fees were imposed upon end-users in the City:

First, during the Franchise Agreement negotiations, the LBWL insisted that the Franchise Agreement be structured so that the end-users of LBWL's electric service had the legal responsibility to pay the Franchise Fees. *See* November 15, 2016 LBWL Board meeting minutes, App Ex. 12 at p. 13. Here is an actual image of the relevant excerpt of those minutes (emphasis added):

---

[2] It is true that the City could terminate the Franchise Agreement if the LBWL simply did not collect any Franchise Fees from Plaintiff and the Class, or if the City deemed that the LBWL was not using its best efforts to collect the Franchise Fee (*e.g.*, by failing to turn off power to a customer who paid his or her base electric bill but refused to pay the Franchise Fee). However, this fact only reinforces the agency relationship, because an agent must act in the interest of its principal. *See generally Burton v. Burton*, 332 Mich. 326, 337; 51 N.W.2d 297 (1952).

General Manager Peffley stated that there is a concern that this fee could be illegal and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the BWL would only be the collection agency for the City of E. Lansing. However, the BWL does not want to get in the middle of a law suit, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:

Second, consistent with the LBWL's dictates, the Franchise Agreement that ultimately was executed (Exhibit B hereto) has at least five separate provisions which make clear that the LBWL has no independent legal or contractual responsibility to pay the Franchise Fees, but rather is obliged only to collect the Fees on behalf of the City, to wit:

1. The LBWL's obligation with respect to the Franchise Fees is only to "collect and remit" the Fees to the City [Franchise Agreement, Section 2];[3]

2. The City holds the LBWL harmless from any losses associated with the collection and remittance of the Franchise Fees [*Id.*];

3. The LBWL has no obligation to remit any Fees not collected from end-users [*Id.*];

4. The LBWL is required to include the Fees as a line item on its bills to end-users [*Id.*]; and

5. The City actually pays the LBWL a fee for collecting the Franchise Fees. [*Id.*, Section 14][4]

[3] In this regard, there is a fundamental difference between a Franchise Agreement imposing upon the LBWL the obligation to "pay" the Franchise Fees to a municipality, and the obligation to "collect and remit" such Fees. Indeed, the LBWL has several Franchise Agreements with other municipalities which expressly require the LBWL to "pay" Franchise Fees instead of imposing the obligation to "collect and remit" from end-users that is found in the Franchise Agreement in this case. None of these other Franchise Agreements contain the "collect and remit" language, nor do any of these require the Franchise Fees to be set forth as a line item on the utility bills or allow the LBWL to recover a fee for collecting the Franchise Fees on behalf of the municipalities. Each of these other Franchise Agreements were submitted to the Circuit Court as Exhibits 16, 17, and 18 to the Brief in Support of Plaintiff's Motion for Partial Summary Disposition and therefore are properly part of the record on Appeal.

[4] Given this evidence, at the very least there is a fact dispute as to whether the LBWL was the City's "collection agent," yet the Court made the "agency" determination as a matter of law. This was another palpable error in the April 13 Opinion, because "[w]hen there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact

2. Under Prevailing Law, The Legal Incidence Of The Franchise Fees Falls On The City's Inhabitants Who Purchase Their Electricity From The LBWL.

Why does this matter? Because under Michigan law, where a third party is required to collect the challenged charges from end-users and remit the charges to the government, the legal incidence of the charges falls on the end-users who incur the charges.

