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 No. 361105

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

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PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff agrees with the "Statement of Jurisdiction" submitted by the City.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This is an appeal of right brought by the City pursuant to MCR 7.202(6)(a)(v) from an order denying Defendant City of East Lansing's (hereinafter, the "City") motion for summary disposition based upon a governmental immunity defense that the City asserted and briefed as to Count III of Plaintiff's Complaint, Unjust Enrichment for Violation of MCL 141.91. *See* City's Motion for Summary Disposition (Appx. Ex. 1, attached without exhibits) at pp. 16-21. In *Wright v. Genesee County*, 504 Mich. 410, 934 N.W.2d 805 (2019) ("*Genesee County*") the Michigan Supreme Court held that unjust enrichment claims against municipalities are not barred by governmental immunity because they are not tort or contract claims but rather seek the return of monies being unfairly retained by the government. The Court's express holding was this:

> a claim for unjust enrichment is neither a tort nor a contract but rather an independent cause of action. And the remedy for unjust enrichment is restitution—not compensatory damages, the remedy for tort. **For both reasons, the GTLA [governmental immunity] does not bar an unjust-enrichment claim."** [*Id.* at p. 414 (emphasis added)].

Does *Genesee County* compel a finding that the City does **not** enjoy governmental immunity from Plaintiff's Unjust Enrichment claims:

Plaintiff/Appellee states: Yes.
Defendant/Appellant will state: No.
The Circuit Court stated: Yes
This Court should state: Yes.

2. Is the Plaintiff's unjust enrichment claim an "independent cause of action" as opposed to a tort or contract claim?

Plaintiff/Appellee states: Yes.
Defendant/Appellant will state: No.
The Circuit Court stated: Yes
This Court should state: Yes.

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3. Does Plaintiff's unjust enrichment claim seek "monetary damages"?

Plaintiff/Appellee states: No.
Defendant/Appellant will state: Yes.
The Circuit Court stated: No
This Court should state: No.

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I. COUNTER-STATEMENT OF FACTS

A. NATURE OF THE CASE

This appeal involves a groundless claim of governmental immunity advanced by Defendant City of East Lansing (the "City") with respect to a single count – an unjust enrichment claim -- of a six-count Complaint. Because the Michigan Supreme Court expressly held in *Wright v. Genesee County*, 504 Mich. 410, 934 N.W.2d 805 (2019) that unjust enrichment claims are **not** tort claims and therefore governmental entities do not enjoy immunity from such claims under the Governmental Tort Liability Act ("GTLA"), the Circuit Court properly rejected the City's immunity defense. The City's appeal of that rejection has been taken (1) for the improper purpose of delaying the ultimate resolution of this case and (2) without any reasonable basis for belief that there was a meritorious issue to be determined by this Court.

This is a certified class action challenging the "Franchise Fees" imposed by the City of East Lansing (the "City") on citizens whose properties receive electric service from the Lansing Board of Water and Light ("LBWL"), a municipal utility owned by the City of Lansing, Michigan. Since 2017, the City has extracted millions of dollars from the payers of the Franchise Fees, at a rate of about $1.4 million per year, and has used those revenues to finance the City's general governmental functions that are wholly unrelated to the LBWL's franchise. Indeed, the City has used the vast bulk of the Franchise Fee revenues to partially satisfy its underfunded public pension obligation which, according to the City, "could bankrupt us unless we begin to address it now." *See* App. Ex. 2. As former Mayor Mark Meadows wrote to a City resident:

> It is the projected growth in annual required payments towards our unfunded legacy costs that are the danger. **If we do not address the issue by increasing the voluntary payments we make today, within ten years virtually all of our property tax revenues will have to be used to make payments on the unfunded liability**. …
>
> Our objective is to make a minimum of an additional $5 million dollar payment to the pension fund every year. $3 million is to come from the income tax, **$1.3**

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> **million from the BWL franchise fee** and $700,000 from other cuts in the budget that we enacted last May. [App. Ex. 2 (emphasis added)].

On March 31, 2022, the Circuit Court issued an Opinion and Order granted Plaintiff's Motion for Summary Disposition (Appx. Ex. 3) and a separate Opinion and Order substantially denying the City's Motion for Summary Disposition (Appx. Ex 4). The principal ruling made by the Circuit Court in the Opinions and Orders was that the City's "franchise fees" are in fact not "franchise fees" at all, but instead are unlawful taxes. A **lawful** franchise fee is one where the legal incidence of the fee falls upon the **utility** and the revenues are utilized to pay the costs a municipality incurs as a result of the utility's use of the municipality's infrastructure. **Here, however, as the Circuit Court properly found, the legal incidence of the tax falls upon the East Lansing electrical customers in the LBWL's service area (i.e., Plaintiff and the Class) and the revenues are utilized for purposes wholly unrelated to the LBWL's use of the City's infrastructure**. Indeed, as the facts in this case demonstrate, this unlawful tax was specifically designed by the City and the LBWL to be imposed directly on some but not all of the City's residents, with the LBWL acting as a mere collection agent for the tax, having no financial responsibility other than to collect the tax and remit it the City. The City contracted with the LBWL to collect the unlawful tax on its citizenry. The City did this even though the City admits it "has no ability to impose Franchise Fees directly on its citizens." *See* Appx. Ex. 5 (City's Response to Request to Admit No. 18).