For example, in *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998), the Court recognized that Michigan's use tax is legally imposed on consumers, even though the applicable statute imposed upon retailers the burden to collect and remit the tax to the state. In reaching this result, the Court observed:

> Contrary to the Department of Treasury's argument, however, § 7 suggests that there is no joint tax liability. Rather, § 7 specifically provides that the appropriate use taxpayer is the consumer. Indeed, the Supreme Court in *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959), recognized that, **although the seller is required to collect the use tax on behalf of the state, the ultimate burden of paying the tax is on the consumer or purchaser, which is the party exercising the privilege of use, storage, or consumption**. We believe that this is an important concept, because it represents one of the primary distinctions between the use tax and the sales tax, the legal incidence of which falls upon the seller only in the case of the sales tax. MCL 205.52; MSA 7.522. As the Court in *Lockwood, supra* at 527, explained:
>
> > As a practical proposition [the use tax and the sales tax] are assessed on different privileges, and the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. **The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage, or consumption, as the case may be. <u>One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him</u>**. [229 Mich. App. at 215-216 (emphasis added).]

. . .") *St Clair Intermediate Sch Dist v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 556; 581 NW2d 707 (1998).

There is a fundamental legal difference between (1) a situation where the government requires a service provider to collect a tax from its customers and remit it to the government and (2) a situation where the government imposes the tax on the service provider but allows the service provider to recoup the amount paid from its customers. This has long been the law in Michigan. *See, e.g., Sims v. Firestone Tire & Rubber Co.*, 397 Mich. 469, 474, 245 N.W.2d 13 (1976) ("While retailers are considered to be the taxpayers, the law allows them to shift the economic burden of any tax levied to the shoulders of the consumers"); *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (recognizing that Michigan's use tax is imposed on ultimate purchasers and that the sellers' duty to collect the tax does not make the sellers primarily liable for the tax).

B. The *Morgan* Case Does Not Support A Finding That Plaintiff's Headlee Claims Are Barred By The One-Year Limitations Period Prescribed by MCL 600.308a.

Given the foregoing legal principles, it is clear that *Morgan* does not authorize the Court to conclude that the Franchise Fees are legally imposed on the LBWL.

Notably, the franchise fee in *Morgan* was "specifically permitted" by the federal Cable Communications Policy Act, 47 USC 521, et seq. *Morgan*, 267 Mich. App. at 514-515. The governing federal statute makes absolutely clear that the authorized franchise fee is imposed on cable providers and not end-users of cable services:

> **(a) Payment under terms of franchise.** Subject to the limitation of subsection (b**), any cable operator may be required under the terms of any franchise to pay a franchise fee**. [47 USC 542(a) (emphasis added)].

Given these facts, the *Morgan* court correctly held that the cable companies were the parties that were legally obligated to pay the Franchise Fees, even though they ultimately passed-through those charges to their customers. As the court noted, "when the tax obligation falls primarily on the retailer, 'retailers are considered to be the taxpayers. *Sims, supra* at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich. App. at 515.

Morgan also makes clear that Plaintiff and the Class are the payers of the Franchise Fees imposed by the City here:

> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, **but the inclusion of the charge on the bill was Comcast's action, not defendant's**. **Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff**. [267 Mich. App. at 516 (emphasis added)].

Here, under the Franchise Agreement, the City required the LBWL to include the Franchise Fees "**on the corresponding energy bills."** Franchise Agreement, Section 2. Thus, "inclusion of the charge on the bill" was a requirement of **the City**, as opposed to a unilateral act by the LBWL. In contrast to *Morgan*, the City's collection of the Franchise Fees here would not be a wrong against the LBWL because the City and the LBWL **expressly agreed** that the LBWL – as collection agent for the City – would collect and remit the Franchise Fees to the City. Thus, *Morgan* is completely inapposite and should not have informed the Court's resolution of any issue in this case.

CONCLUSION

Plaintiff requests that the Court grant Plaintiff's Motion for Reconsideration and amend its April 13 Opinion by affirming the Circuit Court's decision granting partial summary disposition to Plaintiff as to the Headlee Amendment and MCL 141.91 claims.

KICKHAM HANLEY PLLC

By*: /s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff/Appellee and the Class

Dated: April 19, 2023

STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's Motion for Reconsideration and Brief in Support contain 3172 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2023, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

JAMES HEOS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v

CITY OF EAST LANSING,

Defendant-Appellant.