B. PERTINENT PROCEDURAL BACKGROUND

Plaintiff filed his Class Action Complaint (Appx. Ex. 13) on April 2, 2022. Counts I-III allege that the Franchise Fees constitute "taxes" that have not been authorized by the City's voters and therefore violate Art. 9, § 31 of the Michigan Constitution (the "Headlee Amendment") and MCL 141.91 (the "Tax-Based Claims"). Specifically, Count II states a claim for Assumpsit for Money had and Received for Violation of the Prohibited Taxes by Cities and Villages Act, MCL 141.91; Count

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III states a claim for Unjust Enrichment for Violation of the Prohibited Taxes by Cities and Villages Act, MCL 141.91. Count IV alleges that the Franchise Fees violate equal protection guarantees of the Michigan Constitution (*see* Mich. Constitution 1963, Article 1, § 2) because they are imposed only on City citizens who are located in those geographical areas of the City which receive electric service from the LBWL and are not imposed on City citizens who are located in different geographical areas of the City which receive their electric service from Consumers Energy. Plaintiff asserted that no rational basis exists for imposing the Franchise Fees only upon one subset of the citizenry based upon their physical location in the City. Finally, Counts V (unjust enrichment) and Count VI (assumpsit) allege that the Franchise Fees are unlawful governmental exactions because the City is prohibited by Michigan law (the Foote Act, 1905 PA 264, 1915 CL 4841) from imposing **any** fees as a condition of allowing the LBWL to provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

1. Plaintiff's Motion for Summary Disposition

On June 29, 2021, Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on the Tax-Based Claims stated in Counts I-III of the Complaint. Plaintiff asserted specifically that the Franchise Fees constituted unlawful taxes that have been imposed by the City upon its citizens in violation of the Headlee Amendment to the Michigan Constitution because the Franchise Fees were not approved by the City's voters, as required by Section 31 of the Headlee Amendment. The Franchise Fees also violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91, because they are taxes that are not ad valorem property taxes and were not being imposed on January 1, 1964.

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2. The City's Motion for Summary Disposition

On July 21, 2021, the City filed a motion for summary disposition (hereinafter, "Def. MSD Brief" Appx. Ex. 1, attached without exhibits) seeking dismissal of all of Plaintiff's claims. The asserted grounds for the City's motion for summary disposition were many:

1. All of Plaintiff's tax-based claims (stated in Counts I, II, and III of the complaint) are barred by the one-year statute of limitations applicable to Headlee Amendment claims and are untimely because the Complaint was not filed within one year of the City's "entry into the franchise agreement with the BWL, enactment of the Franchise Ordinance, and collection of the Franchise Fee…[which] *occurred in 2017*." Def. MSD Brief at p. 10 (emphasis in original; full discussion pp. 8-13).
2. Even if the tax claims are timely, Counts I, II, and III fail because the Franchise Fee is a user fee and not a tax because the Franchise Fee is "a lease of the City's right of ways." Def. MSD Brief at p. 14. The City only provided a "sneak peek" of this defense without any factual or legal support, promising to back it up it in its response to Plaintiff's motion for summary disposition. Def. MSD Brief at pp. 13-14.
3. Plaintiff's Assumpsit claims (Count II and Count VI) must fail because Assumpsit is no longer a recognized cause of action in Michigan and/or is "redundant" of Plaintiff's unjust enrichment claims. Def. MSD Brief at pp. 14-16.
4. Plaintiff's claim for violation of 141.91 and request for disgorgement of unlawfully collected funds under the equitable theory of unjust enrichment must fail because the "gravamen of Count III sounds in tort" and is thus barred by governmental immunity. Def. MSD Brief at p. 17 (full discussion pp. 16-22).
5. Plaintiff's equal protection claim (Count IV) must fail because imposition of the Franchise Fee on the LBWL is rationally related to a legitimate governmental interest. Def. MSD Brief at p. 22-25.
6. The Foote Act does not prohibit the City from imposing the Franchise Fees nor does the Foote Act provide for a private cause of action. Def. MSD Brief at p. 25-27.

In response to the City's motion for summary disposition, Plaintiff asserted that none of the City's arguments had merit based upon the following:

1. A Headlee Amendment plaintiff may seek a refund of all unlawful taxes paid within a year of the filing of the lawsuit. Therefore, Plaintiff's Headlee Amendment claim (Count I) is timely to the extent he seeks a refund of Franchise Fees paid since March 31, 2019 (one year prior to the lawsuit being filed).

   Moreover, Plaintiff's non-Headlee tax claims (Count II and Count III) are not subject to the Headlee Amendment's one-year statute of limitations because they are separate and independent of the Headlee Amendment claims.

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2. The City's "sneak peek" into its reasoning that the Franchise Fee is a user fee because it is "a lease of the City's right of ways" is unsupported by the facts of this case. The City admitted that the LBWL does not actually pay the Franchise Fee—which is in fact paid by the City's electric customers. *Compare* FN 3 of the City's MSD Brief, p. 3 (a proper franchise fee is "**paid by a company that uses a municipality's right of ways"**) and City's admission on p. 22 of its MSD Brief that the Plaintiff and the Class pay the Franchise Fee.

   By the express terms of the written agreement between the City and the LBWL, the LBWL is **a mere collection agent for the City**. The LBWL is not obligated to pay the City any Franchise Fees for use of the City's right of ways, only to "collect and remit" the Franchise Fees it collects from Plaintiff and the Class. The City cannot avoid responsibility for its wrongful actions by twisting this fact to suit its purposes as needed.

3. The City's argument regarding Assumpsit not being a recognized cause of action and/or "redundant" of Plaintiff's unjust enrichment claims is misguided.

   It is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

4. The City's governmental immunity argument is nonsensical. Violation of a statute is not a per se tort claim—any more than violation of the Headlee Amendment is a tort claim.

5. As to Plaintiff's equal protection claims, Plaintiff asserted that no rational basis exists for treating the City's citizens who own property in the LBWL's service area differently from the citizens who own property in the Consumers Energy service area.

   Moreover, the City's governmental interest is not, in fact, legitimate. The City knows that it is a fiction to state that the LBWL **actually pays** the Franchise Fee—because the LBWL does not. Thus, similar to Delta Township, the Franchise Fee is an illicit tax imposed upon the City's electric customers that the LBWL only collects on behalf of the City. This activity is far from a legitimate governmental interest that the City can protect.

6. The Foote Act prohibits the Franchise Fees. Under Michigan law, the City is powerless to compel anyone, including the LBWL or its end users, to pay a Franchise Fee. Moreover, Plaintiff does not need express statutory authorization to sue for a refund of the Franchise Fees and an injunction prohibiting them in the future. Again, the absence of a legal remedy under the Foote Act renders equitable relief under theories of assumpsit and unjust enrichment necessary. *See, e.g., Tkachik v. Mandeville*, 487 Mich. 38, 790 N.W.2d 260 (2010).

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Plaintiff contended that in light of the City's admissions of material fact, summary disposition in favor of Plaintiff was appropriate for reasons stated in Plaintiff's motion for summary disposition and that the Circuit Court should deny the City's Motion for Summary Disposition in its entirety.

3. The Circuit Court's Opinions and Orders on the Parties' Dispositive Motions.

On August 12, 2021, the Court heard argument on the parties' motions. *See* Transcript, Appx. Ex. 6.

On March 31, 2022, the Court issued its Opinions and Orders on Plaintiff's and the City's respective dispositive motions. In its Opinion and Order Regarding Plaintiff's Motion (Appx. Ex. 3), this Court granted Plaintiff's request for summary disposition as to the City's liability for Plaintiff's Tax-Based Claims in Counts I-III of Plaintiff's Complaint and denied the City's counter motion pursuant to MCR 2.116 (I)(2). After analysis of the *Bolt v. City of Lansing*, 459 Mich. 152, 161; 587 N.W.2d 264 (1998) factors, the Court expressly found that the "Franchise Fee collected by the LBWL constitutes a tax as opposed to a permissible fee in violation of statute." Appx. Ex. 3 at p. 11. In reaching its decision, the Circuit Court ruled that the illegal tax has a revenue raising purpose that benefits the general public especially in light of the fact that the allocation of the tax is to the general fund.[1] The Circuit Court also found that it was not proportionate to the cost of the service provided because there was "no particularized benefit provided to this who pay the fee, and the City admits that the 5% fee was decided because other townships have settled on that amount. *Id.* p. 8. Furthermore, the Circuit Court found that the Franchise Fee is effectively compulsory and not voluntary.

[1] Specifically, the Circuit Court stated: "when asked to balance the regulatory-purpose with the revenue-raising purpose, the allocation of the fee into the general fund clearly provides that it serves a revenue-raising purpose." Appx. Ex. 3 at p. 7.

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Specifically, the Circuit Court found that the fee was:

> not at all tied to the amount of electricity used by the fee payers, and the fee payers choices are between either paying the franchise fee and not having electricity. The cold temperature in Michigan winters forecloses the option of living without electricity; and thus, submitting to the franchise fee is effectively compulsory. [*Id.* p. 9. *See also* Appx. Ex. 4, Opinion and Order Regarding Defendant's Motion for Summary Disposition at pp. 7-10.

With regard to the City's dispositive motion, the Circuit Court granted the City's Motion for Summary Disposition as to Count IV of Plaintiff's Complaint, Violation of State Equal Protection Guarantees. All other requests by the City for dispositive relief were denied. Specifically, and most pertinent to this motion, the Circuit Court rejected the City's governmental immunity defense expressly recognizing that unjust enrichment is an independent cause of action and not a tort.[2] Appx. Ex. 4 at pp. 11-12. The Circuit Court's rulings left the issue of the City's liability under the Foote Act (Counts V and VI of the Complaint) for trial.

4. The City's Appeals

On April 20, 2022, the City filed a claim of appeal with regard to the Circuit Court's denial of the City's motion for summary disposition under its governmental immunity defense asserted with regard to the unjust enrichment stated in Count III of Plaintiff's Complaint.[3] The City's claim of

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[2] In rendering its opinion, the Circuit Court also expressly rejected the City's statute of limitations arguments, holding that the limitations period for Plaintiff's Headlee claims does not depend upon the date of adoption of the "Franchise Fee" but upon the time the fees were assessed and that Plaintiff's claims for violation of MCL 141.91 "extend beyond" the one-year statute of limitations that governs the Headlee Amendment.. Appx. Ex. 4 at p. 6. The Circuit Court also rejected the City's challenge to Plaintiff's assumpsit and unjust enrichment claims stated in Counts II, III, V, and VI expressly holding that the substantive remedies available under assumpsit are preserved and that Plaintiff "may maintain an action of assumpsit to recover back the amount of an illegal exaction." Appx. Ex. 4 at p. 11.