UNPUBLISHED
April 13, 2023

No. 361105, 361138
Ingham Circuit Court
LC No. 20-000199-CZ

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

PER CURIAM.

In these consolidated appeals, defendant, the City of East Lansing (the City), appeals the trial court's opinions and orders partially denying the City's motion for summary disposition and granting partial summary disposition to plaintiff[1] on his competing motion for summary disposition.

At issue is a "franchise fee" that the Lansing Board of Water and Light (LBWL), a public utility provider, charged its customers (plaintiff and the class). The LBWL collected the fees and remitted them to the City pursuant to a franchise agreement between the LBWL and the City. Plaintiff brought this class action challenging the franchise fee as an unlawful tax imposed in violation of the Headlee Amendment,[2] MCL 141.91, and the Foote Act, 264 PA 1905. In partially denying the City's motion for summary disposition, the trial court reasoned that plaintiff's Headlee claim was not barred by the statute of limitations. The trial court further reasoned that plaintiff's claims for unjust enrichment and assumpsit premised on MCL 141.91 were distinct from his

[1] The trial court granted plaintiff's request for class certification.

[2] More precisely, plaintiff claims that the "franchise fee" was a new local tax levied without voter approval contrary to Const 1963, art 9, § 31. "The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121; 537 NW2d 596 (1995).

Headlee Claim. As to plaintiff's claims based on the Foote Act, the trial court denied the City's motion for summary disposition.

Being bound by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), we conclude that the trial court erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations. We further conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred. Finally, we conclude that plaintiff is not a real party in interest for purposes of enforcing the Foote Act. Accordingly, we reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting summary disposition in favor of the City.

I. BACKGROUND

The City is serviced by two electric utility providers—the LBWL and Consumers Energy. The LBWL provides service to a significantly larger portion of the City; its service area encompasses about 89% of the City's total rights of way, while Consumers services the rest.

In 2015 or 2016, the City approached the LBWL and Consumers about charging them a franchise fee to continue operating within the City. Consumers refused to pay a franchise fee, while the LBWL was amenable to paying one. Eventually, the LBWL and the City came to an agreement in which the City granted the LBWL use of the City's rights of way, permission to conduct its business of distributing electricity within the City, and an exclusive right to service certain areas of the City. In exchange, the LBWL agreed to "collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the [LBWL] within the City," with the fee "appear[ing] on the corresponding energy bills." The franchise agreement further provided that it should not be construed as the LBWL relinquishing any rights it had under the Foote Act, nor as the City waiving its ability to contest the LBWL's assertion of such rights. The City began receiving franchise fees from the LBWL pursuant to their franchise agreement in September 2017.

In April 2020, plaintiff filed the six-count complaint giving rise to this case. Counts I, II, and III alleged that the franchise fee was an impermissible tax and requested a refund of the franchise fees paid. Count I alleged a Headlee claim, while Counts II and III were based on alleged violations of MCL 141.91, which prohibits the collection of taxes not authorized by law. Count IV alleged that the franchise fee violated the Equal Protection Clause of the Michigan Constitution, Const 1963, art I, § 2, because it applied only to customers of the LBWL, not customers of Consumers. Counts V and VI alleged that the franchise fee was prohibited by the Foote Act, and requested a return of the franchise fees paid.

The parties eventually filed competing motions for summary disposition. The City argued that it was entitled to summary disposition on all counts. As to Count I, the City argued that plaintiff's Headlee claim was barred by the statute of limitations. The City argued that Counts II and III were likewise barred by the statute of limitations because those counts were indistinct from Count I. For Count IV, the City argued that plaintiff could not request money damages for an equal-protection violation. For plaintiff's claims premised on the Foote Act, the City argued that plaintiff was not a real party in interest and could therefore not enforce the act. The trial court

granted the City's motion for summary disposition as to plaintiff's equal-protection claim, but otherwise denied the motion.