[3] The City only asserted governmental immunity as a defense to Count III of Plaintiff's Complaint, arguing that Count III of Plaintiff's Complaint, unjust enrichment for violation of MCL 141.91 was actually a tort claim. Specifically, the City argued:

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appeal triggered an automatic stay of all proceedings in the Circuit Court.

On April 21, 2022, the City filed an application for leave to appeal on an interlocutory basis the other rulings that were adverse to the City contained in the Circuit Court's March 31, 2022 Opinions. On May 12, 2022, Plaintiff filed his answer to the City's application for leave to appeal requesting the this Court should deny it because, among other things, (1) the City's application was filed with the improper intent of delaying entry of a final judgment in the Circuit Court so that it can continue to impose and collect an illegal tax; and (2) the City has not satisfied its burden to prove that it will "suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.205(B)(1). The Court has not yet ruled on the Application.

II. ARGUMENT

A. THE SUPREME COURT'S DECISION IN WRIGHT V. GENESEE COUNTY CONTROLS THE OUTCOME OF THE CITY'S IMMUNITY APPEAL

The Circuit Court properly rejected the City's claim of governmental immunity as to the only

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> Here, the operative allegations of Count III are that MCL 141.91 prohibits the City from imposing certain taxes except under certain circumstance not applicable in this case; that the Franchise Fee is allegedly a tax imposed on residents in violation of MCL 141.91; that the City's conduct was allegedly wrongful because the Franchise Fee was collected in violation of MCL 141.91; and that Plaintiff and the class members are entitled to recover the amounts paid because of the violation. Based upon these allegations, the gravamen of Count III sounds in tort. [Appx. Ex. 1 at p. 17, citations to Plaintiff's Complaint omitted.]

Now, however, despite failing to brief and argue this defense as to any other claim in the complaint, and therefore failing to preserve this issue for appeal, the City initially sought to bootstrap Counts II, V, and VI into its current claim of appeal, stating specifically in its separately-filed Application for Leave to Appeal that the City's claim of appeal "regarding the circuit court's denial of governmental immunity…**governs Counts II, III, V, and VI of the Class Complaint to the extent they were allowed to proceed notwithstanding governmental immunity**. *See* City's Application for Leave to Appeal at p. 19. [Emphasis added.] In its Brief on Appeal in this matter, however, the City's immunity arguments are limited to Counts III and V. *See* City's Br. at p. 1. This Court should not permit the City's improper bootstrapping of V into the City's claim of appeal based upon governmental immunity.

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claim against which the City claimed it enjoyed immunity – the unjust enrichment claim in Count III based upon the City's violation of MCL 141.91. The City's appeal of the Circuit Court's rejection of its immunity defense is wholly reliant on this Court finding that Plaintiff's unjust enrichment claims are "tort claims" which seek "compensatory damages." As the City clearly knows, however, the Supreme Court recently definitively held that unjust enrichment claims are not "tort claims" and do not seek "compensatory damages." Accordingly, there is no immunity for such claims.

First and foremost, the outcome of this appeal is dictated by the Michigan Supreme Court's decision in *Wright v. Genesee County*, 504 Mich. 410, 934 N.W.2d 805 (2019) ("*Genesee County*"). In *Genesee Co*, the Michigan Supreme Court held that unjust enrichment claims against municipalities are not barred by governmental immunity because they are not tort or contract claims but rather seek the return of monies being unfairly retained by the government. The Court's express holding was this:

> A claim for unjust enrichment is neither a tort nor a contract but rather an independent cause of action. And the remedy for unjust enrichment is restitution—not compensatory damages, the remedy for tort. **For both reasons, the GTLA [governmental immunity] does not bar an unjust-enrichment claim.** [*Id.* at p. 414 (emphasis added)].

See also Id. at 422 ("Unjust enrichment has evolved from a category of restitutionary claims with components in law and equity into a unified independent doctrine that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's wrongful behavior. Both the nature of an unjust-enrichment action and its remedy—whether restitution at law or in equity—separate it from tort and contract."); *Id.* at 423-24 ("unjust enrichment sounds in neither tort nor contract and seeks restitution rather than compensatory damages").

B. PLAINTIFF'S UNJUST ENRICHMENT CLAIM BASED ON THE CITY'S VIOLATION OF MCL 141.91 FALLS SQUARELY WITHIN THE RULING IN *GENESEE COUNTY*.

Substantively, in order to recover under a claim of unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the

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plaintiff because of the retention of the benefit by the defendant. *Morris Pumps v Centerline Piping, Inc*, 273 Mich. App. 187, 193; 729 NW2d 898 (2006). Where, as here, a governmental entity collects funds to which it is not legally entitled, a plaintiff may obtain a refund of those charges pursuant to a claim for unjust enrichment. In *Mercy Services v. City of Rochester Hills*, 2010 Mich. App. LEXIS 2044 (2010) (Appx. Ex. 7), the Court held that the City had been unjustly enriched by its unlawful collection of "service fees" from an entity that, by law, was exempt from the payment of such fees. In reaching this result, the Court observed

> In order to sustain a claim of unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Morris Pumps*, 273 Mich App at 195. Plaintiff paid defendant approximately $ 1,293,327.59 in annual service charges from 2002 through 2007. **Defendant had no legal right to impose an annual service charge. Plaintiff was unaware of the impropriety of the charges, and therefore, simply paid what defendant asked. Defendant does not contest that this money constituted a benefit to it bestowed by plaintiff. But an inequity plainly resulted to plaintiff when defendant retained improperly imposed annual services charges**.
>
> We are not persuaded by the trial court's reasoning supporting its denial of plaintiff's unjust enrichment claim. The trial court found that it would be inequitable to compel defendant to return the money "when plaintiff actually received and knew it was receiving benefits for fees paid for [public] services including police and fire protection." The fact that plaintiff's property is exempt from taxes and annual service charges by mandate of statute manifests the Legislature's intent that a nonprofit corporation like plaintiff, so long as it meets certain requirements, is not obligated to pay taxes or annual service charges despite the fact that it may receive benefits from the city in the form of public services. Although it is true that it would be burdensome for defendant to have to return to plaintiff six years worth of annual service charges on which defendant has relied, this does not render a refund inequitable. Defendant was never entitled to the annual services charges in the first place. In essentially all cases where a party has been unjustly enriched, it would be burdensome to the enriched party to require it to return the benefit; this alone is insufficient to defeat an unjust enrichment claim. [*Id.* at *9-11 (emphasis added)].

In *Genesee County, supra*, 504 Mich. 410, the Michigan Supreme Court observed the following about the doctrine of unjust enrichment:

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> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. Restatement Restitution, 1st, Sec. 1, comment a, p 12. It is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at another's expense." *McCreary v. Shields*, 333 Mich. 290, 294, 52 N.W.2d 853 (1952) (quotation marks and citation omitted). A claim of unjust enrichment can arise when a party "has and retains money or benefits which in justice and equity belong to another." *Id.* (quotation marks and citation omitted).
>
> The remedy for unjust enrichment is restitution. *See, e.g., Kammer Asphalt Paving Co., Inc. v. East China Twp. Sch.,* 443 Mich. 176, 185, 504 N.W.2d 635 (1993) ("[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'"), quoting Restatement Restitution, 1st, Sec. 1, p 12 (second alteration in original); *City Nat'l Bank of Detroit v. Westland Towers Apartments*, 413 Mich. 938, 938, 320 N.W.2d 881 (1982) (discussing "equitable recovery on the claim of unjust enrichment"); 2 Restatement Restitution & Unjust Enrichment, 3d, § 49, p 176 ("A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment."). [504 Mich. at 417-418.]

Notably, *Genesee County* distinguished the Court's earlier decision in *In re Bradley Estate*, 494 Mich. 367, 371, 835 N.W.2d 545 (2013) which held that the "GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." The Court held that, under *In re Bradley Estate*, "at least two categories of claims are not barred by the GTLA: those seeking compensatory damages for breach of contract and **claims seeking a remedy other than compensatory damages**." *Genesee County*, 504 Mich. at 417 (emphasis added). *In re Bradley Estate* involved claims for compensatory damages as a result of the governmental defendants' alleged contempt of court. In *Genesee County*, in contrast, the Court held that because the "remedy for unjust enrichment is restitution," a claim for unjust enrichment does not seek "compensatory damages" and therefore is not barred by governmental immunity. *Id.* at 418.

Nonetheless, the City claims that *In re Bradley Estate* controls here because "Michigan law has long recognized that a 'tort' is a 'civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty.'" Defs' Br. At p. 8 (citing *In re Bradley Estate*, 494 Mich. At 381). But the

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City's argument ignores the *Genesee County* Court's further discussion and qualification of *In re Bradley Estate*, which expressly rejected the City's "civil wrong" argument as applied to unjust enrichment claims:

> **To the extent that *In re Bradley Estate* implied that tort liability encompassed noncontractual liability without qualification, our decision overstated the scope of "tort liability."** But *Bradley* did not contemplate an action like this one, alleging liability not from a "civil wrong," but rather from a benefit received." In sum, the plaintiff's unjust-enrichment claim is based on the county's unjust benefit received – outside the scope of "civil wrongs."
>
> And *In re Bradley Estate* is not an obstacle for the plaintiff for another reason. The plaintiff does not seek compensatory damages, but restitution. This Court's application of the GTLA in *In re Bradley Estate* depended on the understanding that the petitioner's civil-contempt petition sought compensatory damages for an injury: …
>
> Thus, our holding in *In re Bradley Estate* simply did not address an action like this one in which the plaintiff is seeking restitution for a benefit unfairly retained by the county, rather than compensatory damages for an injury. Because the plaintiff's unjust enrichment claim is not a tort in name or in substance, the GTLA does not apply. [504 Mich. at 422-423 (emphasis added)]

C. THE FACT THAT PLAINTIFF ALLEGES A VIOLATION OF A STATUTE DOES NOT TRANSFORM PLAINTIFF'S UNJUST ENRICHMENT CLAIM INTO A TORT CLAIM

The City further attempts to distinguish *Genesee County* on the grounds that Plaintiff's unjust enrichment claim is a tort claim because it "alleges a civil wrong, **a statutory violation** – not the 'unjust retention of a benefit owed to another.'" City's Br. At p. 9 (emphasis added). The Court should reject the City's argument because, as noted above, *Genesee County* expressly held that where an unjust enrichment claim is based on the governmental defendant's "unjust benefit received," the claim is "outside the scope of 'civil wrongs.'" 504 Mich. at p. 423.