In his competing motion, plaintiff asked the trial court to grant plaintiff and the class summary disposition on Counts I, II, and III of the complaint. In granting the motion, the trial court held that the franchise fee could be a tax on plaintiff and the class because, under the terms of the franchise agreement, plaintiff and the class were "responsible for paying the franchise fee." The trial court then applied the criteria from *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998) to the franchise fee to determine whether it was a "user fee" or a "tax," and concluded that the franchise fee was a tax. As the tax had not been approved by a majority of voters and was not otherwise authorized by law, the trial court held that plaintiff was entitled to summary disposition on Counts I, II, and III.

This appeal followed.

II. STATUTE OF LIMITATIONS

On appeal, the City argues that the trial court erred when it ruled that plaintiff's Headlee claim in Count I was not barred by the statute of limitations. The City further argues that plaintiff's equitable claims premised on MCL 141.91 in Counts II and III are likewise time-barred because they are identical to plaintiff's Headlee claim in Count I. We agree.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). An argument that a claim is barred by the statute of limitations is properly brought under MCR 2.116(C)(7). See *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009). As explained in *Dextrom v Wexford County*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

B. HEADLEE CLAIM

"The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121 n 2; 537 NW2d 596 (1995) (*TACT*). As pertinent to this case, Const 1963, art 9, § 31 provides that a local governmental unit is "prohibited from levying any tax not authorized by law or charter" unless a majority of

voters have approved the levying of the new tax. See also *Shaw v City of Dearborn*, 329 Mich App 640, 652; 944 NW2d 153 (2019). Const 1963, art 9, § 32 provides that "[a]ny taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of" the Headlee Amendment. MCL 600.308a(1) provides in which courts an action "under section 32 of article 9 of the state constitution of 1963 may be commenced," and subsection (3) provides that such an action must be "commenced within 1 year after the cause of action accrued."

Our Supreme Court has held that when a plaintiff is seeking a refund of an unlawful tax under the Headlee Amendment, the claim "accrues at the time the tax is due." *TACT*, 450 Mich at 123. The tax at issue in this case is slightly different than the one in *TACT*. In *TACT*, at issue was a one-time property transfer tax that was paid by the property owner directly to the governmental entity-defendant. Here, on the other hand, at issue is a recurring (alleged) tax on plaintiff's electricity bill that plaintiff paid to a third party—the LBWL—who remitted the alleged tax to the City. The parties dispute what effect this has on when plaintiff's claim accrued. Plaintiff argues that these differences do not affect the analysis, and that a Headlee claim accrued each time the alleged tax was due. The City, on the other hand, argues that this case is analogous to *Morgan*, 267 Mich App 513, and that, like in *Morgan*, plaintiff's claim accrued when the City entered into the franchise agreement with the LBWL.

We agree with the City that this case is analogous to *Morgan*. At issue in *Morgan* was a franchise fee charged by Comcast pursuant to a franchise agreement it had entered into with the City of Grand Rapids on July 10, 2001. *Id*. at 514. The plaintiff brought a proposed class action on behalf of Comcast cable subscribers to recoup the franchise fees, arguing that the fees constituted an unlawful tax in violation of the Headlee Amendment. *Id*. This Court held that the plaintiff's action was untimely, explaining:

> Comcast paid defendant a "franchise fee" consisting of five percent of its gross revenues. The five percent fee is specifically permitted by the federal Cable Communications Policy Act, 47 USC 521, *et seq*, which also allows cable providers to list separately in their billing statements the amount representing the subscriber's portion of the franchise fee. 47 USC 542. However, the mere listing of the charge on a separate line does not render plaintiff the charge's payer. Rather, plaintiff paid her entire bill according to her contractual obligation to Comcast, which paid the charge to defendant according to the franchise agreement. Defendant had no recourse against plaintiff for any unpaid portion of her bill, so this case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. *World Book, Inc v. Dep't of Treasury*, 459 Mich 403, 407-408; 590 NW2d 293 (1999); *Sims v Firestone Tire & Rubber Co*, 397 Mich 469, 474; 245 NW2d 13 (1976). In those situations, courts have generally held that the sellers must challenge the illegal taxes directly, and the consumers have no standing to pursue tax relief unless the tax burden potentially interferes with a federal right. See *Nat'l Bank of Detroit v Dep't of Revenue*, 334 Mich 132, 141-142; 54 NW2d 278 (1952), and the cases cited therein. In short, when the tax obligation falls primarily on the retailer, "retailers are considered to be the taxpayers." *Sims*, 397 Mich at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders.