Further, subsequent decisions of this Court, applying *Genesee County*, have held that governmental defendants have no immunity for claims to recover exactions the defendants impose and collect in violation of statutes and ordinances. Indeed. in at least two subsequent opinions, this Court has applied the principles of *Genesee County* to find that a plaintiff's claims based upon an illegal

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government exaction could proceed.

For example, in *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948 (Appx. Ex. 8), the plaintiff challenged the City of Flint's water and sewer charges on various grounds, including that certain rate increases violated the city's own ordinances. This Court held that **even where a private right of action does not exist under a city ordinance,** if a municipality has obtained money through an unlawful exaction in violation of the ordinance, the plaintiff has a common law equitable claim for a refund. The Court expressly recognized the distinction that Plaintiff asserts here – **namely, that there is a difference between a private cause of action for money damages (which is not at issue here) and an equitable claim to compel a refund of money obtained in violation of the law (which is at issue here)**:

> We first consider defendant's argument that the Flint Ordinances at issue here, Flint Ordinances, §§ 46-52.1 and 46-57.1, did not afford plaintiffs a private cause of action. We agree **only in part**.
>
> "[N]o cause of action can be inferred against a governmental defendant." *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014). Absent "express legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity[.]" *Lash*, 479 Mich at 194 (quotation marks and citations omitted; emphasis added). **Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute**." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895**). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions**. *See id. Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."). Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's mere violation of a City Ordinance, *Lash*, 479 Mich at 194, **but it is equally clear that plaintiffs may maintain a cause of action for a refund of an unlawful exaction**. [Appx. Ex. 8 at p. 8 (emphasis added) (footnote omitted)].

The Court went on to find that the Circuit Court erred in dismissing the plaintiff's unjust enrichment claims because they were "premised on an unlawful exaction:"

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> In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*, Count IV properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. **Moreover, as our Supreme Court made clear in *Wright*, a claim for unjust enrichment is not barred by the GTLA**. *Wright*, 504 Mich at 422, summary disposition of Count III was not appropriate under MCR 2.116(C)(7). [*Id.* at pp. 8-9 (emphasis added).]

Kincaid's reasoning applies equally well to a statute as to an ordinance; in fact, the *Kincaid* court applied case law addressing the right to sue for recovery of an unlawful exaction under a statute, such as *Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013), discussed *infra* at pp. 17-18.

Similarly, in *Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020) (Appx. Ex. 9), this Court held that where a statute does not provide a private right of action for its violation, the court retains the equitable power to require refunds of monies collected in violation of the statute under principles of unjust enrichment. In *Logan*, the plaintiff challenged certain fees imposed by a municipality's building division that allegedly were excessive and imposed in violation of the state construction code act ("CCA"), MCL 125.1501 *et seq*. The plaintiff brought claims for (1) statutory violation of the CCA, (2) violation of the Headlee Amendment and (3) unjust enrichment premised on the municipality's violation of the CCA. In an earlier opinion dated January 11, 2018, 2018 Mich. App. LEXIS 89 (Appx. Ex. 10), this Court held that, even though the plaintiff there did not have a private right of action under the CCA, he still could seek a refund of the excessive fees under the equitable doctrine of unjust enrichment:

> Although the circuit court correctly recognized that the statute did "not expressly allow a private cause of action for recovery of fees collected in violation of its provisions," it failed to take the next, necessary step; the court did not ask whether any remedy was available to plaintiffs with regard to their claim that the township had violated MCL 125.1522(1). And plaintiffs did properly state an unjust enrichment claim.
>
> In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township

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> was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count. [Appx. Ex. 10 at *7-8.]

This Court vacated the circuit court order partially granting summary disposition in the township's favor. *Id.* The township applied for leave to appeal to the Supreme Court, which ultimately vacated the this Court's January 11, 2018 Opinion and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich. 204; 934 NW2d 713 (2019) (MAHB), and *Genesee County. Logan v West Bloomfield Charter Twp*, 505 Mich. 863; 935 NW2d 42 (2019).

On remand, the *Logan* Court affirmed its prior ruling, holding that "*MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order." Appx. Ex. 9, p. 1. The Court characterized the plaintiff's equitable claims as follows:

> As noted, in the current case, plaintiffs are individuals who seek the return of excessive fees assessed in violation of the CCA. But **plaintiffs have not sought redress directly under the statute; rather, plaintiffs claimed that the township was unjustly enriched by the funds collected in violation of the statute**. [emphasis added]

Similarly, in this case, in Counts III, Plaintiff has not "sought redress directly under" MCL 141.91. Instead, Plaintiff claims the City was "unjustly enriched by the funds collected in violation" of the statute.

The *Logan* Court went on to find that, even though he had no private cause of action under the CCA, the *Logan* plaintiff nonetheless had properly sought return of the excessive fees by invoking the equitable doctrine of unjust enrichment:

> The current matter is similar to Genesee Co in that while the plaintiffs in both actions do seek money from the defendants, the money is not meant as compensation. Rather, plaintiffs in this action, like the plaintiff in Genesee Co, seek the return of monies paid

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> over to defendant that should not have been charged in the first instance and therefore was unjustly held by defendant. **Requesting the return of the funds was not a tort or contract action, but an action to divest the township of benefits unjustly retained. As the relief sought is equitable in nature, the claim is not barred by MAHB**. Accordingly, we again conclude that the circuit court improperly dismissed plaintiffs' unjust enrichment claim. [Emphasis added].