> In *Taxpayers Allied for Constitutional Taxation* [*TACT*] *v Wayne Co*, 450 Mich 119, 124-125 n 7; 537 NW2d 596 (1995), our Supreme Court held that individuals who do not pay a tax directly may still challenge whether the tax violates the Headlee Amendment. Const 1963, art 9, § 32. However, the Court noted that the one-year statute of limitations, MCL 600.308a(3), would apply to such a plaintiff and would begin running at the time the offending tax resolution was enacted. *TACT*, 450 Mich at 125 n 7. The Court reasoned that "the only wrong that could give rise to a cause of action is the enactment of the resolution—an action that is not continuing in nature." *Id*. at 124-125 n 7.
>
> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, but the inclusion of the charge on the bill was Comcast's action, not defendant's. Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff. Following the example in *TACT*, plaintiff's Headlee claim accrued when defendant first imposed the "franchise fee" on Comcast—July 10, 2001. Because plaintiff failed to bring her Headlee claim within one year from that date, the trial court correctly granted defendant's motion for summary disposition. [*Morgan*, 267 Mich App at 514-516.]

The crux of *Morgan*'s holding relies on the fact that Comcast agreed to pay the franchise fee to the defendant as a condition of the defendant granting Comcast a franchise. The plaintiff did not owe the franchise fee to the defendant; the plaintiff paid the franchise fee to Comcast pursuant to the plaintiff's contractual obligation to Comcast, and if the plaintiff did not pay the charge, the defendant had no recourse against the plaintiff. While Comcast passed the franchise fee onto consumers, *Morgan* held that this did not make the plaintiff a taxpayer, similar to how a consumer is not a taxpayer if the retailer passes the burden of sales tax onto the consumer.

Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in *Morgan*, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich at 124-125 n 7, which accrued when the franchise fee was passed by ordinance. See *Morgan*, 267 Mich App at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred.

Plaintiff attempts to distinguish *Morgan*, but his arguments are unpersuasive. Plaintiff argues that this case is distinguishable from *Morgan* because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects . . . ." Here, however, it appears that the LBWL *is* "independently liable" to the City for the franchise fees. Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL, including not

only bringing a breach-of-contract claim to recover the fees from the LBWL but revoking the LBWL's franchise.

Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees . . . ." Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. Agency is a legal doctrine, and plaintiff makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City. Cursorily reviewing relevant caselaw, it is not apparent that the LBWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the LBWL, or that the LBWL had actual or apparent authority to act on the City's behalf. See *St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Rather, the LBWL and the City were two independent parties with contractual obligations to one another.

Accordingly, because we are bound by *Morgan*, we conclude that plaintiff's Headlee claim was time-barred.

C. MCL 141.91

In *TACT*, our Supreme Court stated that it "has long recognized that statutes of limitation may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. Both parties agree on appeal that plaintiff's claims premised on MCL 141.91 are equitable in nature, and so we accept that as true for purposes of this opinion. Plaintiff's claims premised on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his MCL 141.91-related claims when arguing that he was entitled to summary disposition. For all three claims, plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the "legal incidence" of the fee, and then argued that the *Bolt* criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the *Bolt* criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his MCL 141.91-related claims.

It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim. As the "statute of limitations may apply by analogy to equitable claims," *TACT*, 450 Mich at 127 n 9, we conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are barred by analogy.

Plaintiff asserts that his claims premised on MCL 141.91 "are distinct causes of action from his Headlee Amendment claim," but he never explains a difference between them except by noting that he is seeking "a one-year refund under Headlee and a six-year refund under MCL 141.91." This, however, is what our Supreme Court sought to avoid with its guidance in *TACT*: "If legal limitations periods did not apply to analogous equitable suits, a plaintiff could dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity." *TACT*, 450 Mich at 127 n 9 (quotation marks, citation, and alteration omitted).

III. FOOTE ACT

The City also argues that the trial court erred by not dismissing plaintiff's Counts V and VI, which are premised on the Foote Act. The Foote Act provided in relevant part:

> Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along or across any public streets, alleys and highways and over, under or across any of the waters of this state, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: Provided, that the same shall not injuriously interfere with other public uses of such streets, alleys or highways, or with the navigation of said waters, and that the designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities, the village council of villages, and the township board of townships, as the case may be: Provided, that this act shall not apply to the county of Wayne: Provided further, that nothing herein shall deprive cities, villages or townships of the power and control over their streets and highways, which they have by the general laws of this state. [264 PA 1905. See also *Lansing v Mich Power Co*, 183 Mich 400, 404; 150 NW 250 (1914).]

The Foote Act was abrogated by Const 1908, art 8, § 28. But, in *Lansing*, 183 Mich at 410-411, our Supreme Court held that Const 1908, art 8, § 28 could not impair a state franchise that had already vested under the Foote Act before the 1908 Constitution's enactment. The Court explained, in pertinent part:

> The [Foote Act] tendered a franchise to defendant; such franchise was accepted by defendant by way of installing its service equipment in the public streets and providing a service of a public utility; and this tender and acceptance constitute a contract between the state and defendant beyond the power of the Legislature, the Constitution, or of this court to impair by destroying the contract right to remain in the streets. [*Lansing*, 183 Mich at 410-411.]

See also *Traverse City v Consumers Power Co*, 340 Mich 85, 103; 64 NW2d 894 (1954) ("This Court has held that rights acquired under the 1905 act are vested rights . . . .")

Plaintiff's complaint alleged that the LBWL operated in the City prior to 1908, and so the Foote Act prohibited the City from imposing any fees as a condition of allowing the LBWL to provide electric service to the City. The City argues that plaintiff cannot assert such claims because the Foote Act applies only to electric utility providers, and, thus, plaintiff is not a real party in interest. We agree.

"Whether an individual is the real party in interest is a question of law that we review de novo." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

As explained by this Court in *Beatrice Rottenberg Living Trust*:

> [A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. See *Kent v Northern Cal Regional Office of American Friends Serv Comm*, 497 F2d 1325, 1329 (CA 9, 1974). The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. *Miller v Allstate Ins Co*, 481 Mich 601, 608-612; 751 NW2d 463 (2008). In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. See, e.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 12; 124 S Ct 2301; 159 L Ed 2d 98 (2004); *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 532 (CA 6, 2002).
>
> "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule " 'requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted . . . .' " *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278; 409 NW2d 804 (1987) (citation omitted). [*Beatrice Rottenberg Living Trust*, 300 Mich App at 355-356.]

"A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

The Foote Act plainly applies only to electric utility providers. See 264 PA 1905 ("Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity . . . shall have the right . . . ."). Thus, the entity here with a potential "vested right" is the LBWL; plaintiff and the class have no rights or interests stemming from the Foote Act. Accordingly, plaintiff and the class cannot assert a cause of action stemming from a violation of the Foote Act because they are not a real party in interest.[3]

IV. CONCLUSION

For the reasons explained, the trial court erred by denying the City's motion for summary disposition as to Counts I, II, III, V, and VI of plaintiff's complaint, and granting summary