Here, in Count III, the money sought is not "meant as compensation." Rather, Plaintiff seeks "the return of monies paid over to defendant that should not have been charged in the first instance and therefore was unjustly held by" the City. Accordingly, Plaintiff properly seeks a refund of the unlawful Franchise Fees under the equitable theory of unjust enrichment for violation of MCL 141.91.

The City makes no attempt to distinguish *Kincaid* or *Logan*. In fact, the City's brief does not even mention these decisions. While the decisions are admittedly unpublished and therefore not technically binding, the Court should consider *Kincaid* and *Logan* to be very persuasive because both cases directly addressed and rejected the specific "statutory violation" argument advanced by the City here.

D. THE CITY FAILS TO MEANINGFULLY ADDRESS THE SECOND PREREQUISITE TO GOVERNMENTAL IMMUNITY – I.E., THAT THE PLAINTIFF MUST BE SEEKING "COMPENSATORY DAMAGES."

In its myopic focus on whether Plaintiff's unjust enrichment claim is based on a "civil wrong," the City misses something basic – *i.e.*, establishing that a plaintiff is asserting a claim based upon a civil wrong, although necessary to a finding of immunity, is not sufficient to render a government defendant immune under the GTLA. As *Genesee County* held, immunity does not apply unless plaintiff asserting claims based upon a "civil wrong" is **also** seeking "compensatory damages," as opposed to restitution. While the City makes the blanket assertion that Plaintiff's claims do seek "a money judgment to compensate for alleged statutory violations," Br. at p. 12, the City never makes a real attempt to show why that is the case. The City's failure to meaningfully address this critical element by itself justifies the rejection of its appeal on the merits.

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In *Genesee County*, the Court made clear the distinction between "compensatory damages" and restitution:

> In a tort action, an injured party may seek damages for an injury caused by the breach of a legal duty. *Wilson v Bowen*, 64 Mich 133, 141; 31 N.W. 81 (1887). The remedy for the breach is compensatory damages. That is, the defendant compensates the injured party for the injury caused by the defendant's wrongful conduct. *State Farm Mut Auto Ins Co v Campbell*, 538 U.S. 408, 416; 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003); *Rafferty v Markovitz*, 461 Mich 265, 271; 602 N.W.2d 367 (1999). …
>
> Unjust enrichment, by contrast, doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position. 1 Restatement Restitution & Unjust Enrichment, 3d, § 1, comments *d* & *e*, pp 7-10. [504 Mich. 421-422]

Here, the City collected money in violation of the law and Plaintiff and the Class seek to have the City return that money. That is not "compensatory damages" in any sense of that term. If, for example, a plaintiff is run over by a government vehicle and injured, a claim against the government seeks "compensatory damages" to "compensate for an injury." In such a case, the government hasn't taken money from the plaintiff and therefore the payment of such compensation is not "restitution," as it is in the instant case.

Notably, *Genesee County* was not the first case in which the Supreme Court recognized that there is a clear legal distinction between an action at law for money damages—for which a municipality potentially has tort immunity—and an equitable action to obtain a refund of money that a municipality has obtained unlawfully—for which a municipality may be held accountable in equity. Immunity does not apply in the latter situation. In *Hyde Park Cooperative et. al. v. The City of Detroit et. al,* 493 Mich. 966; 829 NW2d 195 (2013) (Appx. Ex. 11), the plaintiff challenged a building inspection fee imposed by the City of Detroit on the grounds that it violated the Housing Law of Michigan because the fee exceeded the "actual, reasonable cost of providing the inspection" under MCL 125.526(12). This

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Court's opinion (Appx. Ex. 12) found that there was a factual issue as to whether the fee was reasonable and remanded the case to the trial court for a trial on that issue. In disposing of the appeal, however, this Court added a footnote, which stated in relevant part:

> We note that plaintiffs would not be entitled to money damages. The Housing Law does not expressly authorize a private cause of action against a municipality for money damages. … [*Hyde Park Coop. v. City of Detroit*, 2012 Mich. App. LEXIS 1408 (Mich. App. July 24, 2012), fn. 5 at **12-13 (Appx. Ex. 12)].

Plaintiffs sought leave to appeal this Court's decision to the Supreme Court. In lieu of granting leave, the Michigan Supreme Court specifically vacated the Footnote 5 which stated that the plaintiff could not obtain a monetary recovery. In doing so, the Court stated:

> Moreover, we note that a claim for 'money damages' such as the one rejected by this Court in *Lash v Traverse City, 479 Mich 180, 191-197; 735 N.W.2d 628 (2007)*, **is not identical to an action for a refund of an allegedly unlawful exaction**. *See, e.g.*, *Beachlawn Building Corporation v City of St. Clair Shores,* 370 Mich 128; 121 N.W.2d 427 (1963); *Bolt v City of Lansing,* 459 Mich 152; 587 N.W.2d 264 (1998). [*See* Appx. Ex. 11 (emphasis added).]

Therefore, even before *Genesee County*, the Supreme Court recognized two important principles that destroy the City's immunity argument here: (1) that where a governmental unit collects money in violation of state law, the person who pays the money has a cause of action to recover it back; and (2) the citizen's claim to recover the money is an equitable action to recover an unlawful exaction and not a legal claim for "compensatory damages."[4]

[4] *Hyde Park Cooperative*, *Kincaid* and *Logan* further destroy the City's argument (Br. at pp. 12-14) that Plaintiff is asserting a "private cause of action" against the City which is prohibited by the Supreme Court's decision in *Lash v. City of Traverse City*, 479 Mich. 180, 194, 735 N.W.2d 628 (2007). Each of those cases recognized a distinction between purported private causes of action under statutes which seek compensatory damages (which are barred by immunity) and equitable actions which seek restitution of unlawful exactions (which is what Plaintiff is asserting here and which are not subject to an immunity defense).

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E. THE CITY'S PRINCIPAL AUTHORITY – *FARISH V. DEPARTMENT OF TALENT & ECONOMIC DEVELOPMENT* – FURTHER CONFIRMS THAT THE CITY IS NOT IMMUNE FROM PLAINTIFF'S UNJUST ENRICHMENT CLAIMS.

In another puzzling approach to the immunity issue, the City relies heavily on this Court's decision in *Farish v. Department of Talent & Econ. Dev.*, 336 Mich. App. 433, 456, 971 N.W.2d 1 (2021). Def's Br. at pp. 10-12. In *Farish,* this Court considered whether the state may "reduce future unemployment benefits as a mechanism to collect interest and penalties due because of an overpayment," and held that it may not. *Id.* at 458. This Court also held that "federal law provides for a private cause of action to enforce the statute, but only as to declaratory and injunctive relief" and that the plaintiff's conversion claims were barred by governmental immunity. *Id.* As part of its decision on governmental immunity, this Court held that the plaintiff's claims – which **did not** allege unjust enrichment – were barred by governmental immunity because those claims did not assert that the state had no right to the funds at issue:

> Plaintiffs next argue that because they seek restitution rather than damages, their suit does not sound in tort and so is not barred by immunity. In support, they rely on *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). In that case, the county drain commissioner sought a proportionate share of group health insurance premiums that were overpaid and refunded to the county and deposited into its general fund. *Id.* at 415. We held that the plaintiff's breach-of-contract claim could proceed, but that his tort claims, including conversion, were barred by the GTLA. *Id.* at 415-416. On remand, the plaintiff amended his complaint to include a claim for unjust enrichment, which the county argued was also barred by the GTLA. *Id.* at 416. The Supreme Court disagreed and held that a claim of unjust enrichment does not subject the defendant to tort liability. The Court reasoned that, unlike tort and contract actions in which the party seeks compensatory damages, the remedy for unjust enrichment was restitution. *Id.* at 419. **Significantly, the plaintiff did not merely allege the mechanism used by the county to obtain the monies was improper, but that the county had no right to the sums at all**.
>
> **Thus, plaintiffs' reliance on *Genesee Co* is misplaced. Plaintiffs do not allege unjust enrichment, i.e., they do not claim that the state is not entitled to collect penalties and interest. They argue only that the mechanism used by the state to recoup those sums violates federal law, a proposition with which we agree. But absent a claim that the state has no right to assess penalties and interest, we do not see how our holding that deductions from future unemployment**

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> **benefits are not permitted by federal law renders the state "unjustly enriched." Receipt of sums to which the state is entitled is not unjust enrichment, and 42 USC 503 does not bar a state from imposing or collecting those sums except by the means at issue.** Our 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. [336 Mich. App. at 455-456 (emphasis added)]

The distinction made by the *Farish* court is dispositive here. Plaintiff's claim here is that the City "had no right to the sums at all." Unlike *Farish*, where the state collected monies it was entitled to collect (albeit through the wrong "mechanism"), in this case the Plaintiff alleges, and the Circuit Court concluded, that the City had no right to impose and collect the Franchise Fees **at all**. Accordingly, as in *Genesee County*, the City obtained and retains funds owing to another. That is the essence of unjust enrichment, and it is **not** the type of claim the *Farish* court considered.

Nonetheless, the City erroneously claims that, like the plaintiff in *Farish,* Plaintiff and the Class here are merely "complain[ing] about the mechanism by which" the Franchise Fees were imposed, and Plaintiff "here does not argue that the City could never charge a franchise fee." Defs' Br. at p. 11. This argument is a complete distortion of Plaintiff's claims. Plaintiff's claims have nothing to do with the "mechanism" used by the City to impose and collect the Franchise Fees. Plaintiff clearly claims that the City had "no right to the sums at all" to impose and collect the Franchise Fees because the Franchise Fees were barred by Headlee, MCL 141.91 and the Foote Act. Accordingly, the Court should reject the City's feeble attempt to shoehorn this case into the *Farish* holding.[5]

[5] MCR 7.216(C) specifically prohibits a party from taking an appeal "for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." Given that the City's immunity arguments are not well-grounded in fact or law, the City's appeal could only have been brought in violation of MCR 7.216(C). Plaintiff acknowledges that a party may not seek relief under MCR 7.216(C) in its Brief on Appeal but must make a separate motion for that relief. Plaintiff intends to file a motion for relief under MCR 7.216(C) after the Court rules on the substance of the City's immunity appeal.

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CONCLUSION

For all of the foregoing reasons, Plaintiff requests that the Court affirm the Circuit Court's March 31, 2022 Order finding that the City was not entitled to governmental immunity as to Plaintiff's unjust enrichment claims.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, I electronically served the foregoing document on all counsel of record using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

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