[3] We further note that nothing in the Foote Act or subsequent cases interpreting the act prevents electric utility providers from relinquishing their vested rights under the act, or—as is the case here—from agreeing to reserve but not pursue their rights under the act. While this may also go to the merits of plaintiff's claim (i.e., there was no Foote Act violation), it tangentially relates to whether plaintiff is a real party in interest—the LBWL holds any vested rights under the Foote Act, and it is the only entity that can decide whether and how it wishes to enforce those rights.

disposition to plaintiff on Counts I, II, and III of plaintiff's complaint. We therefore reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting the City's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien
/s/ Allie Greenleaf Maldonado

EXHIBIT B

Attachment 1- East Lansing Electric Franchise

CITY OF EAST LANSING

ORDINANCE NO. 1411

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.

SECTION 2. FRANCHISE FEE.
During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. Such fee will appear on the corresponding energy bills.

The fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first

franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.

Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance. However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby affirmed, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. All of Grantee's towers, masts, and poles shall be so placed on either side of the highways, streets, alleys and bridges as not to unnecessarily interfere with the use thereof for highway, street, alley and bridge purposes. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways, streets, alleys, and bridges. All work performed by said Grantee in said highways, street[s], alleys, and bridges shall be done so as to minimize interference with the use thereof, and when completed, the same shall be left in as good condition as when work was commenced. The Grantee shall have the right to cut or trim trees if necessary in the conducting of such business.

Said lines and appurtenances shall be constructed so as to interfere as little as possible with the proper lawful use of the streets, alleys, and public places. The installation of all poles, conduits, and appurtenances shall be according to industry standards and shall be subject to such reasonable regulations as shall be prescribed by said City from time to time.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of construction or maintenance. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising out of the negligence of the City, its employees or its contractors. Grantor shall indemnify, hold harmless and defend the Grantee from any and all claims, losses or litigation which result from the Grantee's compliance with this Ordinance. However, Grantor is not responsible for Grantee's negligent or intentional misconduct associated with the provision of utility services.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

SECTION 7. NONEXCLUSIVE FRANCHISE . Certain rights, power and authority herein granted, are exclusive as to providing electricity and electric service in certain areas of the City of East Lansing as described in Exhibit A. Otherwise, with respect to jurisdiction of East Lansing, this remains a nonexclusive franchise.

The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the collection and remittance of the Franchise Fee described in Section 2. As such either party may terminate the exclusive right to serve upon 60 days prior written notice. Therefore, to the extent either shall cease, both ceases.

SECTION 8. RATES. The rates and Rules and Regulations governing the supply and use of electricity shall be the same as in the City of Lansing except that the rates shall be increased within the boundaries of the City by the amount of any taxes, license fees, franchise fees, or any other charges against the Grantee's property or its operations, or the production and/or sale of electrical energy, levied or imposed by the City or otherwise incurred by Grantee as a result of this Ordinance.

Section 10. SERVICE AREA. To the extent permitted by law, Grantee shall furnish electric service to all customers requesting such service within Grantee's service area or the non-exclusive area.

Section 11. FOOTE ACT FRANCHISE. Nothing herein shall be construed as either party rendering an opinion or position of the Grantee's vested franchise rights under the Foote Act, 1905 PA 264. The City does not waive any right to contest, and the Grantee does not relinquish any right to assert.

Section 12. GRANTEE RULES. The Grantee shall have authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee to exercise its rights and perform its obligations under this franchise, and to assure uninterrupted service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the State of Michigan.

SECTION 13. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

Section 14. PUBLICATION AND ADMINISTRATIVE COSTS. The City shall assume the cost of publication of this franchise. A BWL administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply.

Section 15. SEVERABILITY. If any provision of this franchise is to any extent illegal, otherwise invalid, or incapable of being enforced, such provision shall be excluded to the extent of such invalidity or unenforceability; all other provisions hereof shall remain in full force and effect.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the 6 day of June, 2017.

Marie Wicks
City Clerk

June 16, 2017